UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Aero Ways, Inc.	)	
	)	
COMPLAINANT	)	
	)	**Docket No. 16-09-12**
v.	)	
	)	
Delaware River & Bay Authority	)	
	)	
RESPONDENT	)	

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on a formal complaint filed in accordance with the *Rules of Practice for Federally-Assisted Airport Enforcement Proceedings*, Title 14 Code of Federal Regulations (CFR) Part 16.[1]

Aero Ways, Inc. (Complainant) filed a formal Complaint pursuant to 14 CFR Part 16 against the Delaware River and Bay Authority (DRBA, Authority or Respondent), sponsor and operator of the New Castle Airport (Airport). The Complainant alleges substantially that the Respondent is engaged in unjust discrimination against the Complainant and has precluded the Complainant from self-servicing its own aircraft. Specifically, the Complainant alleges the Authority is in violation of 49 U.S.C. § 47107(a)(1) and (6) and Grant Assurance 22, *Economic Nondiscrimination.*

With respect to the allegations presented in this Complaint, under the specific circumstances at the Airport as discussed below and based on the evidence of record in this proceeding, the FAA finds the Authority is not currently in violation of its Federal obligations. The FAA's decision in this matter is based on applicable Federal law and FAA policy, review of the pleadings and supporting documentation submitted by the parties, reviewed by the FAA, which comprises the Administrative Record reflected in the attached FAA Exhibit 1.

II. PARTIES

In 1999, Aero Ways, Inc., was founded and began operating at the New Castle Airport. [FAA Exhibit 1, Item 10, exhibit 10, p. 4 and FAA Exhibit 1, Item 11, exh. 4] When it began conducting business at the Airport, the Complainant was managing an aircraft being operated

[1] 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.

under FAA Part 135.[2] [FAA Exhibit 1, Item 1, ¶6] On March 12, 2007, Aero Ways became a fixed base operator (FBO).[3] [FAA Exhibit 1, Item 11, exh. 6; FAA Exhibit 1, Item 1, exh. F, sub exh. 59; and FAA Exhibit 1, Item 11, exh. 4][4]

The New Castle Airport (ILG or KILG)[5] is a public-use airport owned by New Castle County, Delaware and leased to the DRBA which operates the airport under a long-term lease agreement.[6] [FAA Exhibit 1, Item 10, pp 3-4] The DRBA is a bi-state government agency which was established in 1962 by a compact between the States of Delaware and New Jersey. [FAA Exhibit 1, Item 10, p. 3] The Airport, located four nautical miles south of Wilmington, is classified as a general aviation reliever airport.[7] ILG has 121 based aircraft and 70,037 annual operations. The Airport has three runways and an air traffic control tower. [FAA Exhibit 1, Item 17] The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq*. Since 1982, $46,645,660 in Federal AIP grants has been invested at ILG. [FAA Exhibit 1, Item 16]

III. BACKGROUND AND PROCEDURAL HISTORY

Factual Background

In 1999, Aero Ways, Inc. began operating at the New Castle Airport. [FAA Exhibit 1, Item 10, exhibit 10, p. 4 and FAA Exhibit 1, Item 11, exhibit 4] Three years later, the company files for bankruptcy with the Respondent as its only creditor. [FAA Exhibit 1, Item 10, p. 6 and FAA Exhibit 1, Item 11, exhibit 5, p. 2] The Complainant reaches a settlement agreement with the Respondent and emerges from bankruptcy on March 14, 2003.[8] [FAA Exhibit 1, Item 1, exhibit F, sub exh. 25 and FAA Exhibit 1, Item 1, exhibit F, sub exh. 26]

On June 6, 2003, the Complainant's attorney sends three letters to the Respondent inquiring about hangar lease options and states that the Complainant seeks to acquire the rights to fuel its

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[2] The term "Part 135" refers to 14 CFR Part 135, Operating Requirements: Commuter and On Demand Operations and Rules Governing Persons on Board Such Aircraft. 14 CFR § 135.1 requires entities conducting commuter and on-demand operations to hold an Air Carrier Certificate or Operating Certificate as prescribed by 14 CFR Part 119. However, the Complainant, who was an aircraft management service provider at the relevant times herein, was not required to obtain such certification and could only conduct flights under 14 CFR Part 91, General Operating and Flight Rules.

[3] A fixed-base operator (FBO) is an individual or firm operating at an airport and providing general aircraft services such as maintenance, storage, and ground, and flight instruction. [FAA Order 5190.6B, Appendix Z]

[4] Subsequent to the pleadings filed in this matter, on May 24, 2010, Aero Ways, Inc., was issued air carrier certificate number WY1A261K to operate under the provisions of Part 135. The carrier's operations specifications list one aircraft, a Canadair CL-600, U.S. registration number N453GS. This footnote is provided by the Director for informational purposes and these facts are not considered material to the issues of this proceeding. [FAA Exhibit 1, Item 22]

[5] ILG and KILG are International Air Transport Association issued letters (IATA airport code) used to identify the New Castle Airport at Wilmington, Delaware. ILG hereafter refers to the airport.

[6] The Director finds that DRBA is the Respondent herein responsible for compliance with the airport's grant assurances.

[7] The term "reliever airport" is defined in 49 U.S.C. § 47102(22) as an airport designated to relieve congestion at a commercial service airport and to provide more general aviation access to the community. ILG serves as an important reliever airport to Philadelphia International Airport (PHL).

[8] The Record is unclear as to the specific details of this settlement agreement.

customers' aircraft. [FAA Exhibit 1, Item 1, exhibit F, sub exhs. 5, 6, and 7] Discussions between the two parties continue in 2004; the Complainant considers various lease locations including the Hercules hangar, the Annenberg hangar, and building its own hangar. [FAA Exhibit 1, Item 1, exhibit F, sub exhs. 8 and 9; FAA Exhibit 1, Item 11, exhibit 17; FAA Exhibit 1, Item 1, exhibit F. sub exh. 10] During these discussions, the Complainant continues to seek the right to fuel its customers' aircraft and eventually the general public. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 8, p. 2; FAA Exhibit 1, Item 1, exhibit F, sub exh. 9, p. 2; and FAA Exhibit 1, Item 11, exhibit 17]

In 2005, the Respondent retains outside counsel to assist in drafting its revised Minimum Standards and Rules and Regulations.[9] [FAA Exhibit 1, Item 11, exhibit 2, ¶7]

During 2005, discussions between the two parties regarding lease options and fueling rights continue. On April 28, 2005, the Complainant and his attorney meet with the new airport manager and his staff. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 12 and FAA Exhibit 1, Item 1, exhibit F, sub exh. 23, p. 2] The following day, the Complainant's attorney describes this meeting to James K. Brengle, partner at Duane Morris, LLP in an e-mail stating[10]:

> *"Although the manager was not at all clear, I think we were told that the non-discrimination provisions of the FAA agreement do not require the Authority to permit Aero Ways to fuel planes in its care, custody and control. Instead, he took the position that Aero Ways may only fuel planes that are owned or leased by it and must otherwise deal with one of the three FBO's on the field. When we suggested that Aero Ways might become an FBO, the manager then said that, even if that were to happen, the Authority may do a study on economic need and exclude Aero Ways from acting as an FBO if the study concluded that there were not enough business* (sic) *to support all FBO's."* [FAA Exhibit 1, Item 1, exhibit F, sub exh. 12]

On May 2, 2005, the Respondent provides the Complainant's attorney with a draft copy of its Minimum Standards. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 14 and FAA Exhibit 1, Item 1, exhibit F, sub exh. 23, p. 2] The Respondent specifically requests the Complainant's comments on the draft. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 14]

On May 25, 2005, the Complainant proposes changing its standard form agreement with its customers in order to qualify for self-fueling rights as described under the draft Minimum Standards it received earlier in the month. Aero Ways' attorney asks the Respondent to confirm that these changes will secure the Complainant's fueling rights. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 16] The Record indicates that between May 25 and July 27, 2005, the Complainant's attorney called and e-mailed the Respondent seeking confirmation regarding its fueling rights. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 17]

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[9] The Director believes this process may have started as early as July 2004 because FAA Exhibit 1, Item 1, exhibit F, sub exh. 13, a working draft of the Minimum Standards, was originally dated July 2004.

[10] Documents submitted by the parties offer no description of "jkbrengle@duanemorris.com". Therefore the Director obtained FAA Exhibit 1, Item 18 to determine the identity and nature of this individual.

On August 1, 2005, the Complainant proposes to buy hangars #5 and 9. This offer is conditioned upon the Respondent's approval of self-fueling rights and the installation of the necessary infrastructure. [FAA Exhibit 1, Item 1, exhibit F, sub exh 20, p. 1] The Respondent replies to this proposal on August 22, 2005. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 21] The Respondent's letter states that revisions to the Minimum Standards and Rules and Regulations are ongoing and "final text has not been completed or adopted by the Board of Commissioners of the Authority." [FAA Exhibit 1, Item 1, exhibit F, sub exh. 21] Because the hangar purchase proposal is conditioned upon certain approvals related to the Minimum Standards, the Respondent recommends waiting until the Minimum Standards and Rules and Regulations have been adopted to evaluate the proposal. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 21]

On September 21, 2005, the Complainant's attorney sends the Respondent a contract which is similar to the proposal to buy hangars #5 and 9 made on August 1. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 29] On September 30, 2005, the Complainant reiterates its request that the Respondent approve its revised customer agreements. The Respondent reiterates that the Minimum Standards sent to the Complainant were an early draft no longer reflective of the Authority's current thinking, and raises additional questions about the Complainant's self-fueling proposal. [FAA Exhibit Item 1, exhibit F, sub exh. 30]

Between October 24 and November 3, 2005, the Complainant's attorney and the Respondent exchange e-mails to discuss if the Complainant and Bi-State Oil, Aero Ways' largest customer, can share employees in order to self-fuel Bi-State's aircraft. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 33; FAA Exhibit 1, Item 11, exhibit 27 and exhibit 28]

Sometime between October and December 21, 2005, the Respondent adopts new Minimum Standards and Rules and Regulations.[11] [FAA Exhibit 1, Item 10, pp 12-13]

In December of 2005, the parties meet and Aero Ways states that it is interested in offering fuel to all of its managed aircraft customers and is willing to become an FBO in order to do so. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 38 p. 1]

On January 3, 2006, the Complainant's attorney e-mails the Respondent about Aero Ways leasing Bi-State's aircraft. [FAA Exhibit 1, Item 11, exhibit 30, p. 2]

On January 25, 2006, the parties meet. Again, the Complainant states its desire to offer fuel to all of its managed aircraft customers, and states it is willing to become an FBO to do so. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 38 p. 1] The parties then discuss the various sites that would be available to the Complainant for an FBO operation. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 38 p. 1]

[11] The Record is unclear as to when the Respondent adopted its revised Minimum Standards and Rules and Regulations. FAA Exhibit 1, Item 10, p. 12 refers to an October 2005 draft and the following page states, "After the Minimum Standards and Revised Rules and Regulations were adopted, the DRBA and Aero Ways met on December 21, 2005."

On March 3, 2006, the Complainant makes a conditional offer to purchase Hangar C. This offer is conditioned upon Complainant being the successful bidder on the Annenberg Hangar. [FAA Exhibit 1, Item 1, exhibit F sub exh. 45, p. 1]

On June 29, 2006, the Complainant sends its business plan for a new FBO to the Respondent and summarizes its plans for completing the purchase of Hangars C and D.[12] [FAA Exhibit 1, Item 1, exhibit F, sub exh. 46, p. 1]

On August 22, 2006, the Respondent sends the Complainant a letter acknowledging that their acquisition of Hangars C and D will allow Aero Ways to meet the basic property and operation requirements for FBOs as outlined in the Minimum Standards. The Respondent then outlines other items the Complainant must address to fulfill all of the FBO requirements in the Minimum Standards. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 47]

On February 9, 2007, the Respondent sells hangars C and D to C. Belmont Holdings, LLC, a parent company to Aero Ways. [FAA Exhibit 1, Item 14, p. 3] To secure this transaction, the Respondent received a corporate guaranty from Aero Ways and a personal guaranty from Charles M. Belmont[13] to guarantee C. Belmont Holdings, LLC's obligations. C. Belmont Holdings, LLC requests, and the Respondent consents to, an assignment of the leases to Aero Ways. In addition, C. Belmont Holdings, LLC subleases the hangars to Aero Ways. [FAA Exhibit 1, Item 15, exhibit 61]

On March 12, 2007, the Complainant becomes an FBO, authorized to fuel and service its customers and the general public. [FAA Exhibit 1, Item 11, exhibit 6; FAA Exhibit 1, Item 1, exhibit F, sub exh. 59; and FAA Exhibit 1, Item 11, exhibit 4]

On October 5, 2007, the Complainant requests the Respondent provide it with additional signage on the highway and taxiway. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 58] On November 20, 2007, the Complainant requests a meeting with the Respondent to discuss a list of ten issues related to its FBO activities including airport maintenance and signage. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 59]

On November 20, 2007, the Respondent leases Hangars A and B to XO Jet, a private aviation company. [FAA Exhibit 1, Item 8, ¶9; FAA Exhibit 1, Item 10, pp 15-16; and FAA Exhibit 1, Item 11, exhibit 37]

On December 20, 2007, the Complainant stops paying the Respondent fuel flowage fees.[14] [FAA Exhibit 1, Item 15, exhibit 61, p. 4]

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[12] The Record is unclear as to when the Complainant chose to seek acquisition of Hangar D or if it is the same as the Annenberg Hangar.

[13] The Complainant's website states that Charles M. Belmont is President and CEO of Aero Ways. [FAA Exhibit 1, Item 11, exhibit 4]

[14] FAA Exhibit 1, Item 15, exhibit 60, p. 4 indicates that fuel flowage fees are owed by the Complainant to the Respondent in each subsequent month through February 24, 2010.

On January 15, 2008, XO Jet requests proposals for its base fuel in Wilmington. [FAA Exhibit 1, Item 11, exhibit 38] Shortly thereafter, the Complainant and Respondent discuss XO Jet's ability to self-fuel. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 60] On April 3, 2008, the Complainant's attorney writes to the Respondent inquiring about XO Jet's fueling practices. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 66] On June 5, 2008, the Respondent sends a letter to the Complainant's attorney explaining that XO Jet is a Part 135 operator and may self-fuel. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 70]

On June 25, 2008, the Complainant's attorney sends a letter stating the Respondent has violated its Federal Grant Assurances and requests a pre-complaint resolution meeting. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 71]

On June 26, 2008, the Complainant contacts the Respondent to inquire about the fueling practices of Red Eagle Avionics, LLC. [FAA Exhibit 1, Item 11, exhibit 42] The Respondent determines that Red Eagle is not permitted to offer fuel for sale to the general public and requires this tenant to comply with the Minimum Standards. [FAA Exhibit 1, Item 11, exhibit 2, ¶13]

On July 21, 2008, the Complainant's attorney sends the Respondent's attorney a letter regarding scheduling a mediation/settlement conference. [FAA Exhibit 1, Item 1, exhibit A]

On September 19, 2008, the Complainant's employee damages a DRBA card reader that permits gate access to the airport. As a result of the incident, the Respondent withdraws the authority for the Complainant to use the gate associated with this card reader.[15] [FAA Exhibit 1, Item 1, exhibit F, sub exhs. 81, 82, and 83; FAA Exhibit 1, Item 10, pp 18 – 19; FAA Exhibit 1, Item 11, exhibit 43; and FAA Exhibit 1, Item 11, exhibit 45, sub exh. a] On September 30, 2008, the Complainant's attorney submits a Freedom of Information Act (FOIA) request to the FAA for data related to the incident.[16] [FAA Exhibit 1, Item 1, exhibit F, sub exh. 84]

In October of 2008, the Complainant, the Respondent, and their counsel meet to discuss concerns related to the Complainant's grant assurance allegations and the issue of damages.[17] [FAA Exhibit 1, Item 10, pp 21-22 and FAA Exhibit 1, Item 11, exhibit 2, ¶18] On October 27, 2008, an unsigned letter is sent to the Respondent outlining the Complainant's damages. [FAA Exhibit 1, Item 2, exhibit A] On November 4, 2008, the Complainant's attorney sends a letter to the Respondent's attorney stating that:

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[15] The Respondent allowed the Complainant to use gates other than the incident gate to access the airfield. The Record is not clear whether the Complainant remains barred from using this gate today.

[16] To further explain the FOIA request, the Director offers the following summary: The Complainant's employee attempted to enter the airfield in a Recreational Vehicle (RV). The Complainant claims that the Respondent's employee directed the driver of the RV to back up because the Secret Service was not allowing vehicles to enter this gate. When the RV reversed, it struck and damaged the card reader. The Respondent claims that the guard did not require the RV to reverse because Senator Joseph Biden's aircraft had already departed. The Complainant's Counsel requested under FOIA the records of aircraft departures for the incident date to prove that the Senator's aircraft was present at the time of the incident. It appears that the data provided in response is inconclusive regarding the Senator's aircraft's movement that day.

[17] The FAA's Part 16 airport enforcement proceeding is an administrative proceeding designed to determine an airport sponsor's compliance with its Federal obligations. It does not create a right of private action. Accordingly, there is no mechanism for making complainants whole or awarding damages.

> *"The list of damages will be reduced without prejudice to 17.5% of the actual total damages [footnoted to indicate $10,326,047.00 (Ten Million, ThreeHundred (sic) and Twenty Six Thousand, and Forty Seven Dollars).], to account for factors potentially outside the scope of DRBA control, and provided we could settle the matter in a timely fashion, without intervention of the Department of Transportation."* [FAA Exhibit 1, Item 2, exhibit B]

In October of 2008, the Complainant fails to pay the Respondent for its quarterly fuel permit.[18] [FAA Exhibit 1, Item 15, exhibit 61, p. 6]

In November of 2008, the Complainant fails to pay the Respondent rent for short term hangar usage.[19] [FAA Exhibit 1, Item 15, exhibit 61, p. 6]

On January 27, 2009, the Complainant stops paying the Respondent landing fees.[20] [FAA Exhibit 1, Item 15, exhibit 61, p. 5]

In February of 2009, the Complainant fails to pay the Respondent rent for Hangar C and Hangar D.[21] [FAA Exhibit 1, Item 15, exhibit 61, p. 5]

On March 19, 2009, the Respondent contacts the Complainant about finalizing the lease of additional property in front of Aero Ways' ramp. [FAA Exhibit 1, Item 11, exhibit 51]

On September 29, 2009, the Complaint is filed with the FAA. [FAA Exhibit 1, Item 1]

On November 16, 2009, the Respondent notifies the Complainant that $120,045.61 in rent and fees is past due and the amount is growing. [FAA Exhibit 1, Item 15, exhibit 60] Three days later, the Vice President of C. Belmont Holdings, LLC disputes the amount outstanding and remits some of the funds owed. [FAA Exhibit 1, Item 15, exhibit 61, p. 1]

On March 15, 2010, the Respondent notifies C. Belmont Holdings, LLC that $132,134.67 of Aero Ways' rent and fees is past due and the amount is growing. [FAA Exhibit 1, Item 15, exhibit 61, p. 2]

Procedural History

On September 29, 2009, FAA received the Complaint and its accompanying Addendum. [FAA Exhibit 1, Item 1 and Item 2]

On October 22, 2009, FAA docketed Aero Ways, Inc. v. Delaware River and Bay Authority. [FAA Exhibit 1, Item 3]

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[18] FAA Exhibit 1, Item 15, exhibit 60, p. 6 indicates that this fee is also owed to the Respondent in December 2008.
[19] FAA Exhibit 1, Item 15, exhibit 60, p. 6 indicates that short term hangar usage rent is also owed to the Respondent in each subsequent month through September 2009.
[20] FAA Exhibit 1, Item 15, exhibit 60, p. 5 indicates that landing fees are owed to the Respondent in each subsequent month through February 23, 2010.
[21] FAA Exhibit 1, Item 15, exhibit 60, p. 5 indicates that rent for Hangar C and Hangar D is also owed to the Respondent in January 2010, February 2010, and March 2010.

On October 30, 2009, the Respondent filed an unopposed motion requesting additional time to file its answer. [FAA Exhibit 1, Item 4]

On November 6, 2009, the FAA's Office of Chief Counsel grants the Respondent an additional 60 days to file its Answer. [FAA Exhibit 1, Item 5]

On December 23, 2009, the Respondent filed an unopposed motion requesting additional time to file its answer. [FAA Exhibit 1, Item 6]

On December 24, 2009, the FAA's Office of Chief Counsel grants the Respondent an additional three weeks to file its Answer. [FAA Exhibit 1, Item 7]

On February 3, 2010, the Respondent filed an Answer, Motion to Dismiss, Memorandum of Points and Authorities in Support of Respondent's Answer and Motion to Dismiss, and an Appendix of exhibits. [FAA Exhibit 1, Items 8, 9, 10, and 11]

On February 16, 2010, the Complainant filed an unopposed motion requesting additional time to respond. [FAA Exhibit 1, Item 12]

On March 30, 2010, the Complainant filed a Consolidated Response and Memorandum to Respondent's Motion to Dismiss. [FAA Exhibit 1, Item 14]

On April 12, 2010, the Respondent filed a Rebuttal. [FAA Exhibit 1, Item 15]

On August 3, 2010 the FAA extended the due date of the Director's Determination to on or before September 2, 2010. [FAA Exhibit 1, Item 23]

IV. ISSUES

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

- Whether the Respondent prevented the Complainant from self-fueling its own aircraft in violation of 49 U.S.C. § 47107(a)(6) and Grant Assurance 22, *Economic Nondiscrimination.*
- Whether the Respondent failed to make the airport available to the Complainant under reasonable terms and without unjust discrimination constituting a violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, *Economic Nondiscrimination.*
- Whether the Respondent's Minimum Standards and Rules and Regulations resulted in unreasonable or unjustly discriminatory requirements for the Complainant constituting a violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, *Economic Nondiscrimination.*
- Whether the Respondent has applied its Minimum Standards and Rules and Regulations in a way which unjustly discriminates against the Complainant in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, *Economic Nondiscrimination.*

The Complainant has also alleged violations of FAA Order 5190.6A, *Airport Compliance Requirements*.[22] While the Order is useful in helping airport sponsors interpret their obligations under the FAA's Airport Compliance Program, it is not controlling with regard to airport sponsor conduct. The Order sets forth policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. As a result, these allegations will be analyzed only when applicable to show a violation of a grant assurance violation.

V. APPLICABLE LAW AND POLICY

The federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing federal funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

The following is a discussion pertaining to the Airport Improvement Program, Airport Sponsor Assurances, the FAA Airport Compliance Program, enforcement of Airport Sponsor Assurances, and the Complaint and Appeal Process.

The Airport Improvement Program

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

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

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[22] On September 30, 2009, the FAA published FAA Order 5190.6B, *Airport Compliance Manual* and cancelled FAA Order 5190.6A. Although the Complaint was filed one day prior to the issuance of FAA Order 5190.6B, the Director has chosen to investigate the Complaint using FAA Order 5190.6B in an effort to provide greater clarity and transparency, and to determine *current* compliance. This decision has no bearing on the analysis contained herein. However, it should be noted that the format of FAA Order 5190.6B does not match the previous Order. As a result, the citations attached to FAA Order 5190.6A, as contained in the Complaint, will not accurately direct the reader to the location of the guidance presented in FAA Order 5190.6B.

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.[23] FAA Order 5190.6B, *Airport Compliance Manual* (FAA Order 5190.6B), issued on September 30, 2009, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to compliance with federal obligations of airport sponsors. 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.

One federal grant assurances applies to the circumstances set forth in this Complaint: Grant Assurance 22, *Economic Nondiscrimination*.

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 and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. Federal Grant Assurance 22, *Economic Nondiscrimination* deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Grant Assurance 22 of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part:

> "...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. [(a)]
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> b. In any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to-
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> (1) furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and
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> (2) charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

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[23] *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.

c. Each fixed-base 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.

d. Each air carrier using such airport shall have the right to service itself or to use any fixed-base operator that is authorized or permitted by the airport to serve any air carrier at such airport.

f. It will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees [including, but not limited to maintenance, repair, and fueling] that it may choose to perform.

g. In the event the sponsor itself exercise any of the rights and privileges referred to in this assurance, the services involved will be provided on the same conditions as would apply to the furnishing of such services by commercial aeronautical service providers authorized by the sponsor under these provisions.

h. 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.

i. 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."

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. [*See* FAA Order 5190.6B, ¶14.3]

FAA Order 5190.6B describes the responsibilities under Assurance 22 assumed by the owners or sponsor of public use airports developed with federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. [*See* FAA Order 5190.6B, Chapter 9]

The owner of an airport developed with federal assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination. [*See* FAA Order 5190.6B, ¶¶9.1.(a), 14.2]

Minimum Standards

FAA Order 5190.6B, describes the responsibilities under the Federal grant assurances assumed by owners or sponsors of public-use airports developed with federal assistance. Among these is the responsibility for enforcing adequate rules, regulation, or ordinances as are necessary to ensure the safe and efficient operation of the airport. [*See* FAA Order 5190.6B, ¶¶14.3, 14.4]

The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. It is the prerogative of the airport owner or sponsor to impose conditions on users of the airport to ensure its safe and efficient operation. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. [*See* FAA Order 5190.6B,Chapter 10]

While an airport owner or sponsor may impose minimum standards on those engaged in aeronautical activities, an unreasonable requirement, or any requirement applied in an unjustly discriminatory manner, could constitute the grant of an exclusive right.

FAA Advisory Circular 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities*, dated August 28, 2006, discusses FAA policy regarding the development and enforcement of airport minimum standards. Although minimum standards are optional, the FAA highly recommends their use and implementation as a means to minimize the potential for violations of federal obligations at federally obligated airports.

The FAA Airport Compliance Program

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

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

The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of federal property to ensure that the public interest is being served. FAA Order 5190.6B sets forth policies and procedures for the FAA Airport Compliance Program. FAA Order 5190.6B 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. FAA Order 5190.6B 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)]

FAA Order 5190.6B outlines the standard for compliance, stating, "A sponsor meets commitments when: (1). The federal obligations are fully understood; (2). A program (e.g., preventive maintenance, leasing policies, operating regulations, etc.) is in place that the FAA deems adequate to carry out the sponsor's commitments; (3). The sponsor satisfactorily demonstrates that such a program is being carried out; and (4). Past compliance issues have been addressed." [*See* FAA Order 5190.6B, ¶2.8.b.]

Enforcement of Airport Sponsor Assurances

The Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. § 40101, *et seq.*, assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The federal role in encouraging and developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport owner or sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport owners or sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public reasonable access to the airport. The FAA has a statutory mandate to ensure that airport owners comply with their federal grant assurances.[24]

The Complaint and Appeal Process

Pursuant to 14 CFR § 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant(s) shall provide a concise

[24] See, 49 U.S.C. §§ 40101, 40103(c), 40113, 40114, 46101, 46104, 46105, 46106, 46110, 47104, 47105(d), 47106(d), 47106(e), and 47122. Also, FAA Order 5190.6B at paragraph 1.1 states, "The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather, it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance." (emphasis added)

but complete statement of the facts relied upon to substantiate each allegation. The complaint(s) shall also describe how the complainant(s) directly and substantially has/have been affected by the things done or omitted by the respondent(s). [*See*, 14 CFR § 16.23(b)(3-4)]

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

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

Title 14 CFR § 16.31(b), in pertinent parts, provides that "(t)he Director's determination will set forth a concise explanation of the factual and legal basis for the Director's determination on each claim made by the complainant." In accordance with 14 CFR § 16.33(b) and (e), upon issuance of a Director's determination, "a party adversely affected by the Director's determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination;" however, "(i)f no appeal is filed within the time period specified in paragraph (b) of this section, the Director's determination becomes the final decision and order of the FAA without further action. A Director's determination that becomes final because there is no administrative appeal is not judicially reviewable."

Title 14 CFR § 16.247(a) defines procedural recourse for judicial review of the Associate Administrator's final decision and order, as provided in 49 U.S.C. § 46110 or section 519(b)(4) of the Airport and Airway Improvement Act of 1982, as amended, (AAIA), 49 U.S.C. §§ 47106(d) and 47111(d).

VI. ANALYSIS AND DISCUSSION

The Complainant states that the Respondent has been in violation of its Federal Grant Assurances since August of 2001. [FAA Exhibit 1, Item 1, ¶25] However, neither the seven-page Complaint, nor the 100-plus pages of accompanying exhibits, offer a substantial chronological history to explain the nature of the Complainant's relationship with the Respondent and how the alleged violations occurred. Instead, the Complaint incorporates the "facts and issues set in forth in Exhibit 'D', Attached Hereto, and Exhibit 'F', Attached Hereto)

(sic)". [FAA Exhibit 1, Item 1, ¶23] The Director has thoroughly reviewed the lengthy Record and relied on the total sum of the pleadings and supporting exhibits to establish the factual background contained above and the analysis which follows.

The Part 16 process was established to provide an expedited FAA review and initial agency determination for questions associated with an airport sponsor's compliance with its Federal obligations as embodied in its Federal grant agreements. The burden of proof falls upon the Complainant to establish and substantiate each allegation made.[25] The Director must make its initial decision based on the pleadings and supporting documentation provided by the parties as well as any other information obtained by the FAA as part of its investigation. [*See* 14 CFR §16.29(b)(1) and §16.31(a)] In its Reply, the Complainant argues various points under the Administrative Procedures Act and Federal Rules of Procedure and concludes that the Respondent has failed to properly answer the Complaint. [FAA Exhibit 1, Item 14] The Director disagrees with this conclusion. The Respondent fulfilled the requirements of 14 CFR §16.23(g)(h)(i) and (j). Because much of the precedent and case law presented by the Complainant is not relevant to the scope of the Part 16 process, the Director found it to offer little value to the extant Complaint.

The manner in which the Complainant compiled and referenced its documents contained in FAA Exhibit 1, Item 1, exhibit F was problematic for the Director. The Director noticed the following issues which could create confusion: sub exhibits were out of numerical order; several sub exhibits were blank; and some sub exhibits may represent draft versions of correspondence proposed by the Complainant's attorney to his client. The Director also found that identical exhibits were introduced in multiple places. In any event, the Director has chosen to exercise his judgment in organizing the accompanying Index of Administrative Record.

To facilitate the Director's analysis of the Complaint, the allegations have been grouped into four issues for discussion. These issues reflect the substance of the allegations broadly presented by the Complainant throughout the Record as a whole. The principal matter to be determined by the FAA remains consistent with Part 16: whether or not the airport sponsor is in compliance with its Federal obligations as embodied in its Federal grant agreements.

Issues Identified for Analysis and Discussion

Issue 1: *Whether the Respondent prevented the Complainant from self-fueling its own aircraft in violation of 49 U.S.C. § 47107(a)(6) and Grant Assurance 22, Economic Nondiscrimination.*

The Complainant alleges a violation of:

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[25] Simply submitting voluminous pages of documents does not necessarily guarantee that the Complainant will meet this burden. [*See* JetAway Aviation Inc. v. Montrose County, Colorado and Montrose County Building Authority, FAA Docket No. 16-08-01, (July 2, 2009) (Director's Determination) at 8 and 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) at 55]

> *"Federal Airport Assurance 22 (d) relating to the DRBA's failure to allow Aero Ways, Inc. the right to service itself."* [FAA Exhibit 1, Item 1, ¶27]
>
> *"Federal Airport Assurance 22(f) relating to the DRBA's failure to allow Aero Ways, Inc. the right to service itself."* [FAA Exhibit 1, Item 1, ¶28]

The Respondent denies these allegations. [FAA Exhibit 1, Item 8, ¶27 and 28] The Respondent further explains:

> *"Under DRBA regulations, only aircraft owners or sole lessees, using their own employees and equipment, have 'self-fueling' rights. Not being the owner or lessee of any aircraft – and seeking instead to fuel the aircraft owned by its customers – Aero Ways was prohibited from self-fueling."* [FAA Exhibit 1, Item 10, p. 2]
>
> *"Aero Ways did not **own** any aircraft and clearly was seeking to fuel its **customers'** aircraft. It therefore did not have any self-fueling rights under applicable FAA requirements."* (Emphasis original) [FAA Exhibit 1, Item 10, p. 8]

Grant Assurance 22(d) protects an air carrier's right to service its own aircraft. Grant Assurance 22(f) explicitly protects the rights of individuals and corporations to perform services, such as fueling, on their own aircraft with their own employees. FAA Order 5190.6B states, "The FAA considers the right to self-service as prohibiting the establishment of any unreasonable restriction on the owners or operators of aircraft regarding the servicing of their own aircraft and equipment." [*See* FAA Order 5190.6B, ¶ 11.2.] Conversely, the FAA has held that airport sponsors are not required to permit aeronautical users to self-fuel aircraft they do not own. [*See* AmAv v. Maryland Aviation Administration, FAA Docket No. 16-05-12, (March 20, 2006) (Director's Determination) at 10] In addition, the FAA has held that when a corporation lacks adequate ownership interest in an aircraft, that particular aircraft does not qualify as the corporation's "own" aircraft for the purposes of Grant Assurance 22(f). [*See* Sterling Aviation, LLC v. Milwaukee County, Wisconsin, FAA Docket No. 16-09-03, (April 13, 2010) (Director's Determination) at 12 (*Sterling*) referring to a letter sent to Milwaukee County's attorney in 2008 and now included in the Index of Administrative Record as FAA Exhibit 1, Item 19] As such, the question before the Director is whether or not the Complainant is an air carrier or aircraft owner.

The Director has thoroughly reviewed this sizeable Record. However, the Director can find no evidence to demonstrate that the Complainant was, at the times relevant herein, an air carrier, aircraft lessee, or aircraft owner. In fact, the Complaint states:

> *"At the onset of Aero Ways, Inc.'s business at KILG, Aero Ways was managing a FAA Part 135 certificated aircraft, which information was given to the DRBA by Aero Ways, Inc. personnel, but not considered or even mentioned by DRBA with regards to the initial denial of fueling rights."* [FAA Exhibit 1, Item 1, ¶6]

Other documents in the Record, including several exhibits provided by the Complainant, describe Aero Ways as an aircraft management company. [FAA Exhibit 1, Item 1, exhibit B, p. 2; FAA Exhibit 1, Item 1, exhibit B, sub exh. 1; FAA Exhibit 1, Item 1, exhibit F, sub exh. 23, p. 1; and FAA Exhibit 1, Item 11, exhibit 4] Moreover, the Record clearly documents the Complainant's desire to fuel its "customers" aircraft. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 5, p. 1; FAA Exhibit 1, Item 1, exhibit F, sub exh. 6, p. 1; FAA Exhibit 1, Item 1, exhibit F, sub exh. 7, p. 1; FAA Exhibit 1, Item 1, exhibit F, sub exh. 8, p. 2; FAA Exhibit 1, Item 1, exhibit F, sub exh. 9, p. 2; FAA Exhibit 1, Item 1, exhibit F, sub exh. 32; FAA Exhibit 1, Item 1, exhibit F, sub exh. 36; FAA Exhibit 1, Item 1, exhibit F, sub exh. 38, p. 1; and FAA Exhibit 1, Item 11, exhibit 17]

An October 9, 2002 Aero Ways business plan states that it, "operates under the Rules of Part 91 of the Federal Aviation Administration Regulations (FAR's)."[26] [FAA Exhibit 1, Item 11, exhibit 5, p. 3] An undated[27] Aero Ways business plan states:

> *"...the company has provided charter revenue to its clients through a third party relationship with an FAA certified air carrier with minimal revenue sharing to Aero Ways. As a result of this growing segment of the aviation industry, Aero Ways has filed the proper application and documentation with the Federal Aviation Agency to obtain an Air Carrier Certificated Federal Aviation Agency Part 135 Charter operator in its right."* [FAA Exhibit 1, Item 1, exhibit F, sub exh. 87, p. 4]

However, the Record contains no documentation to establish that the Complainant held an air carrier certificate during this period of time. Lacking a certificate to operate under Part 135 or Part 121, the Complainant was not considered to be an air carrier by the FAA.[28]

As noted above, the Record describes the Complainant as an aircraft management company which has business relationships, governed by written agreements, with its customers. [FAA Exhibit 1, Item 1, exhibit B, p. 2; FAA Exhibit 1, Item 1, exhibit B, sub exh. 1; FAA Exhibit 1, Item 1, exhibit F, sub exh. 16; FAA Exhibit 1, Item 1, exhibit F, sub exh. 23, p. 1; and FAA Exhibit 1, Item 11, exhibit 4] The Record is very clear about this. Specifically, in May of 2005, the Complainant received a draft copy of the Minimum Standards being considered by the Respondent. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 15] This draft included a provision to permit aircraft managers to self-fuel.[29] [FAA Exhibit 1, Item 1, exhibit F, sub exh. 13, pp 31-32] After learning of this potential change, the Complainant revised its standard form agreement to

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[26] The term "Part 91" refers to 14 CFR Part 91, "Air Traffic and General Operating Rules". Operators conducting flights under Part 91 are not required to obtain an Air Carrier Certificate or Operating Certificate as prescribed by 14 CFR Part 119.

[27] The Director believes this business plan was adopted in 2005 as it states that Aero Ways is entering its seventh year of operations. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 87, p. 3]

[28] The term "Part 121" refers to 14 CFR Part 121 Operating Requirements: Domestic, Flag, and Supplemental Operations. 14 CFR § 121.1 requires entities conducting domestic, flag, and supplemental operations to hold an Air Carrier Certificate or Operating Certificate as prescribed by 14 CFR Part 119.

[29] The provision permitting aircraft managers to self-fuel, as outlined in the draft Minimum Standards designated as FAA Exhibit 1, Item 1, exhibit F, sub exh. 13 was never adopted by the Respondent.

comply with the requirements contained in this draft. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 16]

The Complainant is not the owner or long-term lessee for the aircraft it seeks to self-fuel. FAA Order 5190.6B states, "Self-service activities must be performed by the owner or employees of the entity involved. Self-service activities cannot be contracted out to a third party." [*See,* FAA Order 5190.6B, ¶ 11.4.]

When an airport sponsor allows a tenant to expand its self-fueling activities to aircraft it does not own, lease, rent or operate for its exclusive use, it offers a privilege outside its obligations contained in Grant Assurance 22(d) and (f). [*See Sterling* at 13 referring to a letter sent to Sterling's attorney in 2009 and now included in the Index of Administrative Record as FAA Exhibit 1, Item 20] The Respondent has declined the Complainant's repeated requests to grant such a privilege and this decision is well within the sponsor's proprietary rights.

Given that the Complainant is neither an air carrier, nor an aircraft owner, the Director finds that Grant Assurance 22(d) and (f) do not currently apply to the Complainant. As a result, the Director dismisses the Complainant's allegations with regard to Grant Assurance 22(d) and (f), *Economic Nondiscrimination.*

Issue 2: *Whether the Respondent failed to make the airport available to the Complainant under reasonable terms and without unjust discrimination constituting a violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, Economic Nondiscrimination.*

The Complainant alleges the Respondent violated:

> *"Federal Airport Assurance 22(a) relating to the DRBA's failure to make KILG available for reasonable terms and without unjust discrimination to Aero Ways, Inc."* [FAA Exhibit 1, Item 1, ¶26]

The Respondent denies these allegations. [FAA Exhibit 1, Item 8, ¶26] The Respondent offers specific statements and supporting exhibits to address each incident raised by the Complainant. This is fully discussed below.

Grant Assurance 22(a) requires an airport sponsor to:

> "...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."

Although the Complaint is specific in its allegations regarding the Respondent's Federal grant assurances, it does not always provide a complete, concise explanation to describe the distinct actions taken or omitted by the Respondent to commit each alleged violations.[30] Instead, the

[30] The FAA accepted this Complaint under 14 CFR Part 16 and thoroughly reviewed the evidence contained in the Record because the Complainant raised issues related to the Airport Authority's obligations under its Federal grant

Complainant points to various incidents over the course of its ten-year tenancy at the airport, which it believes establishes unreasonable or discriminatory treatment. Therefore, the Director will review the following incidents which relate to Grant Assurance 22(a): (1) Complainant's access to the airport; (2) allegations related to the Respondent's lack of communication with the Complainant; (3) Complainant's request for a taxiway sign and additional land lease; (4) Complainant's assertion that the Respondent required it to become an FBO; and (5) self-fueling requirements.

(1) Complainant's Access to the Airport

Grant Assurance 22(a) states that the Respondent must make the airport available as an airport for public use. Section III of this Determination establishes that the Complainant began operations at the Airport in 1999. [FAA Exhibit 1, Item 10, exhibit 10, p. 4 and FAA Exhibit 1, Item 11, exhibit 4] The Director has thoroughly examined the Record and determined only one instance in which the Respondent denied airport access, via a midfield gate, to the Complainant. [FAA Exhibit 1, Item 10, p. 19]

Both parties agree that on September 19, 2008, one of the Complainant's employees damaged an airport gate reader when attempting to drive a motor home through the midfield gate. [FAA Exhibit 1, Item 1, exhibit F, sub exhs. 81 and 83; FAA Exhibit 1, Item 10, p. 19; FAA Exhibit 1, Item 11, exhibit 2, §14; FAA Exhibit 1, Item 11, exhibit 43; and FAA Exhibit 1, Item 11, exhibit 46] However, the parties dispute the circumstances surrounding the incident, which resulted in the Respondent limiting the Complainant's access to this gate. [FAA Exhibit 1, Item 1, exhibit F, sub exhs. 81 and 83; FAA Exhibit 1, Item 11, exhibit 45, sub exh. a; and FAA Exhibit 1, Item 11, exhibit 46]

The Complainant submitted a picture of the gate where this incident occurred.

[FAA Exhibit 1, Item 1, exhibit F, sub exh. 86]

agreements. Pursuant to 14 CFR § 16.29(a) the Director believed a reasonable basis for further investigation was warranted.

The Respondent claims the motor vehicle involved in this incident exceeded 26 feet. [FAA Exhibit 1, Item 10, p. 19] The Complainant does not dispute this.

When contacted by the Respondent regarding this incident, the Complainant stated in an e-mail to the Acting Senior Airport Manager:

> *"The Driver of the motor home brushed up against the card reader and immediately stopped the vehicle with very minimal damage. At that point the driver, Dwayne Lenker was met by DRBA vehicle 14, and was instructed by the female DRBA employee to 'immediately back up' because of Secret Service requirements that they 'had to close the gate'. This instruction caused the majority of the damage to the Motor Home and the balance of the damage to the card reader. This was a minor accident which was inadvertent."* [FAA Exhibit 1, Item 1, exhibit F, sub exh. 81]

The police report filed in response to this incident states:

> *"UPON ARRIVAL I OBSERVED A LT GREEN RECREATIONAL VEHICLE FACING WESTBOUND IN FRONT OF THE FAA GATE NEAREST TO DASSAULT FALCON JET ON THE EXTERIOR PERIMETER. ALSO OBSERVED A DAMAGED GATE CONTROL PANEL ON THE LEFT SIDE OF THE RV. I MADE CONTACT WITH OP1 [Dwayne Lenker, Aero Ways' employee], WHO ADVISED THAT HE WAS FACING NORTH (PARALLEL TO RT 13)PRIOR (sic) PRIOR TO TURNING LEFT TO ACCESS THE FAA GATE, WHEN HE DID NOT PROPERLY NEGOTIATE HIS LEFT TURN. UNIT 1'S LEFTSIDE COLLIDED WITH THE CONTROL PANEL AND BROKE IT OFF THE MOUNT FOR POI # 1 AT AIRPORT ADDRESS LOCATION. DAMAGE CAUSED TO THE RV CONSISTED OF 10 FOOT AREA OF DENTS, SCRATCHES, AND A BROKEN OFF STORAGE DOOR...OP1 WAS ISSUED A WARNING FOR IMPROPER TURN."* (Capitalization original) [FAA Exhibit 1, Item 11, exhibit 43, p. 3]

The incident occurred on a Friday at 3:15 in the afternoon. [FAA Exhibit 1, Item 11, exhibit 43, p. 1] The Respondent contacted the Complainant's employee to obtain additional information the following Tuesday. [FAA Exhibit 1, Item 11, exhibit 45] On September 26, a week after the incident occurred, the Respondent revoked the Complainant's access to that specific gate. [FAA Exhibit 1, Item 10, p. 19 and FAA Exhibit 1, Item 11, exhibit 45, sub exh. a] The following Monday, September 29, 2008, the Complainant provided the information requested the week before and asked the Respondent to re-instate its use of the gate as it was needed and "numerous other individuals have damaged card readers in the past without such a sanction, or any sanction at all." [FAA Exhibit 1, Item 1, exhibit F, sub exh. 83] The Airport Director, responded the following day, and his e-mail states:

> *"Several facts appear to be in dispute from witness statements (Aeroways staff and DRBA) and the accompanying Police report which was filed. As you know, there was a summons issued to your driver as a result. Most importantly, the*

> *incident occurred in the late afternoon (3:30pm) and the two aircraft you mentioned departed ILG in the morning prior to 11:30am.*
>
> *Let's work together to get this incident behind us."* [FAA Exhibit 1, Item 1, exhibit F, sub exh. 83, p. 1]

The Record does not indicate any response from the Complainant. Instead, on September 30, 2008, the Complainant's attorney filed a Freedom of Information Act Request. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 84]

The Complainant now alleges that the Respondent "has discriminated solely against Aero Ways, Inc., regarding the September 30, 2008 incident requiring the intervention of the United States Government by way of the Freedom of Information Act [FOIA]."[31] [FAA Exhibit 1, Item 1, ¶32]

The Complainant's Reply argues the circumstances surrounding the incident and states that this incident "only became an issue when the Respondent's airport manager sent Aero Ways, Inc. an e-mail stating that 'most importantly' is the fact that the two aircraft described in your e-mail were not on the airfield at the time of the incident." [FAA Exhibit 1, Item 14, p. 10]

Because the Complainant did not include a copy of the FAA's response to this FOIA request in its pleadings, the Director obtained and reviewed a copy which is now included in the Index of Administrative Record as FAA Exhibit 1, Item 21. Regardless, the Director is unclear as to how this data pertains to the incident or more clearly substantiates either party's account of it.

The Director believes that principles outlined in SeaSands Air Transport, Inc. v. Huntsville-Madison County Airport Authority, FAA Docket No. 16-05-17, (August 28, 2006) (Director's Determination) (*SeaSands*) are applicable to this situation and offer guidance. In *SeaSands*, the airport sponsor terminated its relationship with the Complainant as result of its unprofessional behavior and nonpayment of rent. The Complainant alleged that this action constituted an unreasonable denial of access. The Director stated:

> "An airport sponsor acts as a proprietor with regard to managing its airport to certain reasonable levels of service, personal decorum, business professionalism and financial responsibility. Grant assurance 22 prohibits such an airport sponsor from exercising its proprietary rights to deny aeronautical access unreasonably. This allows a sponsor to apply a standard for reasonable security, personal behavior, and rules of tenancy."

The Director concluded that the Respondent acted reasonably. [*See, SeaSands* at 15][32]

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[31] The Director assumes this allegation inaccurately references the date and speaks to the card reader incident which occurred on September 19, 2008 as documented by the police report designated as FAA Exhibit 1, Item 11, exhibit 43]

[32] The Director does not compare the behavior of the employee in *SeaSands* with that of the Complainant's driver here. Rather, precedent is offered as a comparison of the incidents in the two cases as it relates to security and rules of tenancy. Again, the Airport's standard regarding its rules for revoking a gate privilege is reasonable, and its action in revoking the Complainant's gate access under these circumstances was not discriminatory.

The Rules and Regulations adopted by the Respondent in the late fall/early winter of 2005[33] state that "any person causing damage to or destroying public property of any kind at the Airport, including buildings, fixtures, or appurtenances, whether through violation of these rules and regulations or through any act or omission shall be fully liable to the DRBA." [FAA Exhibit 1, Item 1, exhibit J, p. 5] In addition, the Director believes Grant Assurance 19, *Operation and Maintenance*, compels airport sponsors to address damaged facilities.[34] Against this background, the Director finds that the DRBA's decision to sanction the Complainant from using this gate was not unreasonable.

Unlike in *SeaSands*, the extant Complaint argues that it has been treated in a discriminatory manner because other tenants have damaged airport property but were sanctioned to a lesser degree or not at all. The Director notes the threshold for establishing an allegation of unjust discriminatory treatment as:

> "...the Complainant must show that PAC has unjustly discriminated against Rick Aviation, by denying to Rick a preference that it has provided to Mercury in the context of Rick and Mercury being similarly-situated." [Rick Aviation, Inc. v. Peninsula Airport Commission, FAA Docket No. 16-05-18, (May 8, 2007) (Director's Determination) at 17 (*Rick Aviation*)]

In order to substantiate this allegation, the Complainant must explain how another similarly-situated tenant violated the Rules and Regulations and was sanctioned less severely or not all. Because the Record contains no such examples, the Director finds the Complainant has not met the burden of proof to substantiate its allegation.

At minimum, the Complainant acknowledges this incident as a, "minor accident which was inadvertent." [FAA Exhibit 1, Item 1, exhibit F, sub exh. 81] The Respondent claims it resulted in "significant damage to the gate's access control system making the gate unusable for entry to DRBA tenants until a repair could be made." [FAA Exhibit 1, Item 11, exhibit 45, sub exh. a] The Respondent's decision to sanction the Complainant was within its proprietary rights, and the Record provides no evidence to establish that this sanction was discriminatory.

(2) Allegations Related to the Respondent's Lack of Communication with the Complainant

The Complainant states:

> *"That a DRBA Commissioner was told not to talk to Aero Ways, Inc., but was not restricted from communicating with any other FBO's at KILG, in contravention of the Airport Assurances regarding discriminatory practices set forth below.,* (sic) *(See Exhibit 'E", Attached Hereto)."* [FAA Exhibit 1, Item 1, ¶17]

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[33] See Footnote 11.

[34] Grant Assurance 19, *Operation and Maintenance* requires, in pertinent part, "[t]he airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned and controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation."

> *"That DRBA Manager Donald Ranier (sic) requested a series of meetings and phone calls in August of 2006, wherein he proported (sic) to want to resolve the issues with Aero Ways, Inc., then not only failed to do so, but refrained from contact with Complainant, (See Exhibit 'G', Attached Hereto)."* [FAA Exhibit 1, Item 1, ¶18]

The Respondent denies this allegation at FAA Exhibit 1, Item 8, ¶17 and states:

> *"Denied, except to the extent that Mr. Rainear requested to meet with Aero Ways in 2006. By way of further response, the DRBA states that Donald Rainear left the DRBA in May 2009, before Aero Ways filed its Part 16 action."* [FAA Exhibit 1, Item 8, ¶17]

The Director examined FAA Exhibit 1, Item 1, exhibit E. It is one page of a two-page e-mail print out. In one of the messages, Tommy Cooper[35] tells the Complainant's attorney that, "Mike Houghton told Steve and Don not to talk to you." [FAA Exhibit 1, Item 1, exhibit E] FAA Exhibit 1, Item 10 explains that Michael Houghton is a partner at Morris, Nichols, Arsht & Tunnell, LLP, the law firm used by the Respondent; Stephen Williams is the current Director of Airports for the DRBA; and Don Rainear was the DRBA's Deputy Executive Director from 2002 through May 2009. [FAA Exhibit 1, Item 10, p. 4] In other words, a DRBA Commissioner told Complainant's legal counsel that DRBA's attorney asked two DRBA employees not to communicate with the Complainant's legal counsel. Therefore, the Complainant's allegation that a "DRBA Commissioner" was told not to talk to the Complainant cannot be substantiated by this document.

The Director examined FAA Exhibit 1, Item 1, exhibit G. It is two pages of a three-page e-mail exchange. The messages discuss the Complainant's need to execute the purchase agreements for two hangars it proposed to acquire as well as other requirements the Complainant would need to meet to become an FBO. The last message in the exchange, sent on August 31, 2006, is from Don Rainear to the Complainant's attorney. In the message, Rainear suggests meeting to discuss issues raised in the e-mail exchange. [FAA Exhibit 1, Item 1, exhibit G] Rainear states:

> *"Rather than offer a point by point discussion regarding our respective e-mails, I think a meeting might be helpful to clear the air. If the Fire Marshal meeting will be held in the next few days, I'm agreeable to wait until after that meeting together. (as soon as thereafter as possible). If the Fire Marshal meeting will be later then let's get together right away."* [FAA Exhibit 1, Item 1, exhibit G, p. 1]

The Record indicates that the Fire Marshal met with the Complainant on September 19, 2006. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 50] A letter from the Complainant's attorney to the Respondent's attorney dated September 28, 2006 states:

> *"As you know, Don Rainear e-mailed me on August 31 and we agreed, in the ensuing exchange, to attempt to avoid our dispute about whether closing on the*

[35] FAA Exhibit 1, Item 1, exhibit F, sub exh. 18 states that Tom Cooper is an Authority Commissioner.

Aero Ways/DRBA transactions must be accompanied by confirmation by the Authority that Aero Ways may commence the business of an FBO. Instead, we agreed that a meeting among the Authority, Aero Ways and the Fire Marshall would at least inform Aero Ways of the equipment and security devices that must be installed in the facilities in question... Although there was some difficulty and delay in getting all necessary parties to focus on these items, I believe that, with meetings that have occurred this week, that list is now in place...." [FAA Exhibit 1, Item 1, exhibit F, sub exh. 52, p. 1]

The Complainant offers no reason to explain why it opted to wait until after the Fire Marshal meeting – scheduled over two weeks after Rainear's offer to meet – to pursue the meeting. However, as indicated in the letter signed by the Complainant's counsel on September 28, unspecified meetings did occur in the later part of September. Given that this letter was accompanied by the executed purchase agreement for the hangars being acquired by the Complainant and a list of outstanding tasks required of the Complainant to become an FBO, the Director concludes that the Complainant moved forward in its goal of becoming an FBO during this time. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 52] While this delay may have been undesirable by the Complainant, the Director is unclear as to how it equates to a violation of Grant Assurance 22.

Given the sizeable Record, the Director disagrees with the Complainant's allegations regarding a lack of communication between the two parties. The Record contains the following references to electronic mail exchanges and letters in which DRBA Commissioners, employees, and its legal counsel wrote to or responded to the Complainant or its attorney:

1. FAA Exhibit 1, Item 1, exhibit C - Letter from Donald Nelson Isken, of Morris, Nichols, Arsht & Tunnell, to Joseph Michael Lamonaca, Attorney for Complainant, regarding Complainant's allegations dated July 1, 2009.
2. FAA Exhibit 1, Item 1, exhibit E - Electronic mail exchange between William Manning, Chuck Belmont, Ronald Beckson, and Tommy Cooper dated September 12-13, 2005.
3. FAA Exhibit 1, Item 1, exhibit F, sub exh. 11 - Electronic mail exchange between William Manning, Donald Rainear, and Stephen D. Williams dated March 31- April 1, 2005.
4. FAA Exhibit 1, Item 1, exhibit F, sub exh. 14 - Electronic mail exchange between Stephen D. Williams, William Manning, and Jim Brengle dated May 2, 2005.
5. FAA Exhibit 1, Item 1, exhibit F, sub exh. 21 - Letter from Respondent to Complainant regarding proposal to purchase hangars #5 and 9 dated August 22, 2005.
6. FAA Exhibit 1, Item 1, exhibit F, sub exh. 24 - Electronic mail exchange between Tommy Cooper and William Manning dated August 24 and 26, 2005.
7. FAA Exhibit 1, Item 1, exhibit F, sub exh. 27 - Electronic mail exchange between William Manning, Chuck Belmont, Ronald Beckson, and Tommy Cooper dated September 9, 12, and 13, 2005.
8. FAA Exhibit 1, Item 1, exhibit F, sub exh. 30 - Electronic mail exchange between Ronald Beckson and Donald Rainear dated September 30, 2005.
9. FAA Exhibit 1, Item 1, exhibit F, sub exh. 31 - Electronic mail exchange between Tommy Cooper and William Manning dated October 6, 2005.

10. FAA Exhibit 1, Item 1, exhibit F, sub exh. 34 - Electronic mail exchange between William Manning, Michael Houghton, David Brinson, Chuck Belmont, and Ronald Beckson dated October 24, 2005.
11. FAA Exhibit 1, Item 1, exhibit F, sub exh. 37 - Memo from Michael Houghton and Rachel A. Dwares to William Manning regarding the Annenberg hangar and hangar C dated January 26, 2006.
12. FAA Exhibit 1, Item 1, exhibit F, sub exh. 38 - Memo from Michael Houghton and Rachel A. Dwares to William Manning regarding meeting on January 26, 2006 dated January 27, 2006.
13. FAA Exhibit 1, Item 1, exhibit F, sub exh. 41 - Electronic mail exchange between Donald Rainear, Michael Houghton, and William Manning dated February 13 - 14, 2006.
14. FAA Exhibit 1, Item 1, exhibit F, sub exh. 47 - Letter from Respondent to Complainant regarding Fixed Base Operator compliance at Airport dated August 22, 2006.
15. FAA Exhibit 1, Item 1, exhibit F, sub exh. 48 - Electronic mail exchange between Donald Rainear and William Manning, dated August 31, 2006.
16. FAA Exhibit 1, Item 1, exhibit F, sub exh. 49 - Electronic mail exchange between Ed Bohn, Alex Coles, William Manning, Donald Rainear, Ronald Beckson, and Chuck Belmont dated September 13, 2006.
17. FAA Exhibit 1, Item 1, exhibit F, sub exh. 53 - Incomplete electronic mail exchange between William Manning and Rachel Dwares dated November 7, 2006.
18. FAA Exhibit 1, Item 1, exhibit F, sub exh. 54 - Electronic mail exchange between William Manning, Rachel Dwares, Michael Houghton, David Hamilton, Katherine Betterly, and Rich Zimny dated November 6 - 7, 2006.
19. FAA Exhibit 1, Item 1, exhibit F, sub exh. 55 - Electronic mail exchange between William Manning and Rachel Dwares dated November 8, 2006
20. FAA Exhibit 1, Item 1, exhibit F, sub exh. 58 - Electronic mail exchange between Ed Bohn and Stephen D. Williams dated October 5, 22, and 25, 2007.
21. FAA Exhibit 1, Item 1, exhibit F, sub exh. 59 - Electronic mail exchange between Ed Bohn, Stephen D. Williams, and Michelle K. Griscom-Collins dated November 20 and 26, 2007.
22. FAA Exhibit 1, Item 1, exhibit F, sub exh. 60 - Electronic mail exchange between Ronald Beckson and Stephen D. Williams dated January 30-31, 2008.
23. FAA Exhibit 1, Item 1, exhibit F, sub exh. 69 - Electronic mail exchange between William Manning and Stephen D. Williams dated April 3, 4, and 22, 2008.
24. FAA Exhibit 1, Item 1, exhibit F, sub exh. 70 - Letter from Respondent to William Manning, Attorney for Complainant, regarding XO Jet's fueling practices dated June 5, 2008.
25. FAA Exhibit 1, Item 1, exhibit F, sub exh. 78 - Electronic mail exchange between Holli Singley and Michelle K. Griscom-Collins dated September 10 - 11, 2008.
26. FAA Exhibit 1, Item 1, exhibit F, sub exh. 82 - Electronic mail exchange between Ben Clendaniel and Dwayne Lenker dated September 26 and 29, 2008.
27. FAA Exhibit 1, Item 1, exhibit F, sub exh. 83 - Electronic mail exchange between Charles Belmont, Ben Clendaniel, and Stephen D. Williams dated September 29 - 30, 2008.
28. FAA Exhibit 1, Item 11, exhibit 6 - March 12, 2007 letter from Respondent to Complainant.

29. FAA Exhibit 1, Item 11, exhibit 27 - Electronic mail exchange between William Manning and Michael Houghton dated October 24 and 27, 2005.
30. FAA Exhibit 1, Item 11, exhibit 28 - Electronic mail exchange between William Manning and Michael Houghton dated November 3, 2005.
31. FAA Exhibit 1, Item 11, exhibit 30 - Electronic mail exchange between William Manning and Rachel A. Dwares dated January 3, 4, and 6, 2006.
32. FAA Exhibit 1, Item 11, exhibit 45 - Electronic mail exchange between Benjamin S. Clendaniel and Dwayne Lenker dated September 23 and 26, 2008.
33. FAA Exhibit 1, Item 11, exhibit 45, sub exh. a - Memorandum from Benjamin S. Clendaniel to Complainant dated September 26, 2008.
34. FAA Exhibit 1, Item 11, exhibit 50 - Electronic mail exchange between Benjamin Clendaniel and Dwayne Lenker dated September 26, 2008.
35. FAA Exhibit 1, Item 11, exhibit 50, sub exh. a - A Memorandum from Benjamin S. Clendaniel to the Complainant dated September 26, 2008.
36. FAA Exhibit 1, Item 11, exhibit 51 - Electronic mail exchange between Donald H. Rainer and Chuck Belmont dated March 19 - 20, 2009.
37. FAA Exhibit 1, Item 11, exhibit 53 - Letter from Donald Nelson Isken, Attorney for the Respondent, to Joseph Michael Lamonaca, Attorney for the Complainant, regarding the Complainant's claims and damages dated November 24, 2008.
38. FAA Exhibit 1, Item 15, exhibit 61 - Letter from Respondent to Complainant regarding notification of amounts past due dated November 16, 2009.
39. FAA Exhibit 1, Item 15, exhibit 62 - Letter from Respondent to Complainant regarding notification of amounts past due dated March 15, 2010.

Additionally, the factual background discussed in Section III above notes four different meetings between the two parties. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 12; FAA Exhibit1, Item 1, exhibit F; sub exh 23, p. 2; FAA Exhibit 1, Item 1, exhibit F; sub exh. 38, p. 1; FAA Exhibit 1, Item 10, p. 21; and FAA Exhibit 1, Item 11, exhibit 2, ¶18]

In fact, this situation is best summarized by the Complaint which states:

> *"That on September 19, 2001, William E. Manning, Esquire began contact with the DRBA, and thereafter continued dialog regarding the fueling right for Aero Ways, Inc., which was memorialized in numerous letters and e-mails, (See Exhibit "F", Attached Hereto)."* [FAA Exhibit 1, Item 1, ¶5]

The Record documents 39 written exchanges. This figure does not include telephone calls or meetings referenced in some of these exhibits. Given these facts, the Director dismisses the Complainant's allegations regarding a lack of communication between the two parties.

(3) Complainant's Request for a Taxiway Sign and Additional Land Lease

The Complainant states:

> *"That in furtherance of the DRBA's Discriminatory practices, Aero Ways, Inc., is the only FBO not to have an FBO Sign or Fuel Sign on taxiway Alpha, despite*

being promised same by DRBA's Donald Ranier (sic) in 2007." [FAA Exhibit 1, Item 1, ¶19]

"That in furtherance of the DRBA's Discriminatory practices, in late 2008 Aero Ways, Inc., was promised the leasing of land at Taxiway A7 exit at KILG, however Mr. Ranier (sic) has refused to take the CEO of Aero Ways calls regarding this promised lease." [FAA Exhibit 1, Item 1, ¶20]

The Respondent denies these allegations, but admits that the Complainant does not have a sign on Taxiway Alpha. [FAA Exhibit 1, Item 8, ¶19 and 20] Additionally, the Respondent describes these allegations as, "issues on which the parties have already reached agreement, but, for various reasons, have not yet been implemented." [FAA Exhibit 1, Item 10, pp 20-21]

The Complainant states that the DRBA's Deputy Executive Director promised Aero Ways a sign in 2007 but does not identify how this commitment was made. Nothing in the Record indicates that the Respondent is contractually or otherwise obligated to provide Aero Ways with any signage. An e-mail exchange during October of 2007 does establish that two other businesses, Flight Safety and Atlantic, have signs, but the Record is unclear as to whether these signs are on North DuPont Highway or the taxiway. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 58, p. 2]

Also contained in this e-mail exchange which documents the Complainant's request for additional signage is the following request from the DRBA's Director of Airports:

"We believe we have an answer that will allow for installation of an unlit sign next to one of the telephone poles along Rte. 13. If you will send to me the specifications of the proposed sign, we can move quickly to resolve this." [FAA Exhibit 1, Item 1, exhibit F, sub exh. 58, p. 1]

The Record does not indicate whether or not the Complainant ever responded to this request. However, the Respondent states, "the DRBA has indicated that it will also provide an FBO sign on taxiway Alpha." [FAA Exhibit 1, Item 10, p. 21 and FAA Exhibit 1, Item 11, exhibit 2, ¶17]

With regard to the Complainant's request to lease additional land, the Respondent explains that it has attempted to address this issue. Specifically, the Respondent states that the Complainant has been illegally parking aircraft outside of its leasehold, on DRBA property, near Taxiway A7. [FAA Exhibit 1, Item 10, p. 21; FAA Exhibit 1, Item 11, exhibit 2, ¶17; and FAA Exhibit 1, Item 11, exhibit 50, sub exh. a] The Respondent states that it attempted to resolve this issue by leasing this land to the Complainant and remains willing to negotiate this lease. [FAA Exhibit 1, Item 10, p. 21]

The Complainant's Reply does not address the Respondent's offer to continue negotiations on these issues. However, the Director will remind the parties that a tenant's history and relationship with the airport sponsor matter. [*See Rick Aviation* at 16] The Record indicates that as of March of this year, the Complainant owes the Respondent a balance of $132,134.67 for past due rents and fees. [FAA Exhibit 1, Item 15, exhibit 62] Although the Complainant's Reply refers to the Respondent's attempts to collect these funds as "obstructionist conduct," the

Director disagrees. [FAA Exhibit 1, Item 14, p. 3] The Director notes the Respondent's Federal obligations under Grant Assurance 24, *Fee and Rental Structure*.[36] The airport sponsor is well within its rights as an airport proprietor to deny additional property and services until the Complainant is current on its rent and fees. Therefore, the Director finds that the Airport has not violated Grant Assurance 22, but both parties are encouraged to work together to address the Complainant's outstanding space and signage requests as well as any arrears which may be owed by the Complainant at this time.

(4) Complainant's Assertion that the Respondent Required it to Become an FBO

The Complainant states:

> *"As such, Aero Ways, Inc. was forced to become an FBO, contra to their Business Plan, in an effort to 'self-fuel' aircraft operated by them."* [FAA Exhibit 1, Item 1, ¶6]

The Respondent denies this allegation. [FAA Exhibit 1, Item 8, ¶6] The Respondent's Memorandum of Points and Authorities in Support of Its Answer and Motion to Dismiss offers a lengthy description of its efforts to facilitate various business plans pursued by the Complainant. [FAA Exhibit 1, Item 10, pp 13-15] This is further supported by various documents referenced in the discussion below.

Since emerging from bankruptcy, the Complainant has been clear about its desire to fuel its customers' aircraft. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 5, p. 1; FAA Exhibit 1, Item 1, exhibit F, sub exh. 6, p. 1; FAA Exhibit 1, Item 1, exhibit F, sub exh. 7, p. 1; FAA Exhibit 1, Item 1, exhibit F, sub exh. 8, p. 2; FAA Exhibit 1, Item 1, exhibit F, sub exh. 9, p. 2; FAA Exhibit 1, Item 1, exhibit F, sub exh. 32; FAA Exhibit 1, Item 1, exhibit F, sub exh. 36; FAA Exhibit 1, Item 1, exhibit F, sub exh. 38, p. 1; and FAA Exhibit 1, Item 11, exhibit 17] To assist its tenant, Aero Ways, the Respondent worked with the Complainant and its legal counsel to explore options such as self-fueling Bi-State Oil's aircraft with shared employees and leasing Bi-State's aircraft.[37] [FAA Exhibit 1, Item 1, exhibit F, sub exh. 33; FAA Exhibit 1, Item11, exhibit 27; FAA Exhibit 1, Item11, exhibit 28; FAA Exhibit 1, Item11, exhibit 30] Despite these potential alternatives, the Complainant chose to become an FBO in order to offer fuel to all of its managed aircraft customers and the general public. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 38, p. 1] In fact, a letter from the Complainant to the Respondent describes Aero Ways as, "enthusiastic about our new direction." [FAA Exhibit 1, Item 1, exhibit F, sub exh. 46, p. 1]

The Director finds the Complainant's allegation that it was "forced" to become an FBO to be unsupported by the facts presented in the Record. While the Complainant may now dispute the value of the Respondent's assistance in helping it achieve its ultimate business goal, it's important to note that the Respondent was never obligated by its grant assurances to provide any

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[36] Grant Assurance 24, *Fee and Rental Structure*, requires an airport sponsor to maintain a fee and rental structure for facilities and services at the airport which 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.

[37] FAA Exhibit 1, Item 1, exhibit F, sub exh. 32 describes Bi-State Oil as Aero Way's largest customer.

assistance at all. In fact, as stated in Atlantic Helicopters Inc./Chesapeake Bay Helicopters v Monroe County, Florida, FAA Docket No. 16-07-12, (December 3, 2008) (Director's Determination) at 37, "Airport operators can demand clarity and stability in proposals and are not obligated to provide application assistance or business incubation to allow a [Specialized Aviation Services Organization] to grow at the Airport."

Grant Assurance 22 requires the sponsor to make the airport available to aeronautical users on reasonable terms, but still recognizes the sponsor's proprietary right to establish rules for how business will be conducted at the airport. The Complainant chose to become an FBO and met the sponsor's requirements as outlined in its Minimum Standards on March 12, 2007. [FAA Exhibit 1, Item 11, exhibit 6; FAA Exhibit 1, Item 1, exhibit F, sub exh. 59; and FAA Exhibit 1, Item 11, exhibit 4]

The Complainant may now regret its decision to become an FBO. Regardless, Aero Ways was not coerced by the sponsor to do so and cannot establish that the airport sponsor acted unreasonably or violated its Federal Grant Assurances by allowing the Complainant to alter its original business plan.

(5) Self-Fueling Requirements

The Complainant states:

> *"That the DRBA failed to comply with FAA Order 5190.6A, the Airports Compliance Handbook, Chapter 7-26 (e) (1), in that the DRBA, in contravention of this section, imposed unreasonable restrictions on Aero Ways, Inc. regarding their right to self-fuel aircraft as the 'owner or operators' of the aircraft at the time the request was made."* [FAA Exhibit 1, Item 1, ¶30]

The Respondent denies this allegation and notes that FAA Order 5190.6A does not have a section numbered as Chapter 7-26(e)(1). [FAA Exhibit 1, Item 8, ¶30]

As stated under Section IV above, the FAA's Airport Compliance Handbook, is not controlling with regard to airport sponsor conduct. The Order sets forth policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance.

However, in order to better understand the Complainant's allegation and be responsive, the Director reviewed FAA Order 5190.6A, paragraph 7-26. This paragraph discusses release of conditions contained in instruments of conveyance agreements, and there is no subparagraph (e)(1). The Complainant's Reply abandons this issue. Therefore, the Director is unable to decipher what further allegations the Complainant may seek to present with regard to self-fueling. The Director notes that this issue is discussed at length above, under Issue One. To reiterate that finding, the Director has determined that the Federally protected right to self-service ones' own aircraft did not apply to the Complainant during this period of time.

Summary of Issue Two

In a Part 16 determination, the role of the Director is to determine whether or not the airport sponsor is in compliance with its Federal obligations. The Complainant attempts to characterize every inadvertent miscommunication or perceived slight as a violation of the Airport's grant assurances. The Complainant does this in a manner that is unorganized and haphazard, forcing the Director to unravel these tangled events in order to understand them within the context of the sponsor's obligations. Notwithstanding, the Director has fully reviewed and analyzed each of the Complainant's allegations, evaluating the documentation and information submitted to the Record.

With regard to the five allegations discussed individually above, the Complainant fails to establish that the Respondent's actions resulted in an unreasonable denial of access. As a result, the Director finds that:

(1) Complainant was not unreasonably denied access to the airport; (2) There was not a lack of communications that rises to a level of violating a grant assurance; (3) Respondent's refusal to grant Complainant's request for a taxiway sign and additional land lease was not unreasonable and was not discriminatory; (4) Complainant was not required to become an FBO by the Respondent; and (5) Respondent did not impose unreasonable self-fueling requirements upon the Complainant.

The Director therefore finds that the Respondent did not discriminate in a prohibited manner against the Complainant. The Director dismisses the Complainant's allegations of Respondent's violations of *49 U.S.C. § 47107(a)(1) and Grant Assurance 22, Economic Nondiscrimination.*

Issue 3: *Whether the Respondent's Minimum Standards and Rules and Regulations resulted in unreasonable or unjustly discriminatory requirements for the Complainant constituting a violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, Economic Nondiscrimination.*

The Complainant alleges the Respondent violated:

> *"Federal Airport Assurance 22(h) relating to the DRBA's unjust discrimination practices and conditions imposed on Aero Ways, Inc. that were not imposed on other operators at KILG."* [FAA Exhibit 1, Item 1, ¶29]

In support of this allegation, the Complainant states that the Respondent, "imposed unreasonable restrictions on Aero Ways, Inc. regarding their right to self-fuel aircraft as the 'owner or operators' of the aircraft at the time the request was made." [FAA Exhibit 1, Item 1, ¶30]

The Respondent denies this allegation and provides explanations specific to other operators at the airport which are fully discussed below. [FAA Exhibit 8, ¶29 and 30]

Grant Assurance 22(h) clarifies an airport sponsor's proprietary right to establish requirements to be met by all airport users as long as those requirements are reasonable and not unjustly discriminatory. The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at

the airport. It is the prerogative of the airport owner or sponsor to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must be fair, equal, and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. [*See* FAA AC 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities*, section 1.1.; Flightline v. Shreveport, FAA Docket No. 16-07-05 (March 7, 2008) (Director's Determination) at 19; and Gina Michelle Moore, individually, and d/b/a Warbird Sky Ventures, Inc. v. Sumner County Regional Airport Authority, FAA Docket No. 16-07-16, (February 27, 2009) (Director's Determination) at 44, *aff'd* Final Decision and Order, July 13, 2010.]

At the time the Complainant initiated its request to fuel its customers' aircraft, the Minimum Standards as adopted by the Respondent in 2000 were applicable. [FAA Exhibit 1, Item 15, exhibit 63] With regard to aircraft fueling, these standards state:

> *"No person shall dispense fuel either to the public or to private aircraft either owned by himself or others except those vendors authorized by the Airport Management. All persons conducting fuel operations at the airport shall have proper documentation of training to conduct such operation. All fuel handling operations must meet Federal, State, and county codes and the following prohibitions, restrictions and requirements apply at the airport."*[38] [FAA Exhibit 1, Item 15, exhibit 63. p. 18]

In June of 2003, the Complainant makes a formal inquiry to the Respondent regarding additional space and the right to fuel its customers' aircraft. [FAA Exhibit 1, Item 1, exhibit F, sub exhs. 5, 6, and 7] As discussed in the factual background above, these discussions continue throughout 2004. [FAA Exhibit 1, Item 1, exhibit F, sub exhs. 8 and 9; FAA Exhibit 1, Item 11, exhibit 17; FAA Exhibit 1, Item 1, exhibit F. sub exh. 10] In 2004, the Respondent begins revising its Minimum Standards and Rules and Regulations. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 23, p. 2]

In March of 2004, when the Respondent provided the Complainant with a term sheet for a land lease, it stated the following as a special requirement:

> *"Self-fueling requested – will reach final determination with New Airport Director."* [FAA Exhibit 1, Item 10, p. 7 and FAA Exhibit 1, Item 11, exhibit 13, p. 1]

The Complainant responds to the term sheet on April 19, 2004 and raises issues regarding the length of the lease terms.[39] The Complainant also notes the following change to its request to self-fuel:

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[38] These other requirements pertain to the safe handling of aviation fuels, fuel storage, and automotive refueling. [FAA Exhibit 1, Item 15, exhibit 63, pp 18-20] The Director does not believe these requirements are pertinent to the extant Complaint.

[39] At this time, the DRBA was only permitted to offer a five year lease with three five year extensions due to the length of its master lease with New Castle County. [FAA Exhibit 1, Item 10, p. 9, footnote 5]

> *"As I indicated, Aeroways (sic) initially seeks only the right to fuel its own customers and would agree not to offer fuel to non-customers for a fixed period of time. Eventually, we believe the Authority will conclude that all economic preferences should be dismantled, but Aeroways (sic) is agreeable to a transition period during which it may fuel its own customers' aircraft. That right is enjoyed by others at the airport (we think the Annenberg facility most recently) and all Aeroways (sic) asks is the same consideration."* [FAA Exhibit 1, Item 1, exhibit F, sub exh. 8, p. 2 and FAA Exhibit 1, Item 1, exhibit F, sub exh. 9, p. 2]

On April 28, 2005, the Respondent raises concerns about the Complainant's fueling plans. At a meeting attended by the Complainant, its legal counsel, and the airport manager, the airport manager explains that Grant Assurance 22 does "not require the Authority to permit Aero Ways to fuel planes in its care, custody and control. Instead, he [the airport manager] took that position that Aero Ways may only fuel planes that are owned or leased by it and must otherwise deal with one of the three FBO's on the field." [FAA Exhibit 1, Item 1, exhibit F, sub exh. 12] After this meeting, the Respondent provides a draft copy of its revised Minimum Standards to the Complainant. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 14]

The Record indicates that the Complainant pursued its plans to build a new hangar until April 29, 2005. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 12] In late July, the Complainant alters its plans and initiates an offer to purchase hangars #5 and 10 conditioned upon the Authority's approval of its self-fueling rights. [FAA Exhibit 1, Item 1, exhibit F, sub exhs. 18, 19, and 20] The Respondent acknowledges this change, but declines to act on the conditional offer until its Minimum Standards are approved. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 21]

In the late fall/early winter of 2005, the Respondent adopts new Minimum Standards and Rules and Regulations which limit self-fueling rights to those guaranteed by the Federal Grant Assurances.[40]

Given this background, the Director must address three questions to determine whether or not the Respondent's Minimum Standards resulted in unreasonable or unjustly discriminatory requirements:

(1) Whether or not the Authority's 2000 Minimum Standards were reasonable?
(2) Whether or not the Authority's 2005 Minimum Standards are reasonable?
(3) Whether or not the Authority's delay in acting upon the Complainant's offer was reasonable.

(1) Whether or not the Authority's 2000 Minimum Standards were reasonable?

The Director acknowledges that these standards are vague and fail to differentiate between self-fueling, as protected by the Federal Grant Assurances, and the retail sale of commercial fuel. Additionally, the Minimum Standards fail to prescribe the process a tenant or aeronautical user would need to pursue to obtain the Authority's authorization to self-fuel or sell fuel. The Airport Director, in an affidavit, admits that some tenants had fueling rights written into their leases prior

[40] See Footnote 11.

to the time New Castle County transferred the sponsorship of the airport to the DRBA. Although the DRBA honored these leases, they declined to enter into any new civilian leases containing fueling rights to any non-FBOs or extend existing ones. [FAA Exhibit 1, Item 11, exhibit 2, ¶5] This affidavit also responds to the Complainant's April 19, 2004 assertion regarding the fueling activities of the Annenberg hangar tenant by stating, "that tenant was fueling aircraft it owned and was otherwise complying with DRBA rules and policy." [FAA Exhibit 1, Item 11, exhibit 2, ¶6]

This lack of clarity, both in the written Minimum Standards, and the Respondent's possible misunderstanding of its rules at that time, raise questions regarding the reasonability of these requirements, as well as the Respondent's ability to apply them in a nondiscriminatory manner. However, the Director will decline to make a finding with regard to the 2000 Minimum Standards, because the Respondent took steps to address and correct these shortcomings when it adopted new Minimum Standards and Rules and Regulations in 2005.

As noted by the Respondent, in a Part 16 proceeding, the FAA evaluates an airport sponsor's current compliance. [FAA Exhibit 1, Item 10, pp 23-24] The Respondent correctly references the FAA's standard with regard to the import of current compliance:

> *"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 as grounds for dismissal of such allegations the successful action by the airport sponsor to cure any alleged or potential past violation of applicable federal obligations, subsequent to FAA receipt of the allegations and prior to the issuance of a final FAA compliance decision."* [See Richard E. Steere v. County of San Diego, California, FAA Docket No. 16-99-15, (December 7, 2004) (Final Decision and Order) at 11]

The Complainant disagrees with the case law referenced by the Respondent and states:

> *"The current matter has been one continuous discriminatory matter as set forth in the Complaint, and to suggest that the case law cited precludes the filing of a complaint after such time as resolution and settlement discussion requires is completely false."* [FAA Exhibit 1, Item 14, p. 4]

The Director believes the Complainant mischaracterizes the FAA's standard, because it seeks to extract the individual allegations without their full context from its ten-year relationship with the Respondent. While the Complainant accurately acknowledges that "The term 'current compliance' is case and fact specific" it attempts to argue that the Respondent has failed to take any steps to address any potential violations. [FAA Exhibit 1, Item 14, p. 5] Given that the Respondent adopted new Minimum Standards and Rules and Regulations three years before the Complainant approached the sponsor about mediation and settlement of these issues, the Director disagrees with this blanket assertion.

The Director believes the Complainant may be unclear about the relief offered through the Part 16 process. FAA Airports' compliance program is directed at ensuring 'current compliance' and also 'voluntary compliance' in order to protect the public's interest in civil aviation and achieve compliance with Federal law. Therefore, the goal of the FAA's Compliance Program is to benefit aviation users through the voluntary compliance of airport sponsors. These concepts are central to the FAA's Compliance Program. The FAA generally takes punitive compliance actions, such as withholding funds under 49 U.S.C. § 47114, when reasonable efforts have failed to achieve voluntary compliance. [*See* FAA Order 5190.6B ¶2.4.(a.)] This is because aviation users receive direct benefits from the Federal investments made at public use airports via grants from the FAA to airport sponsors. The FAA's decision to withhold these funds can potentially deprive aeronautical users of the benefit of capital improvements which may enhance safety or expand capacity. Such a decision is not made lightly, and this action is not used to penalize sponsors who may have unknowingly breached their commitments, but corrected past errors after becoming aware of their full obligations. [*See* Drake Aerial Enterprise, LLC v. City of Cleveland, Ohio, FAA Docket No. 16-09-02, (February 22, 2010) (Director's Determination) at 12 (*Drake*)]

The Director believes the construction and application of the 2000 standards with regard to fueling were confusing and gave rise to potential allegations of violations of Grant Assurance 22. However, the Respondent addressed this issue through the adoption of the 2005 Standards.

(2) Whether or not the Authority's 2005 Minimum Standards are reasonable?

In 2005, after several drafts, discussions with an outside consultant and FAA personnel, and the receipt of tenant comments, the Respondent adopted revised Minimum Standards and Rules and Regulations. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 13; FAA Exhibit 1, Item 1, exhibit F, sub exh. 32, p. 1; FAA Exhibit 1, Item 1, exhibit J; FAA Exhibit 1, Item 1, exhibit K; FAA Exhibit 1, Item 1, exhibit L; FAA Exhibit 1, Item 11, exhibit 2, ¶9; FAA Exhibit 1, Item 11, exhibit 11; and FAA Exhibit 1, Item 11, exhibit 36]

The 2005 Minimum Standards apply only to current and prospective aeronautical service providers[41] and specifically state:

> *"No provision of these Minimum Standards shall prohibit any Person that is the sole owner or lessee of an aircraft from performing self service or self-fueling on such aircraft, as required by federal law, subject to conditions imposed (sic) the DRBA or Airport Management."* [FAA Exhibit 1, Item 11, exhibit 36, p. 1]
>
> *"An FBO is the only Person allowed to sell fuel to other Persons at the Airport."* [FAA Exhibit 1, Item 11, exhibit 36, p. 12]

As the Director noted under Issue One above, when an airport sponsor allows a tenant to expand its self-fueling activities to aircraft it does not own, lease, rent or operate for its exclusive use, it offers a privilege outside its obligations contained in Grant Assurance 22(d) and (f). The Complainant makes no new allegations regarding the reasonability of the fueling requirements

[41] The 2000 Minimum Standards were intended to govern all activities. [FAA Exhibit 1, Item 15, exhibit 63, p. 2]

contained in the 2005 Minimum Standards and the Director has chosen to address the issue of whether or not it was applied in a discriminatory manner under Issue Four below.

The Complainant has alleged:

> *"the DRBA undertook to amend their minimum standards for KILG, (See Exhibit 'I', Attached Hereto), as a result of negotiations with Aero Ways, Inc.. As a result of the DRBA's failure to amend the minimum standards as was represented, Aero Ways, Inc., had to change its entire business plan, in 2005, abandoning its Part 135 efforts in full to become an FBO as dictated by the DRBA, (see Exhibit 'D', Attached Hereto)."* [FAA Exhibit 1, Item 1, ¶22]

The Respondent denies this allegation. [FAA Exhibit 1, Item 8, ¶22] The Respondent explains that its review was independent of its negotiations with the Complainant and offers the following rationale with regard to fueling:

> *"In 2005, after considering Devine's advice and discussions with the FAA, the DRBA decided that it would not permit operators of managed aircraft – exclusive or otherwise – to fuel others' aircraft. The rationale was that permitting managers to fuel others' aircraft without having to comply with the substantial requirements with which FBOs need to comply to fuel others' aircraft could amount to economic discrimination against the FBOs and could subject the DRBA to a Part 16 complaint by the FBOs. The DRBA was also concerned with a 'slippery slope' whereby allowing managers to fuel their managed aircraft would create a proliferation of managers doing so, creating safety and environmental concerns."*[42] [FAA Exhibit 1, Item 11, exhibit 2, ¶9]

In order to establish that the Respondent's actions were intended to penalize Aero Ways, the Complainant must demonstrate that the Respondent's actions were unreasonable or resulted in unjust discrimination. As explained in Self Serve Pumps, Inc. v Chicago Executive Airport, FAA Docket No. 16-07-02, (March 17, 2008) (Director's Determination) at 31, "motive alone is insufficient for a finding of an exclusive right or grant assurance violation."

The Respondent was well within its proprietary rights to update and revise its Minimum Standards and Rules and Regulations. Additionally, the Respondent notes that the May 2005 draft raised concerns regarding safety, the potential for environmental problems, and potential questions about their ability to comply with the Federal Grant Assurances. The Respondent sought to address these matters before adopting a final version of its revised Minimum Standards. This is neither unreasonable, nor unjustly discriminatory conduct. Grant Assurance 22 requires the Respondent to make the Airport available as an airport on reasonable terms. However, it does not guarantee any particular individual aeronautical user access to the airport on whatever terms that user may desire. [*See* Santa Monica Airport Association, Krueger Aviation, Inc. and Santa Monica air Center v. City of Santa Monica, California, FAA Docket No. 16-99-21, (February 4, 2003) (Final Decision and Order) at 19; Pacific Coast Flyers, Inc.,

[42] Attorney Thomas Devine was hired by the Respondent to assist with the drafting and adoption of the Airport's revised Minimum Standards and Rules and Regulations. [FAA Exhibit 1, Item 10, p. 4]

Donnya Daubney d/b/a Carlsbad Aircraft Pilot Supply, and Roger Baker v. County of San Diego, California, FAA Docket No. 16-04-08, (July 25, 2005) (Director's Determination) at 31; and *Drake* at 11]

Secondly, the Complainant alleges that the Respondent made false representations when it provided a draft copy of the Minimum Standards, but eventually adopted another version. The Director has examined the Complainant's Exhibit I. It is a document titled, "Minimum Standards for Aeronautical Activities at New Castle Airport". It is clearly marked "DRAFT". It is dated "May 2005", but notations to the right of the page note that the date "July 2004" was previously deleted. Throughout the document, tracked changes include formatting edits, question marks, and various comments. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 13 and FAA Exhibit 1, Item 1, exhibit I as submitted by the Complainant] The e-mail message that accompanied this document when it was sent to the Complainant's attorney on May 2, 2005 states:

> *"As discussed and promised, please find enclosed a copy of the draft minimum standards document for New Castle Airport. I would appreciate any comments you may have on its regulatory content, or any questions regarding its philosophical intent."* [FAA Exhibit 1, Item 1, exhibit F, sub exh. 14]

The Director is unclear as to how a draft document, accompanied by a request for the Complainant's comments, offers any kind of firm representations or guarantees by the Respondent. This appears to be a courtesy extended by the Respondent to the Complainant. Assuming, en arguendo, that the Respondent did represent the requirements contained in the draft document as final to only the Complainant, other aeronautical service providers could allege the Respondent engaged in unjustly discriminatory treatment designed to favor the Complainant.

The Director realizes that minimum standards do and should change over time. As explained in Royal Air, Inc. v. City of Shreveport through the Shreveport Airport Authority, FAA Docket No. 16-02-06, (January 9, 2004) (Director's Determination) (*Royal Air*):

> "It is not a violation of grant assurances, however, for airport sponsors to increase minimum standards. In general, airport minimum standards are intended to promote safety in all airport activities, maintain a higher quality of service for airport users, protect airport users from unlicensed and unauthorized products and services, enhance the availability of adequate services for all airport users, and promote the orderly development of airport land. Minimum standards should be tailored to the airport to which they will apply, and can be modified to reflect the airport's desire to learn from experience and to be watchful for improvement in the way it does business in order to protect the public interest." [*See Royal Air* at 28]

Consulting the aeronautical using public is one method an airport sponsor can utilize to ensure establishing or revising minimum standards help it meet its desired goals. The FAA encourages

this, but there is no obligation or requirement that sponsors do so. [*See* FAA Advisory Circular 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities*, p. 5]

(3) Whether or not the Authority's delay in acting upon the Complainant's offer was reasonable.

While the Record indicates that the Complainant began requesting fueling rights as early as June 6, 2003, these requests were consistently commingled with inquiries regarding the Complainant's changing space requirements. During this time, the Complainant considered various lease locations including the Hercules hangar, the Annenberg hangar, and building its own hangar at another location referred to by both parties as the "BBJ site".[43] The Director is unable to decipher how long the Complainant pursued each proposal, the length of any serious negotiations between the two parties during 2003 and 2004, or the reasons why each proposal was eventually abandoned by the Complainant. In addition, the Complainant's fueling plans were also changing. Initially the Complainant sought to fuel only its customers, but later began to imply that limitations on its fueling operations would only be for a fixed period of time. [FAA Exhibit 1, Item 1, exhibit F, sub exhs. 8 and 9; FAA Exhibit 1, Item 11, exhibit 17; FAA Exhibit 1, Item 1, exhibit F. sub exh. 10]

On April 28, 2005, the Complainant, its legal counsel and the Respondent met to discuss the Complainant's "space needs and fueling rights." [FAA Exhibit 1, Item 1, exhibit F, sub exh. 12] The Complainant received the draft Minimum Standards on May 2, 2005. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 14] In response, it chose to amend its customer agreement and requested the Respondent verify that the new agreement would meet the Minimum Standards, as drafted, on May 25, 2005. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 16] On either July 29 or August 1, the Respondent sent its conditional offer to acquire hangars 5 and 9.[44] [FAA Exhibit 1, Item 1, exhibit F, sub exhs. 19 and 20] On August 22, 2005, the Respondent declined to act on the offer stating:

> *"Given that your proposal states that your acquisition of the hangars is conditioned upon certain approvals arising out of the Minimum Standards, the Authority has determined that it is both parties' best interests to wait to evaluate your proposal until after the Minimum Standards and the revised Rules and Regulations have been adopted."* [FAA Exhibit 1, Item 1, exhibit F, sub exh. 21]

The Minimum Standards were adopted in the late fall/early winter of 2005 and negotiations between the two parties continued.[45]

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[43] The Record contains a term sheet for a land lease of approximately 3.5 acres. [FAA Exhibit 1, Item 11, exhibit 13] A letter from the Complainant to the Respondent dated 21, 2004 discusses the term sheet and the BBJ site. [FAA Exhibit 1, Item 1, exhibit F, sub. exh. 9] The Director believes this term sheet may describe the property commonly referred to by both parties as the "BBJ site."

[44] FAA Exhibit 1, Item 1, exhibit F, sub exhs. 19 and 20 contain nearly identical letters from the Complainant to the Respondent proposing the purchase of hangars #5 and #9. FAA Exhibit 1, Item 1, exhibit F, sub exh. 19 is dated July 29, 2005, and FAA Exhibit 1, Item 1, exhibit F, sub exhs. 20 is dated August 1, 2005. Neither document is on the Complainant's letterhead nor signed. The Director is unsure as to when the letter was sent, but believes one of these letters was sent because the Respondent replied to the Complainant's offer in a letter dated August 22, 2005. [FAA Exhibit 1, Item 1, exhibit F, sub. exh. 21]

[45] See Footnote 11.

The Respondent opted to defer to the Complainant's offer for approximately six months. In comparison, the time between when the Complainant initiated discussions regarding its space and fueling needs (June 6, 2003) and the time it made a conditional offer to acquire hangars 5 and 9 (late July/early August 2005) was over two years. [FAA Exhibit 1, Item 1, exhibit F, sub exhs. 5, 6, 7, 19, and 20] The time between the Complainant's decision to become an FBO (in December of 2005) and the date it returned the executed agreements of sale needed to acquire the minimum space necessary for an FBO (September 28, 2006), was nearly ten months. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 38, p. 1 and sub exh. 52] The time the Complainant took between returning the executed agreements of sale (September 28, 2006) and purchasing hangars C and D (February 9, 2007) was approximately six months. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 52 and FAA Exhibit 1, Item 15, exhibit 61] Furthermore, during this six month period, the Respondent worked with the Complainant and its legal counsel to review other scenarios which might have enabled Aero Ways to fuel Bi-State Oil's aircraft. [FAA Exhibit 1, Item 1, exhibit F, sub exh. 33; FAA Exhibit 1, Item11, exhibit 27; FAA Exhibit 1, Item11, exhibit 28; FAA Exhibit 1, Item11, exhibit 30]

Although the FAA has found that an unreasonable delay can constitute a constructive denial of access, these have been instances in which the airport sponsor denied access for a much longer period of time. [*See* Jim Martyn v. Port of Anacortes, FAA Docket No. 16-02-03, (April 14, 2003) (Director's Determination) (delay of three years); United States Construction Corporation v. City of Pompano Beach, Florida, FAA Docket No. 16-00-14, (August 16, 2001) (Director's Determination) (delay of over a year); Centennial Express Airlines, Golden Eagle Charters, d/b/a Centennial Express Airlines v. Arapahoe County Public Airport Authority, FAA Docket No. 16-98-05, (August 21, 1998) (Director's Determination) (Delay had been in excess of 16 months and was still pending at the time of the Director's Determination). That is not the case here.

Summary of Issue Three

Grant Assurance 22 recognizes an airport sponsor's proprietary right to establish standards for aeronautical businesses and users. The Respondent chose to transition to more stringent self-fueling requirements through the adoption of revised Minimum Standards and Rules and Regulations. Given the Director's concerns about the Respondent's 2000 Minimum Standards, the Director believes the Respondent undertook a conscientious effort to improve the business environment at the airport. This is what the FAA expects airport sponsors to do. Moreover, it allows the Respondent to meet the standard of compliance, as explained under the Applicable Law and Policy above.

While the new Minimum Standards and Rules and Regulations made it difficult for the Complainant to pursue its original business plan, these requirements were not unreasonable or inconsistent with the grant assurances. Although the Respondent deferred taking action on the Complainant's conditional proposal for a period of approximately six months, communication between the two parties, including the consideration of other proposals, was ongoing at this time. As a result, the Director does not find this to be unreasonable. The Director finds that the Respondent's Minimum Standards and Rules and Regulations did not result in unreasonable or unjustly discriminatory requirements for the Complainant.

Issue 4: *Whether the Respondent has applied its Minimum Standards and Rules and Regulations in a way which unjustly discriminates against the Complainant in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, Economic Nondiscrimination.*

The Complainant alleges the Respondent has engaged in "selective and discriminatory enforcement of the [airport] Regulations" and Minimum Standards. Specifically, the Complainant states that other tenants and other FBOs have received more favorable treatment.[46]

The FAA has long held that in order to sustain a finding of unjust economic discrimination, a complainant must establish that it requested similar terms and conditions as other similarly-situated airport users and was denied for unjust reasons. [*See* Aerodynamics of Reading, Inc. v Reading Regional Airport Authority, FAA Docket No. 16-00-03, (December 22, 2000) (Director's Determination) at 19] The Record clearly establishes Aero Ways' requests for fueling rights; therefore, the Director analyze whether or not the Complainant was similarly-situated to other tenants which possess fueling rights.

XO Jet

The Complainant makes several allegations with regard to XO Jet in its pleadings. The Respondent leased a hangar to XO Jet on November 20, 2007. [FAA Exhibit 1, Item 8, ¶9 and FAA Exhibit 1, Item 11, exhibit 37] The Complainant questions the validity of XO Jet's right to self-fuel and asserts that the Respondent was disingenuous and unclear in its explanation. The Complaint states:

> *"When this 'Self-fueling' was challenged by Aero Ways, Inc., DRBA Management told Aero Ways that XOJet (sic) could 'Self-fuel' because they owned the aircraft they were fueling. Edward Bohn of Aero Ways, Inc., proved to DRBA Airport that in fact XOJet (sic) did not own all of their managed aircrafts, not unlike Complainant."* [FAA Exhibit 1, Item 1, ¶9]
>
> *"Thereafter, with the information in hand that XOJet (sic) did not own its aircraft, the DRBA Airport Management changed its story and told Aero Way, Inc., that XOJet (sic) could self-fuel because they were a Subpart K, Fractional Operator."* [FAA Exhibit 1, Item 1, ¶10]
>
> *"This information was proven to be false as XOJet (sic) was not a Subpart K Fractional Operator."* [FAA Exhibit 1, Item 1, ¶11]
>
> *"With this misleading and false information in hand DRBA Airport Management changed their story again on June 5, 2008, telling Aero Ways, Inc. that XOJet (sic) could self-fuel because they were a Part 135 operator. This information was challenged by Aero Ways, Inc., and it became clear that DRBA Management*

[46] The Complaint specifically alleges that the Respondent has treated XO Jet more favorably. However, the Record indicates the Complainant's concerns about the treatment received by other tenants. In order to be thoroughly responsive to the Complainant, the Director will discuss these tenants in addition to XO Jet.

made this statement prior to receiving any supporting documentation that XOJet (sic) was a Part 135 Operation, or that they were duly authorized to operate by the PHL FSDO [Complainant's footnote states, 'To date, no documentation has been provided to show XOJet (sic) is duly authorized to operate by the PHL FSDO.), (See Exhibit 'M', Attached hereto).'"[47] [FAA Exhibit 1, Item 1, ¶12]

The Respondent denies these allegations. [FAA Exhibit 1, Item 1, ¶9, 10, 11, and 12] The Respondent states:

> *"In late 2007, XO Jet, a private aviation company, became a tenant at the Airport. Unlike Aero Ways – a non-air carrier Part 91 operator – XO Jet is an air carrier and holder of a Part 135 certificate. As such, according to federal requirements, XO Jet has the option to self-handle, including to self-fuel; or, it may choose to contract out to third parties providing these services."* (Citations omitted) [FAA Exhibit 1, Item 10, p. 15]

The evidence of Record, including several documents submitted by the Complainant, contradict the Complainant's account. An e-mail from an Aero Ways employee to the Respondent on January 30, 2008 states:

> *"As per our conversation Monday, January 28th, you advised Chuck and I that documentation you possessed will show that 135 operators qualify for self-fueling rights.*
>
> *Would you please, at your earliest convenience share that documentation with us either by fax, e-mail, or in person?"* [FAA Exhibit 1, Item 1, exhibit F, sub exh. 60]

This indicates that the Respondent told the Complainant that XO Jet was a Part 135 operator on Monday, January 28, 2008 – not simply an aircraft owner, nor a fractional owner. The Respondent informed the Complainant that XO Jet was an air carrier. In response, the Respondent replied the next day, January 31, 2008, offering to meet with the Complainant that afternoon. According to the Respondent, the Complainant did not respond to this request to meet. [FAA Exhibit 1, Item 10, p. 17]

On April 3, 2008, the Complainant's attorney sent a letter to the Respondent inquiring about XO Jet's ability to fuel given that it is not an FBO and infers that XO Jet is fueling aircraft it manages. [FAA Exhibit 1, Item 1, exhibit F, sub exhibit 66] On June 5, 2008, the Respondent sends a letter to the Complainant's attorney stating that XO Jet is an air carrier under Part 135 and is exercising its right to self-fuel its own aircraft. The Director has reviewed this letter and notes that it correctly articulates the FAA's policy with regard to self-fueling. In addition, the Respondent includes a copy of XO Jet's Air Carrier Certificate.[48] [FAA Exhibit 1, Item 1, exhibit F, sub exhibit 70]

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[47] The acronym "FSDO" refers to an FAA Flight Standards District Office.

[48] XO Jet's Air Carrier Certificate was awarded by the FAA's Sacramento, California Flight Standards District Office (FSDO). Pursuant to 14 CFR § 119.3, the Sacramento FSDO is XO Jet's certificate holding district office.

The Reply offers statements similar to those in the Complaint, simply elaborating on its unsupported chronology of these events and even attempting to state that the "Respondent did not at all relevant times inform Aero Ways, Inc. that XO Jet was a 135 operator…". [FAA Exhibit 1, Item 14, pp 8-9] The Director fails to understand the significance of these claims, some of which contradict the documentation submitted by the Complainant. The fact remains: XO Jet is an air carrier. Aero Ways was an aircraft management company that became an FBO in order to fuel its customers. These companies are not similarly-situated, and the airport may treat them differently. [*See* Richard M. Grayson and Gate 9 Hangar, LLC v. DeKalb County, Georgia, FAA Docket No. 16-05-13, (February 1, 2006) (Director's Determination) at 11] As discussed in great length under Issue One, XO Jet's right to self-fuel its aircraft used in Part 135 operations is protected by the Federal Grant Assurances. The Complainant had no such protection until it became an FBO.

Lastly, the Complainant alleges that XO Jet is not required to meet Section 5.16(1)(d) of the Rules and Regulations, but Aero Ways is. [FAA Exhibit 1, Item 1, ¶31] This requirement states:

> *"Any person engaged in self-fueling shall carry adequate Liability, Fire, Auto and other insurance coverages as applicable to the type of self-fueling services being provided and in the amounts specified by the DRBA. Minimum above ground storage tank capacity for self-fueling shall be 12,000 gallons for Jet-A and 5,000 gallons for Avgas."* [FAA Exhibit 1, Item 1, exhibit L, p. 15]

The Complainant implies that the Respondent did not require XO Jet to have an above ground 5000 gallon Avgas fuel tank. [FAA Exhibit 1, Item 1, ¶16, footnote 3]

The Respondent states:

> *"Aero Ways alleges that XO Jet does not have a 5000 gallon fuel tank of Avgas on its leased property, which Aero Ways says is required under Section 5.16(d). XO Jet, however does not use Avgas in its aircraft. Therefore it need not (and does not) have a 5000 gallon fuel tank of Avgas on its leased property."* [FAA Exhibit 1, Item 10, p. 16]

The Director notes that the plain language of the requirement imposes a floor on above ground storage tank capacity. It does not state that self-fuelers are required to have both types of tanks. Moreover, XO Jet's lease includes "exclusive possession and full control of the two (2) 12,000 gallon fuel tanks…".[FAA Exhibit 1, Item 11, exhibit 37] The Director believes the Complainant either misunderstands the standard or is not aware of the specifics pertaining to XO Jet's leasehold.

The Complainant also alleges that XO Jet has not been required to meet other requirements regarding documentation which must be provided to airport management, payment of fuel

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FAA Form 8430-18, Air Carrier Certificate, delegates the Administrator's Authority to issue an air carrier certificate to the certificate holding district office. Therefore, XO Jet does not need to seek any additional approvals from the Philadelphia FSDO and the Director is unclear as to why the Complainant believes this to be necessary.

flowage fees, and the location of self-fueling, but that Aero Ways is required to meet these standards. [FAA Exhibit 1, Item 1, ¶16, footnote 4 and FAA Exhibit 1, Item 1, exhibit L, p. 15] First and foremost, the Complainant provides no documentation to substantiate any of these claims which are denied by the DRBA Director of Airports in an affidavit. [FAA Exhibit 1, Item 11, exhibit 2, ¶12] Secondly, the Complainant is now an FBO. Its requirements for fueling are outlined in Section 5, paragraphs 5.01 through 5.15 of the Rules and Regulations and Section III of the Minimum Standards for Aeronautical Services. Section 5.16 of the Rules and Regulations is titled "Additional Requirements for Self-Fueling" and would not be applicable to the Complainant. [FAA Exhibit 1, Item 1, exhibit L, pp 12 – 14 and FAA Exhibit 1, Item 11, exhibit 36, pp 11 - 14]

Annenberg Hangar Tenant

In 2004, the Complainant questioned the fueling rights provided to "others at the airport (we think the Annenberg facility most recently)". [FAA Exhibit 1, Item 1, exhibit F, sub exhs. 8 and 9, p. 2] Although the Record offers little information as to whom this tenant might be or the nature of their business at the airport, the Record is clear with regard to how this tenant was not similarly-situated to the Complainant. The Respondent states this tenant was "exercising self-fueling rights" and "fueling aircraft it owned". [FAA Exhibit 1, Item 11, exhibit 2, ¶6] Unlike the Complainant, the Annenberg Hangar Tenant owned its aircraft; as a result, the Complainant is not similarly-situated to the Annenberg Hangar Tenant.

Red Eagle Avionics

On June 26, 2008, the Complainant received an e-mail that had originally been sent by Red Eagle Avionics advertising the fact that they would have 100LL fuel available to their customers even though they are not an FBO.[49] The Complainant promptly forwarded this e-mail to the Respondent. [FAA Exhibit 1, Item 11, exhibit 42] An affidavit provided by the DRBA's Director of Airports states:

> *"The issue was ultimately resolved, with Red Eagle agreeing to abide by the Rules and Regulations and Minimum Standards. The DRBA enforced the same rules against Red Eagle – a non-air carrier, non-FBO – in the same way as against Aero Ways before it became an FBO."* [FAA Exhibit 1, Item 11, exhibit 2, ¶13]

Given that this concern was expressed in 2008, and not addressed in the Complainant's pleadings, the Director assumes the Respondent's actions addressed the issue appropriately.

Other FBOs

FAA Exhibit 1, Item 1, exhibit F, sub exh. 56 contains an e-mail from an Aero Ways employee to the Complainant's attorney stating:

[49] The term "100LL" refers to a type of aviation fuel.

> *"Since we are a new FBO we must comply now. The existing FBOs will have three years to comply. The problem is that the clock hasn't started ticking the 3 years yet with these other FBOs. I asked when the 3 year time frame will start and he couldn't give an answer. I know for a fact that the other FBOs are not in complete compliance with the min standards."* [FAA Exhibit 1, Item 1, exhibit F, sub exh. 56]

The Record contains no further information regarding which other FBOs were not required to comply with the Minimum Standards. There is no information to explain how they are not compliant.

The Director addressed a similar situation in Rick Aviation. Here, the Director explained:

> "Minimum standards may change over time. Lease terms may change over time. The FAA recognizes that leases are legal documents that exist in time and are rarely identical between users because of differing circumstances of the leases, sites, users, negotiations, business plans, economic circumstances, and market conditions, etc. The FAA does not enforce lease provisions through the compliance program. When a sponsor amends its minimum standards, it may attempt to apply such standards to all users. If such application of new minimum standards appears to be in conflict with lease agreements, such a dispute is a legal dispute over lease terms. This is outside of FAA jurisdiction. However, the FAA recognizes that sponsors may not always be able to enforce new minimum standards against leaseholders of prior legal contracts. In such circumstances, the FAA often recommends that when the sponsor has the ability to re-open lease agreements, it should pursue amending the leases to be consistent with the new minimum standards. The FAA does not require airport sponsor to refrain from applying newer minimum standards to prior tenants." [*See Rick Aviation* at 17]

Given that this concern was expressed in an e-mail from 2006, and not addressed in the Complainant's pleadings, the Director assumes this matter has been addressed by the Respondent.

Summary of Issue Four

The gravaman of the Complainant's allegations rests on its fundamental misunderstanding of the legal right to self-fuel. Because the Complainant does not own air aircraft – in fee simple, through a long-term lease, as a fractional owner, or meet the definition of an air carrier – it has no legal right to self-fuel. Even now, as an FBO, the Complainant's ability to fuel aircraft it does not own is primarily derived from its ability to meet the airport's minimum requirements to provide this aeronautical service to the public, not the grant assurances. This misinterpretation causes the Complainant to mistake other aeronautical users' ability to self-service their own aircraft for dissimilar treatment. The Director has not found this to be the case, and finds that Respondent has not applied its Minimum Standards and Rules and Regulations in a way which unjustly discriminates against the Complainant.

VII. CONCLUSION

Upon consideration of the entire Record herein, the applicable law and policy, and for the reasons stated above, the Director finds and concludes:

(1) The Respondent did not prevent the Complainant from self-fueling its own aircraft in violation of 49 U.S.C. § 47107(a)(6) and Grant Assurance 22, *Economic Nondiscrimination.*

(2) The Respondent did not fail to make the airport available to the Complainant under reasonable terms and without unjust discrimination constituting violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, *Economic Nondiscrimination.*

(3) The Respondent's Minimum Standards and Rules and Regulations are not unreasonable or unjustly discriminatory constituting violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, *Economic Nondiscrimination.*

(4) The Respondent has not applied its Minimum Standards and Rules and Regulations in a way which unjustly discriminates against the Complainant in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, *Economic Nondiscrimination.*

ORDER

Accordingly, it is ordered that:

1. The Complaint is dismissed with prejudice; and

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

RIGHT OF APPEAL

This Director's Determination is an initial agency determination and does not constitute final agency action and order subject to judicial review. [14 CFR § 16.247(b)(2).] A party to this Complaint adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR § 16.33(b) within thirty (30) days after service of the Director's Determination.

Randall S. Fiertz

Director
Office of Compliance and Field Operations

AUG 30 2010

Date