

U.S. Department
of Transportation
Federal Aviation
Administration

APR 0'2 2012

Certified Mail - Return Receipt

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Carlene V. McIntyre, Esq
Assistant General Counsel
Law Department
The Port Authority of New York and New Jersey
225 Park Avenue South, 14th Floor
New York, NY 10003

Re: Evergreen International Airlines, v. the Port Authority of New York and New Jersey, FAA
Docket No. 16-10-04

Dear Mr. Kirsch and Ms. McIntyre:

Enclosed is a copy of the determination of the Federal Aviation Administration (FAA) with respect to the above-referenced matter.

We find that the Port Authority of New York and New Jersey, operator of the John F. Kennedy International Airport, is not currently in violation of its Federal obligations regarding unjust economic discrimination or exclusive rights as set forth in its airport grant assurances and existing Federal statutes with respect to this complaint.

Accordingly, the above-referenced matter is dismissed. The reasons for dismissal are set forth in the enclosed Director's Determination.

Sincerely,

Randall S. Fiertz
Director of Airport Compliance
and Management Analysis

Enclosure

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

EVERGREEN INTERNATIONAL AIRLINES,
INC. McMinnville, OR

Complainant

v.

THE PORT AUTHORITY OF NEW YORK &
NEW JERSEY

Respondent

FAA Docket 16-10-04

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA), Director of the Office of Airport Compliance and Management Analysis, to investigate pursuant to the *Rules of Practices for Federally Assisted Airport Enforcement Proceedings* found in Title 14 Code of Federal Regulations (CFR), Part 16. ¹

Evergreen International Airlines Inc., (Complainant) a Part 121 Air Carrier filed a formal Complaint pursuant to 14 CFR Part 16 against the Port Authority of New York and New Jersey (the Port Authority or Respondent), operator of the John F. Kennedy International Airport, (JFK Airport). The Complainant alleges the Respondent is engaged in disparate treatment of similarly situated aeronautical service providers with regard to ground handling practices² and has placed an unreasonable restriction on self-servicing. The Complainant alleges the Port Authority is in violation of 49 U.S.C. §§ 47107(a)(I) and 40103(e) and the respective FAA Grant Assurances 22, *Economic Nondiscrimination* and 23, *Exclusive Rights*.

¹ Enforcement procedures regarding airport compliance matters may be found at *FAA Rules of Practice for Federally assisted Airport Enforcement Proceedings* (14 CFR Par 16). These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and became effective on December 16, 1996.

² Ground handling includes the array of services necessary to maintain and operate an airline, such as fueling, air conditioning, ground power, baggage handling, communications access, towing, catering, minor maintenance, and similar services. *Airport Business Practices and Their Impact on Airline Competition*, FAA/OST Task Force Study, October 1999, page 48.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April .3-,2012, I caused to be placed in the United States mail (first class mail, postage paid) a true copy of the Director's Determination for FAA Docket No. 16-10-04 addressed to:

Counsel for Complainant:
Leonard D. Kirsch, Esq.
McBreen & Kopko
500 North Broadway
Jericho, NY 11753

Counsel for Respondent:
Carlene V. McIntyre, Esq
Assistant General Counsel
Law Department
The Port Authority of New York and New Jersey
225 Park Avenue South, 14th Floor
New York, NY 10003

Copy to:
FAA Part 16 Airport Proceedings Docket
FAA Airport Compliance and Management Analysis, ACO-100

Anne Torgerson
Office of Airport Compliance and
Management Analysis

The Complainant identifies the issues to be resolved as:

- ~ Whether for the purposes of assessing a gross receipts fee on airline ground handling services, can an airport sponsor discriminate between an airline using its own employees to self-handle its own aircraft and an airline using a subsidiary or sister company (a company with the same shareholders) to self-handle its own aircraft? The Complainant alleges such an action constitutes unjust discrimination in violation of 49 U.S.C. §§ 47107(a)(I) and 40103(e) and the respective FAA Grant Assurances 22, *Economic Nondiscrimination* and 23, *Exclusive Rights*. [FAA Exhibit 1, Item I, page 4]
- ~ Whether the imposition of a gross receipts fee on an airlines' affiliated ground handling company (sister company) for services provided to the airline represents an unreasonable restriction on self-service discrimination in violation of 49 U.S.C. §§ 47107(a)(I) and 40103(e) and the respective FAA Grant Assurances 22, *Economic Nondiscrimination* and 23, *Exclusive Rights*. [FAA Exhibit 1, Item 1, page 4]³

The Complainant alleges that because they are an airline and their "sister company," Evergreen Aviation Ground Logistics Enterprises, Inc., (EAGLE), is providing ground handling directly for them they should not be subject to gross receipt fees for that direct service. EAGLE is an airline services company (a/k/a ground handling company) and is the "sister company" to the Complainant. [FAA Exhibit 1, Item 1, exhibit 4, pg. 2] The Complainant believes that services provided by EAGLE should be viewed as self-servicing and not subject to fees. The Complainant does not object with the Respondent charging the fees when EAGLE provides those services for any other airline or entity. The Complainant believed when the two parties moved their operations to Building 87, they would be viewed as a single operation and no fees would be assessed for services provided to the Complainant. [FAA Exhibit 1, Item 3 exhibit 4, sub-exhibit (a) pg. 3]

The Respondent denies these allegations and argues that EAGLE's sole business is to provide ground handling and cargo handling for airlines and cargo entities. The Respondent argues that the Port Authority policy is and has always been that if the ground handling company exclusively handles its parent company then they are not subject to the fees. If the ground handling company does business with a third party (any other entity) all gross revenues, including work conducted for the parent company, are subject to the fees. [FAA Exhibit 1, Item 3, Statement of Facts and exhibit 4, sub-exhibit (a) pg.1] Another option suggested by the Respondent to Evergreen International Airlines, Inc., was for Evergreen International Airlines employees to perform ground handling for themselves on its premises. Under the terms and conditions of a Port

³ See also FAA Exhibit 1, Item 1, exhibit 2; Part 13 complaint filed May 27, 2010, with FAA Eastern Region, which made similar assertions. Attorney for the Complainant used this as an exhibit in his Part 16 complaint.

⁴ Complainant uses the term "sister company" to identify the relationship of Evergreen and Eagle as being "owned essentially, by the same shareholder." [FAA Exhibit 1, Item 1, page 1].

Authority ground handling privilege permit, the Complainant could also perform ground handling for other airlines, and be liable for payment of the gross receipt fees only with respect to services performed for other airlines. [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit(c)]

With respect to the allegations presented in this Complaint, under the specific circumstances at the JFK Airport as discussed below and based on the evidence of record in this proceeding, the FAA finds the Port Authority is not currently in violation of its Federal obligations. The Director'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.

The basis for the Director's conclusion is set forth herein.

II. PARTIES

A. Respondent

The Port Authority of New York and New Jersey operates JFK Airport, a public-use, air carrier airport certificated under Title CFR Part 139.⁵ The JFK Airport has property consisting of 5,200 acres. [FAA Exhibit 1, Item 8] Nearly 100 cargo air carriers operate out of JFK Airport making it the nation's busiest international air freight gateway by value of shipments in 2008.⁶ The planning and development of the JFK 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, the Port Authority has accepted \$513,637,839.00 in Federal AIP grants for JFK Airport [FAA Exhibit 1, Item 8].

B. Complainant

The Complainant is Evergreen International Airlines, Inc., (Complainant) a corporation organized and existing under the laws of the State of Delaware, with its corporate offices at 3850 Three Mile Lane, McMinnville, Oregon. The information provided by the Complainant clearly states that Evergreen International Airlines, Inc., is an all-cargo airline. FAA records indicate that the Complainant holds an Air Carrier Operating Certificate as specified by 14 CFR Part 121. The same record indicates there are 10 aircraft operating under the certificate number EIAAI 03A and the Complainant has been operating since November 15, 1979. [FAA Exhibit 1, Item 9]

⁵ Title 14 Code of Federal Regulations Part 139 Certification of Airports

⁶ Bureau of Transportation Statistics, U.S. Department of Transportation (2009). "America's Freight Transportation Gateways" [FAA Exhibit 1, Item 5].

http://www.bts.gov/publications/americas_freight_transportation_gateways/2009/highlights/top25_freight_gateways_by_shipment_value/international_airport/index.html

III. BACKGROUND AND PROCEDURAL HISTORY

EAGLE's Privilege Permits

Privilege Permit AYC-902 was executed by the Respondent and EAGLE for a period from May 1, 1998 to April 30, 2003. The Permit authorizes EAGLE to operate and provide cargo aircraft handling, ramp and cleaning services on permitted areas of the airport to approved aircraft and to pay a five percent on gross receipt fees from all ground handling activity. Section 4(a)(i), Titled Fees: explains the terms for the gross receipt fees for services that fall outside of self-servicing. [FAA Exhibit 1, Item 1, exhibit 6]

EAGLE is an established airline services company that provides ground handling services and is a "sister company" to the Complainant. Both companies are part of Evergreen International Aviation Inc., which is a part of Evergreen Holdings Incorporated, a group of companies owned and operated under a common brand name by one person, Mr. Delford Smith. [FAA Exhibit 1, Item 1, pg. 4].

Privilege Permit AYD-796 was executed by the Respondent and EAGLE for a period from May 1, 2008 to April 30, 2013. Privilege Permit AYD-796 authorizes EAGLE to operate and provide cargo handling, ramp and cleaning services on permitted areas of the airport to approved aircraft operators or other persons at the airport. The Permit requires EAGLE to pay the fee of five percent on gross receipts from all ground handling activity. Section 4(a)(i), Titled Fees: explains the terms for the gross receipt fees for services that fall outside of self-servicing. [FAA Exhibit 1, Item 3, exhibit 1, pg. 12] The terms and conditions are identical to Privilege Permit AYC-902 referenced above. The terms for the gross receipt fees are identical to those outlined in AYD-761, which was executed by the Respondent and the Complainant. Privilege Permit AYD-761, expires March 31, 2017. [FAA Exhibit 1, Item 3, exhibit 3, pg. 12]

Evergreen Airlines Lease Agreements and Permits

On October 9, 2006, Agreement of Lease AYD-618 is signed by the Respondent and the Complainant for the leasing of Building 87 by the Complainant at JFK Airport. The ten year lease also permits EAGLE to operate from this location. [FAA Exhibit 1, Item 1, exhibit 7, p. 44, Section 21(c)(ii)] This lease reflects that Evergreen International Airlines, Inc., and EAGLE moved to Building 87 and are co-located. The Respondent recognizes both the Complainant and EAGLE as wholly-owned subsidiaries of Evergreen International Aviation, Incorporated (EA). The lease permits EAGLE (or other EA wholly-owned subsidiary) to use the same premises (Building 87) with no additional fees, so long as the relationship between Evergreen International Airlines, Inc., and EAGLE (or other EA wholly-owned subsidiary) remains the same.'

⁷ The "Family of Airlines" provision of the Lease excludes the required Port Authority subleasing fee of 10% when a company subleases space to an affiliate that is wholly-owned by the parent company.

On February 29, 2008, Privilege Permit AYD-761 is signed by Evergreen International Airlines, Inc., and the Respondent for a term of March 1, 2008 to March 31, 2017. Privilege Permit AYD-761 authorizes the Complainant to operate as an airline at JFK. The permit allows for routine and non-routine aircraft maintenance, which includes inspection, maintenance, servicing, testing, overhaul, cleaning, conversion, repair and installation of parts and supplies on aircraft and aircraft parts. Section 4(a)(i), Titled Fees: explains the terms for the gross receipt fees for ground handling services provided to another carrier on the Airport and would not apply to carriers that self-serve. The terms for the gross receipt fees are identical to those outlined in AYD-796. [FAA Exhibit 1, Item 3, exhibit 3, pg. 12]

On December 1, 2009, Space Permit AYD-940 is signed by Evergreen International Airlines, Inc., and the Respondent for a term of January 1, 2010 to October 31, 2016. Privilege Permit AYD 940 authorizes the Complainant to use and occupy 1.4 acres of an aeronautical site area located in the vicinity of JFK Cargo Building 87 as shown on "Exhibit A" attached to the permit. The terms and conditions state that the rent and the basic fee shall be increased annually on the anniversary date of the agreement. [FAA Exhibit 1, Item 3, exhibit 2, Special Endorsements, pg. 1, ~3]

An email on October 7, 2009, (4:47 p.m.)" from the Complainant's Attorney, Leonard Kirsch, to Port Authority Attorney, Thomas Maher, states:

"...several years ago when we negotiated the Bldg. 87 transaction we agreed that once Evergreen moved into Bldg. 87, EAGLE would no longer have to charge Evergreen Airlines Port Fees for services conducted at Bldg. 87 but only for work performed for Evergreen at other locations. This understanding was not put into the Lease as it did not belong in a lease between the Airline and the Port, but was instituted immediately upon the move into Bldg. 87. The only point inserted in the Lease was that Evergreen Airlines did not have to charge a subleasing fee to EAGLE as this belonged in a lease. Since neither Marie Grace nor you are working in Properties anymore, we need to provide Dennis Lapinski and Sam Stanton with an acknowledgement that this was the transaction. If you wish I can show you a portion of a memo at the time I sent to Evergreen spelling this out at the time. " [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (a) pg. 3 and 4]

On October 14, 2009, (4:14 p.m.) a reply email sent from the Port Authority Attorney, Thomas Maher to the Complainant's Attorney, Leonard Kirsch, states:

"Under what was referred to as the "Family of Airlines" provision, gross receipts from subleasing space to an affiliate that is wholly owned by the parent company are not subject to the required 10% subleasing fee. As you stated, the Bldg. 87 lease contains language supporting this provision. "

⁸ The times are noted to provide further clarification when reading the string of emails that began on October 7 and ended on October 14.

"That said, I do not recall ever agreeing to your initial statement regarding EAGLE's obligation to pay PA (Port Authority) fees for handling services provided to Evergreen. As I recall the PA policy on handling fees, if Evergreen, an EAGLE affiliate, was EAGLE's sale customer, no handling fees would be due the PA. However, if EAGLE performed 3rd party handling for others, regardless where the handling services were performed, all gross receipts including those received from Evergreen would be due the PA.;" [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (a) pg. 3]

On October 14, 2009, (4:21 p.m.) a reply email from the Complainant's Attorney, Leonard Kirsch, to Port Authority Attorney, Thomas Maher, states:

"...I respectfully remember this differently. We compared Evergreen to Delta and AA as they handle third party airlines directly and through a subsidiary to handle other airlines in the AA and Delta terminals. We agreed that since AA and Delta did not pay a Port Fee on service for AA or Delta, just third party airline work. Evergreen would be treated in the same manner since they were all similarly situated. Based on this commitment we recommended Evergreen sign the Lease. "

"As the Port is aware, Evergreen must be treated the same as AA and Delta. As they do not pay Port Fees on their own handling, neither should Evergreen. EAGLE has no problem paying Port fees on third party airline handling. "[FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (a), pg. 3]

On October 14, 2009, (5:00 p.m.) a reply email sent from the Port Authority Attorney, Don Rivas to the Complainant's Attorney, Leonard Kirsch, states:

"I must take issue with your characterization of the problem. Evergreen is not EAGLE. They are separate companies. Therefore, the comparison with AA and Delta do not apply. EAGLE's sole business is to provide ground and cargo handling. The Aviation policy has always been and continues to be that any handling company that solely handles a parent company is not subject to the PA fee. However, if that handling company does business with a third party all gross revenues including the parent's are subject to the PA fee. " [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (a), pg. 2]

On October 14, 2009, (5:09 p.m.) a reply email sent from the Complainant's Attorney, Leonard Kirsch, to Port Authority Attorneys, Thomas Maher and Don Rivas, states:

"Can you confirm that Delta and American pay the Port fees on their own handling of airline as they handle third party airlines as well? This conversation took place two years ago and after proving that both Evergreen and EAGLE were owned by the same shareholder we were led to believe that no Port Fee would be payable on our self-handling. Among the alternatives discussed was having Evergreen not EAGLE employees do the actual handling, but it was agreed since

the two companies were owned by the same shareholder(s), and the handling would occur at Building 87, this was unnecessary. Had this not been agreed to we would have arranged that the employees handling Evergreen were Evergreen employees. However, we were told this was not necessary as long as they handled Evergreen at Building 87 only. It was agreed that (EAGLE handled Evergreen at another facility, it would pay the fee. " [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (a), pg. 2]

On October 14, 2009, (10:26 p.m.) a reply email sent from the Port Authority Attorney, Sam Stanton to the Complainant's Attorney, Leonard Kirsch, states:

"...glad to see that there is finally some discussion/response (even if it is through backdoor channels) regarding the EAGLE Audit since the PA Audit Department; as well as myself, have been patiently waiting for a response from EAGLE for quite some time now. "

"As I explained to Mr. Conroy, in an email (with attachments) on September 16, 2009 - which basically restated the Audit Department's findings and responses to EAGLE's concerns sent on July 31, 2009 and August 6, 2009 - the Port Authority first presented its audit results to EAGLE on June 24, 2009, which revealed that the reported gross receipts were understated by \$807,938 primarily due to EAGLE not reporting as gross receipts the PA fees separately stated and included in customer billings (recovery fees). As a result, EAGLE owed the Port Authority additional fees of \$16,155, associated late charges of \$4,468 and an Audit Service charge of \$777. The Port Authority Audit also disclosed that EAGLE continually did not remit percentage fee payments with its gross receipts activity reports as required by the terms of its agreement. Specifically, it was found that rather than remit percentage fee payments with reported activity, EAGLE would wait to be billed by the PA and then still be several months late with each of its monthly payments. As a result, EAGLE owed the Port Authority late fees of \$95,470 on the percentage fee payments not remitted to the Port Authority when due. On each occasion, the Port Authority stressed the late fees due on percentage fee payments not made when due under the terms of the permit. To date, I have received no written response as I requested in early September 2009 so that we could possibly resolve this matter amicably. "

"From my understanding, EAGLE is seeking reimbursement in the amount of \$169,037 in percentage fees from the period February 2007 through August 2008 that it claims it paid to the Port Authority from gross receipts regarding services provided to Evergreen Airlines. I believe, that when this issue/position first came to light, we (PA Audit Department, JFK Properties staff and the PA Law Department) agreed essentially with Mr. Kirsch's statement below, i.e., as provided in the lease, subleasing between these companies is not subject to the Port Authority fee; however, gross receipts from services are not exempt. Please see the attached correspondence from The Port Authority Audit Department to

EAGLE regarding the audit results, specifically the last paragraph, which addresses this issue. "

"The lease with Evergreen is a separate agreement and that document speaks for itself, just as the permit with EAGLE speaks for itself. I am not aware of any "special arrangement(s) " especially since they do not appear in any Port Authority agreement(s) resulting from the above companies relocating to Building 87. In any event, a portion of a memo sent by Mr. Kirsch to Evergreen does not suffice as a written agreement with the Port Authority. As Mr. Rivas stated, "Evergreen is not EAGLE". They are separate companies. Therefore, the comparisons with AA and Delta do not apply. EAGLE's sole business is to provide ground and cargo handling. The Aviation policy has always been and continues to be that any handling company that solely handles a parent company is not subject to the PAfee. However, if that handling company does business with a third party all gross revenues including the parent's are subject to the PA fee."

"Accordingly, if the above amount owed the Port Authority is not paid in full within the next twenty (20) days, i.e., by November 3, 2009, the Port Authority will aggressively enforce all legal and contractual remedies available, including termination of EAGLE's Permit (AYD-796). "[FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (a), pg. 1 and 2]

On May 12, 2010, the Port Authority sent an overnight letter to Evergreen International Airlines, Inc., and EAGLE which states:

"neither Evergreen Airlines nor EAGLE would incur ground handling fee liability because of ground handling services performed for Evergreen Airlines at JFK Building 87 if those services were performed by Evergreen Airlines employees. This alternative having Evergreen Airlines employees rather than EAGLE employees do the actual handling, was acknowledged by you on April 28. EAGLE employees who now perform those activities on the JFK Building 87 premises could become Evergreen Airlines' employees as a way of satisfying that criterion. A change in those employees' status would be recognized by the Port Authority when their employer became Evergreen Airlines, they surrendered the airport identification issued to them as EAGLE employees, and they were issued airport identification as Evergreen Airlines employees. " [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (b), pg. 2,]

The Administrative Records provides no evidence that the Complainant considered this offer.

On May 19, 2010, the Port Authority sent a letter overnight to EAGLE explaining EAGLE's Privilege Permit AYD-796.

"EAGLE's Privilege Permit (AYD-796) allows it to provide cargo and ground handling services at John F. Kennedy International Airport ("JFK") and despite EAGLE's claim to the contrary, that Privilege Permit requires EAGLE to pay a fee of 5% on gross receipts from all of this activity. At the April 28, 2010 meeting Port Authority personnel restated, once again, its long standing policy that any handling company that solely handles a parent airline is not subject to the ground handling gross receipts fee for such activity. However, if that separate handling company services a third party, all gross revenues, including those received from a related company, are subject to the 5% fee on gross receipts." [FAA Exhibit 1, Item 3, exhibit 5]

On May 25, 2010, Port Authority Attorney, Arnold Kolikoff, sent an overnight letter to EAGLE Attorney, Leonard Kirsch. The letter is a formal response to an email dated May 2010, addressed to Sam Stanton, Port Authority Attorney. The letter states:

"In your e-mail, you imply that the relationship between DHL Trucking and DHL Sea and Air Freight Logistics, and between DHL Trucking and DHL Express, respectively, is similar to the relationship between EAGLE and Evergreen Airlines by asking whether "fees" are charged to DHL Trucking, which appears to be a reference to the 5% fee described above. In fact, those DHL relationships are not similar to EAGLE - Evergreen Airlines relationship. DHL Express is the only air cargo carrier of the three DHL entities, and DHL Express self-handles by using DHL Express employees to load and unload DHL Express cargo. DHL Sea and Air Freight Logistics is a freight forwarder which distributes seaborne and airborne freight by truck. DHL Trucking is a trucking firm which delivers freight and packages for both DHL Express and DHL Sea and Air Freight. "

"Your e-mail regarding DHL entities may have been prompted by past circumstances involving DHL Express and Lufthansa Airlines. In the past; in addition to performing self-handling, DHL Express ground handling personnel provided ground handling to Lufthansa pursuant to an appropriate Port Authority privilege permit. During that period, consistent with the Port Authority's continuing policy and practice, DHL Express paid the 5% ground handling gross receipts fee set forth in the permit only with respect to cargo handling performed for Lufthansa. Evergreen Airlines would receive the same treatment under the same circumstances. Thus, if Evergreen Airlines employees performed ground handling for Evergreen Airlines on its premises, and Evergreen Airlines had a Port Authority ground handling privilege permit, then Evergreen Airlines could also perform ground handling for other airlines, and be liable for payment of the 5% gross receipts fee only with respect to services performed for the other airlines. " [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (c)]

On May 26, 2010, Port Authority Attorney, Sam Stanton, sent an overnight letter to EAGLE Attorney, Leonard Kirsch. The letter is in response to e-mails dated May 20, 2010, and May 25, 2010 from Leonard Kirsch to the Port Authority Attorney, Sam Stanton, concerning monies due per Privilege Permit AYD-796. The letter states:

"As stated previously, at the April 28, 2010 meeting, Port Authority personnel restated, [sic] its long standing policy that any ground handling company that solely handles a parent airline is not subject to the ground handling gross receipts fee for such activity. However, if that separate handling company services a third party, all gross revenues, including those received from a related company, are subject to the 5% fee on gross receipts." [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (e)]

On May 27, 2010,⁹ McBreen & Kopko Attorneys at Law, on behalf Evergreen International Airlines, Inc., and EAGLE filed a Part 13 complaint against the Port Authority of New York and New Jersey with the FAA. [FAA Exhibit 1, Item 1, exhibit 2]

On June 8, 2010, the Port Authority of New York and New Jersey served EAGLE with a "Notice of Default" per Privilege Permit AYD-796. [FAA Exhibit 1, Item 3, exhibit 6]

On June 28, 2010, the FAA wrote a letter to Carlene McIntyre, Attorney for the Port Authority of New York and New Jersey, requesting additional information concerning issues raised in the informal Part 13 complaint. [FAA Exhibit 1, Item 3, exhibit 7]

On July 26, 2010, the FAA sent a letter in response to the informal Part 13 complaint to Leonard Kirsch, Attorney for the Complainant. [FAA Exhibit 1, Item 1, exhibit 4]

FAA, in its response to Evergreen and EAGLE's Part 13 complaint, stated that the FAA recognizes that Evergreen International Airlines, Inc., and EAGLE may be related companies held by the same parent company. FAA indicated that this type of business relationship is not unusual, and common in the aviation industry. EAGLE operates under Privilege Permit Number AYD-796 at JFK. The *Terms and Conditions* in question are Part 4(a)(i) of the permit. [FAA Exhibit 1, Item 3, exhibit 1] The terms are such that if EAGLE operated solely for the purpose of ground handling Evergreen International Airlines, Inc., there would be no gross receipts fee charges. However, EAGLE performs the services for a number of airlines operating at JFK, therefore, under the *Terms and Conditions* outlined, is required to pay the gross receipts fees on all the services performed, including those for Evergreen International Airlines, Inc.

"The FAA does not enforce lease terms or adjudicate contracts. When the question is whether or not parties are adhering to their lease terms of an agreement, the appropriate determination is made by the Court. The FAA

⁹ The letter was dated May 27, 2012 in error.

enforces the grant agreements. In this case, the FAA determines whether or not the airport Sponsor violated it [sic] grant assurance."

"With respect to the allegations presented in this Complaint, together with the evidence of record in this proceeding from both parties, it appears that the Port Authority is not in violation of grant assurance #22." [FAA Exhibit 1, Item 1, exhibit 4, pg. 2]

FAA found that the Respondent was not in violation of Grant Assurance 22, *Economic Nondiscrimination* in the informal Part 13 complaint. [FAA Exhibit 1, Item 1, exhibit 4, pg.2]

On July 30, 2010, Leonard Kirsch, Attorney for the Complainant, wrote a letter to the FAA, referencing the informal Part 13 complainant and stated:

"Among the factual errors is an allegation that DGS provides services to Delta Air Lines at JFK. It does not. DGS (Delta Global Services) only provides services to their party airlines at JFK. Thus, Evergreen and Delta are not similarly situated. However, DGS should have the right to service Delta at JFK without paying a Port fee. For this reason, Evergreen does not allege unjust discrimination in the way the Port Authority treats EAGLE and DGS. This is clear in the Complaint, and was discussed at length with the Port Authority. In fact, the Port Authority acknowledged to me that DGS did not handle Delta Air Lines at JFK. This was confirmed to me during a meeting I had with DGS at their Atlanta office last Monday." [FAA Exhibit 1, Item 1, exhibit 3]

On October 15, 2010, the Complainant filed the formal Part 16 complaint at issue herein. [FAA Exhibit 1, Item 1]

Procedural History

On October 15, 2010, FAA received the Part 16 complaint from Evergreen International Airlines, Inc., [FAA Exhibit 1, Item 1]

On November 5, 2010, FAA provided Notice of Docketing to the parties. [FAA Exhibit 1, Item 1]

On December 3, 2010, The Port Authority of New York and New Jersey filed a Respondent's Motion to Dismiss Complaint, pursuant to 14 C.F.R. § 16.23(g), (i) and G). [FAA Exhibit 1, Item 3]

On December 3, 2010, The Port Authority of New York and New Jersey submitted its Reply with 8 exhibits. [FAA Exhibit 1, Item 3]

On December 22, 2010, Evergreen International Airlines, Inc., filed a Reply and Memorandum of Points in response to The Port Authority of New York and New Jersey's Motion to Dismiss the complaint. [FAA Exhibit 1, Item 4]

On May 10, 2011, the FAA extended the due date of the Director's Determination to on or before August 12, 2011. [FAA Exhibit 1, Item 10(a)]

On August 9, 2011, the FAA extended the due date of the Director's Determination to on or before November 18, 2011. [FAA Exhibit 1, Item 10(b)]

On October 27, 2011, the FAA extended the due date of the Director's Determination to on or before January 18, 2012. [FAA Exhibit 1, Item 10(c)]

On February 8, 2012, the FAA extended the due date of the Director's Determination to on or before February 20, 2012. [FAA Exhibit 1, Item 10(d)]

On February 16, 2012 the FAA extended the due date of the Director's Determination to on or before March 30, 2012. [FAA Exhibit 1, Item 10(e)]

IV. ISSUES

Upon review of the allegations and the relevant specific circumstances, identified above, the FAA has determined that the following issues require analysis in order to provide a determination of compliance with applicable Federal law and policy:

Issue 1: Whether the Respondent is in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22(e), *Economic Nondiscrimination* by requiring Evergreen International Airlines, Inc., to pay gross receipt fees that other similarly situated airlines are not required to pay.

Issue 2: Whether the Respondent restricted the Complainant from self-servicing its aircraft in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22(d), *Economic Nondiscrimination*.

Issue 3: Whether the Respondent's actions regarding the application of Privilege Permits and the requirement for a gross receipts fee result in effectively granting an exclusive right to other air cargo carriers on the airport in violation of 49 U.S.C. § 47107(a)(4) and Grant Assurance 23, *Exclusive Rights*.

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing federal funds 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.

A. 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.

B. Airport Sponsor Assurances

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

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. ¹⁰ 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.

Two federal grant assurances apply to the circumstances set forth in this Complaint: (1) Grant Assurance 22, *Economic Nondiscrimination*; and (2) Grant Assurance 23, *Exclusive Rights*.

(1). 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

¹⁰See, e.g., the Federal Aviation Act of 1958, as amended and recodified, Title 49 U.S.C. §§40101, 40113, 40114, 46101, 46104, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and recodified, Title 49 U.S.C. §§ 47105 (d), 47107(k), 47107(1), 47111(d), 47122.

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)(I) through (6), and requires, in pertinent part:

Each air carrier using such airport shall have the right to service itself or to use any fixed-base operator that is authorized or permitted by the airport to serve any air carrier at such airport. [Assurance 22(d)]

Each air carrier using such airport shall be subject to such nondiscriminatory and substantially comparable rules, regulations, conditions, rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation as are applicable to all such air carriers that make similar use of such airport and use similar facilities, subject to reasonable classifications such as tenants or nontenants and signatory carriers and nonsignatory carriers. Classification or status as tenant or signatory shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such classification or status. [Assurance 22(e)]

[The airport owner or sponsor] will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees (including, but not limited to maintenance, repair and fueling) that it may choose to perform. [Assurance 22(f)]

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

FAA Order 5190.6B describes the responsibilities under Grant 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, Section 9.1]

(2). Assurance 23, *Exclusive Rights*

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

..will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public.

..will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities ...

..will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49 United States Code.

In FAA Order 5190.6B, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [*See e.g. Pompano Beach v FAA*, 774 F2d 1529(11th Cir, 1985)] An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce onto the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [*See Order*, Section 11.2]

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise will be construed as evidence of an intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease. [*See Order*, Section 8.9.d, *Space Limitation*]

FAA Order 5190.6B provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. [*See Order*, Section 8]

C. The FAA Airport Compliance Program

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

The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe and properly maintained public-use airports which airport

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

FAA Order 5190.6B, sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather, it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for the grant of federal funds or the conveyance of federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [See e.g. *Wilson Air Center v. Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10, (August 30, 2001) (Final Decision and Order)]

D. Enforcement of Airport Sponsor Assurances

The Federal Aviation Act of 1958, as amended (FAA Act), 49 U.S.C. § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interest 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 conveyances 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. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their Federal grant assurances.

E. 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 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, "(e)xcept as otherwise provided by statute, the proponent of 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

Complainant's Standing

The Respondent challenges the Complainant's standing to file this Part 16 complaint. In the Respondent's Statement of Facts in Support of the Answer and Motion to Dismiss Complaint, the Respondent argues the following:

"Complainant lacks standing under 16 C.F.R. § 16.23(a) to bring the instant Part 16 proceeding because Complainant is not directly and substantially affected by the noncompliance with Grant Assurance 22 alleged in the Complaint in that the Complaint alleges that fees are improperly assessed by the Respondent against EAGLE, not Evergreen Airlines, the complainant." [FAA Exhibit 1, Item 3, pg. 4-5]

The Complainant contends it is the aggrieved party since the "airline is ultimately responsible for the costs of the fee, and it is the airline which has not been allowed to self-handle." The Complainant argues they are substantially affected because they ultimately pay the fees assessed against EAGLE.

Title 14 C.F.R. § 16.23(b)(4) requires the Complainant to *describe how they are directly and substantially affected by the things done or omitted to be done by the respondents*. The Complainant believes it is directly and substantially affected by the payment of the five percent of gross receipts assessed against EAGLE by the Respondent. [FAA Exhibit 1, Items 1 and 4] The Complainant asserts that since it is forced to pay a gross receipts fee on the costs of self-handling when other airlines do not, it not only increases its cost but is a competitive disadvantage. [FAA Exhibit 1, Item 4, ~2]

The Privilege Permit Number AYD-796 Section 4(a)(i) Fees indicates that EAGLE must pay five percent of Gross Receipts of all its activity on the Airport. The payment is due from EAGLE to the Port Authority in accordance with the agreement. [FAA Exhibit 1, Item 3, exhibit 1] The Director understands that indirectly the Complainant pays the gross receipt fees through a contractual agreement between EAGLE and Evergreen International Airlines, Inc. However, the Respondent cites to various court cases and contends that "[c]ourts have held that when a party is charged a fee and passes the fee onto the party's customers, although the party who is assessed the fee has standing to challenge the fee, but the customer to whom the fee is 'passed on' does not have standing." Respondent relies on the case, *Ben Oehrliens and Sons and Daughters, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1977) involving waste haulers who pass a tipping fee on to its customers, to support its claim that the customers' indirect injury was insufficient to establish standing.¹¹

¹¹ Respondent makes assertions that this complaint is a contract dispute and thus outside the jurisdiction of the FAA; these issues are discussed in detail herein. [FAA Exhibit 1, Item 3, pages 7-8]

The Director views the cases relied on by the Respondent as informative, but is not persuaded that the standard relied on by the Respondent is controlling for a Part 16 complaint which requires a Complainant to be directly and substantially *affected by the things done or omitted to be done by the respondents*. The fact that the Complainant is not paying the fees directly to the Port Authority does not preclude Evergreen International Airlines, Inc., from being directly and substantially affected by any alleged noncompliance. The practice of a ground handling company passing on the cost of the fee to their customer is common. The end result is the Complainant is ultimately responsible for the payment of the five percent gross receipt fees and is directly and substantially impacted. In addition, the Complainant's claim that it is not being permitted to self-handle is direct and substantial.

The Complainant has provided sufficient evidence in the record to show that they are *substantially affected* by actions of the Port Authority. The Director finds the Complainant has met the requirements of Part 16 § 16.23(a).

Issues Identified for Analysis and Discussion

The Complainant alleges it is subject to unjust discrimination because by using its "sister company" to ground handle its aircraft, the Complainant must pay a fee while other airlines that self-service with their own employees do not have to pay a fee. The Complainant alleges that by the Respondent taking such action, it has granted an exclusive right to airlines that self-service. The Complainant has no objection to EAGLE paying a Gross Receipts fee when it handles third party airlines. However, the Complainant does object to paying a Gross Receipts fee when it is handled by EAGLE, its "sister company". The Complainant believes this should be considered self-handling since both the Complainant and EAGLE are part of the same company. The Complainant also claims that such a fee imposed on the Complainant because it uses its "sister company" for ground handling its aircraft represents an unreasonable restriction. [FAA Exhibit 1, Items 1 and 4]

The Complainant argues this is not a contract dispute; rather they are being treated differently than other similarly situated airlines. Complainant argues that Evergreen International Airlines, Inc., is similarly situated to American Airlines, Delta, and Jet Blue. However, EAGLE is required pay a ground handling fee for the services of its "sister company" while other carriers with similar ground handling companies that provide the same services do not pay the fees. [FAA Exhibit 1 Item 4]

The Respondent believes this a contract dispute and not a violation of Grant Assurance 22. The Respondent counters that its enforcement of the terms of the Privilege Permit is not contrary to the FAA's interpretation of Grant Assurance 22 that requires an airport to permit airlines to self-service because EAGLE is not an airline, and EAGLE and Evergreen International Airlines, Inc., are two separate companies. [FAA Exhibit 1, Item 3]

The Director understands from the record provided that these are two separate companies -one in the business of transporting air cargo and the other in the business of providing aircraft ground handling service. The Director believes in order to determine the Respondent's compliance with its Federal grant obligations, three issues must be addressed:

Issue 1: Whether the Respondent is in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22(e), *Economic Nondiscrimination* by requiring Evergreen International Airlines, Inc., to pay gross receipt fees that other similarly situated airlines are not required to pay.

Issue 2: Whether the Respondent restricted the Complainant from self-servicing its aircraft in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22(d), *Economic Nondiscrimination*.

Issue 3: Whether the Respondent's actions regarding the application of Privilege Permits and the requirement for a gross receipts fee result in effectively granting an exclusive right to other air cargo carriers on the airport in violation of 49 U.S.C. § 47107(a)(4) and Grant Assurance 23, *Exclusive Rights*.

Issue 1: Similarly Situated to Other Cargo Carriers

Grant Assurance 22. Economic Nondiscrimination states in pertinent part:

The airport sponsor will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. C,-r22a)

... and that air carriers making similar use of the Airport must be subject to comparable requirements:

Each air carrier using such airport (whether as a tenant, non-tenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rules, regulations, conditions, rates, fees rentals, and other charges with respect to facilities directly and substantially related to providing air transportation as are applicable to all such air carriers which make similar use of such airport and utilize similar facilities, subject to reasonable classifications such as tenants or non-tenants and signatory carriers and non-signatory carriers...(-r22e)

In FAA Order 5190.6B, provides further clarity on the issue of similarly-situated, when it states:

... the sponsor must impose nondiscriminatory and substantially comparable rates, fees, rentals, and charges on all air carriers and users that assume similar

obligations, use similar facilities, and make similar use of the airport [See FAA Order 5190.6B, Section 9.2]

Grant Assurance 22 *Economic Nondiscrimination* defines an air carrier's right to choose the method as to how it services its aircraft:

Each air carrier using such airport shall have the right to service itself or to use any fixed-based operator that is authorized or permitted by the airport to serve any air carrier at such airport. (i[22d])

The Port Authority's policy on ground handling service offers four options:

1. An air carrier can choose to use its own employees to self-serve -no gross receipts fee; [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (b)]
2. An air carrier can self-serve and provide ground handling services to other carriers -gross receipts fee applies for other carriers served; [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (c)]
3. An air carrier serviced by a ground handling subsidiary that solely handles the air carrier is not subject to the gross receipts fee; [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (b)]
4. A ground handling company providing on-demand service on the Airport; gross receipt fee applies to all airport activity. [FAA Exhibit 1, Item 3, sub-exhibit (b) and (c)]

The Respondent offered a fifth option - to recognize EAGLE employees as Evergreen Airline employees. In a letter to the Complainant, the Respondent wrote:

"This alternative, having Evergreen Airlines employees rather than EAGLE employees do the actual handling, was acknowledged by you on April 28, EAGLE employees who now perform those activities on the JFK Building 87 premises could become Evergreen Airlines) employees as a way of satisfying that criterion. A change in those employees' status would be recognized by the Port Authority when their employer became Evergreen Airlines, they surrendered the airport identification issued to them as EAGLE employees, and they were issued airport identification as Evergreen Airlines employees" [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (b), pg. 2, 'i[3]

Referencing the options listed above, the Respondent provides viable possibilities to the Complainant to eliminate paying the gross receipt fees. The options are varied, but include that Evergreen International Airlines, Inc., can utilize their own employees', and

¹² A legal definition of an independent contractor may be one who provides goods and services for another for a set fee under an expressed or implied agreement. A legal definition of an employee may be a person who is hired for a wage, salary, fee or payment to perform work for an employer. [See Goodrich Pilot Training Center, LLC. and Aviation Management Group, LLC. v. Village of Endicott, New York, FAA Docket No. 16-08-03, (April 3, 2009) (Director's Determination), page 8.]

still offer ground handling services for profit with third party companies, thus eliminating the fees being paid directly by Complainant to EAGLE. This would require Complainant verifying that the employees are genuinely employees of Evergreen International Airlines, Inc. If EAGLE employees were transferred to Evergreen International Airlines, Inc., the Complainant could be asked for verification such as; W-2's, employment contracts and social security payments. ¹³

The Complainant continues to insist that the move to Building 87 creates a situation whereby EAGLE employees can perform ground handling for Evergreen International Airlines, Inc., and this is considered "self-servicing" when never before was this considered correct. Furthermore, the business relationship between the two companies, the rules for "self-servicing," and the airport policy for implementing the Privilege Permit all remained the same. The Complainant refused all the options and appears to be seeking an option that is different than the terms and conditions offered by the Respondent.

The Administrative Record shows the Complainant wanted to change its relationship with EAGLE, and end the practice of EAGLE paying a gross receipts fee as required in its 1998 Privilege Permit AYC-902.¹⁴ In October 2006, it appears the Complainant expected this change would occur after the Complainant and EAGLE moved to Building 87, and were co-located. [FAA Exhibit 1, Item 1, exhibit 6]

Nothing in the record indicates that the Complainant made any effort to change the status of the employment of the EAGLE employees to Evergreen International Airlines, Inc. In the Respondent's letter to the Complainant, the letter is clear that the Respondent would recognize the change immediately if the Complainant accepts the Respondent's offer. [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit(b), pg.2, 3]

On October 14, 2009, (5:09 p.m.) a reply email sent from the Complainant's Attorney, Leonard Kirsch, to the Port Authority Attorney, Thomas Maher states:

....Among the alternatives discussed was having Evergreen not EAGLE employees do the actual handling, but it was agreed since the two companies were owned by the same sharehold(s), and the handling would occur at Building 87, this was unnecessary. Had this not been agreed to, we would have arranged that the

¹³In FAA Order 5190.6B. Section 1104. Contracting to a Third Party. *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. To confirm that particular individuals performing tasks on aircraft are employees of the individual or company conducting the self-service activity, the FAA may request clarifying information, such as payroll data.*

¹⁴ Privilege Permit AYC-902 was executed between the Complainant and EAGLE during a time frame when they were not co-located. The Complainant paid the five percent gross receipt fees to EAGLE, who in turn paid the Respondent, thus reflecting an understanding and familiarity of the Privilege Permit fee policies.

employees handling Evergreen were Evergreen employees [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (a), pg. 2]

The above referenced email and the execution of Privilege Permit AYC-902 by the Respondent and EAGLE from May 1, 1998 to April 30, 2003, demonstrate the Complainant's attorney understood the terms and conditions of the payment of the gross receipt fees. [FAA Exhibit 1, Item 1, exhibit 6]

The Complainant alleges that Evergreen Airlines and its relationship to EAGLE is similarly situated to other carriers on the Airport but it is subject to unjust discrimination because EAGLE must pay a gross receipts fee and the other carriers do not.

The Complainant compares its relationship to EAGLE with the relationship between DHL Express, the cargo air carrier and DHL Trucking, and DHL Sea and Air Freight Logistics. [FAA Exhibit 1, Items 3, exhibit 4, sub-exhibit (c)] The relationships between the DHL entities are not similar to Evergreen International Airlines, Inc., and EAGLE. DHL Express is an air cargo airline; DHL Trucking and DHL Sea and Air Freight Logistics are freight logistic companies that distribute freight all over the world. According to a letter from the Respondent to the Complainant, dated May 25, 2010, DHL Express utilizes its own employees and is self-servicing, and therefore does not pay the five percent gross receipt fees. [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (c)]

In the same letter the Respondent provides another example to the Complainant, whereby, DHL Express was ground handling for Lufthansa Airlines. An excerpt from the letter referenced above:

"In the past, in addition to performing self-handling, DRL Express ground handling personnel provided ground handling to Lufthansa pursuant to an appropriate Port Authority privilege permit. During that period, consistent with the Port Authority's continuing policy and practice, DRL Express paid the 5% ground handling gross receipts fee set forth in the permit only with respect to cargo handling performed for Lufthansa. Evergreen Airlines would receive the same treatment under the same circumstances. Thus, if Evergreen Airlines employees performed ground handling for Evergreen Airlines on its premises, and Evergreen Airlines had a Port Authority ground handling privilege permit, then Evergreen Airlines could also perform ground handling for other airlines, and be liable for payment of the 5% gross receipts fee only with respect to services performed for the other airlines." [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (c)]

Delta Global Services (DGS) is another ground handling company that operates on the Airport. DGS is a wholly owned subsidiary of Delta Air Lines. [FAA Exhibit 1, Item 1, exhibit 2, pg. 7] Like EAGLE, DGS is ground handling company providing on-demand service on the Airport; gross receipt fee applies to all airport activity. DGS operates at JFK Airport under a Privilege Permit with identical terms and conditions as EAGLE.

The Administrative Record also reveals that Delta Air Lines employees perform all self-handling services and it is not subject to the five percent gross receipt fees. DGS does not serve Delta Airlines. All ground handling services performed by DGS are subject to the five percent gross receipt fees. The Complainant admits he had erroneously stated the facts in his informal Part 13 complaint dated July 30, 2010 to the FAA:

"Among the factual errors is an allegation that DGS provides services to Delta Airlines at JFK. It does not. DGS only provides services to third party airlines at JFK. Thus, Evergreen and Delta are not similarly situated. However, DGS should have the right to service Delta at JFK without paying a Port fee. For this reason, Evergreen does not allege unjust discrimination in the way the Port Authority treats EAGLE and DGS. This is clear in the Complaint, and was discussed at length with the Port Authority. In fact the Port Authority acknowledged to me that DGS did not handle Delta Air Lines at JFK. This was confirmed to me during a meeting I had with DGS at their Atlanta office last Monday. " [FAA Exhibit 1, Item 1, exhibit 3, pg. 2, '1[1]

An email on October 7, 2009, (4:47 p.m.) from the Complainant's Attorney, Leonard Kirsch, to Respondent Attorney, Thomas Maher, states:

("...several years ago when we negotiated the Bldg. 87 transaction we agreed that once Evergreen moved into Bldg. 87 EAGLE would no longer have to charge Evergreen Airlines Port Fees for services conducted at Bldg. 87 but only for work performed for Evergreen at other locations. This understanding was not put into the Lease as it did not belong in a lease between the Airline and the Port, but was instituted immediately upon the move into Bldg. 87. The only point inserted in the Lease was that Evergreen Airlines did not have to charge a subleasing fee to EAGLE as this belonged in a lease. Since neither Marie Grace nor you are working in Properties anymore, we need to provide Dennis Lapinski and Sam Stanton with an acknowledgement that this was the transaction. If you wish I can show you a portion of a memo at the time I sent to Evergreen spelling this out at the time." [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (a)]

On October 14, 2009, (4:14 p.m.) a reply email sent from the Port Authority Attorney, Thomas Maher to the Complainant's Attorney, Leonard Kirsch, states:

"Under what is referred to as the "Family of Airlines" provision, gross receipts from subleasing space to an affiliate that is wholly owned by the parent company are not subject to the required 10% subleasing fee. As you stated, the Bldg. 87 lease contains language supporting this provision. " "That said, I do not recall ever agreeing to your initial statement regarding EAGLE's obligation to pay PA (Port Authority) fees for handling services provided to Evergreen. As I recall the PA policy on handling fees, if Evergreen, an EAGLE affiliate, was EAGLE's sale customer, no handling fees would be due the PA. However, if EAGLE performed

3rd party handling for others, regardless where the handling services were performed, all gross receipts including those received from Evergreen would be due the PA. "

The emails referenced above are the only indication in the Part 16 complaint that the Complainant *thought* they had requested a different agreement. The evidence provided does not support that the discussion took place or that any different formal interpretation was instituted between the two parties. FAA found in *Aerodynamics of Reading, Inc. v. Reading Regional Airport Authority*, FAA Docket No. 16-00-03, (December 22, 2000) (Director's Determination) at 19 (Aerodynamics DD), "*in order to establish a claim 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.*"

As reflected in the above emails dated October 7, and October 9, 2009, both parties agree that there was to be no charge for subleasing space to EAGLE and that the provisions were stated in the lease. No changes were made to the Agreement of Lease, Space Permit or Privilege Permit concerning the payment of five percent gross receipt fees. Amending one of these documents, to state that the Complainant was no longer responsible for paying the five percent gross receipt fees would have been appropriate.

The Respondent noted: "*From my understanding, EAGLE is seeking reimbursement in the amount of \$169,037 in percentage fees from the period February 2007 through August 2008 that it claims it paid to the Port Authority from gross receipts regarding services provided to Evergreen Airlines.*). "[FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (a), pg. 1 and 2] This email indicates that in an 18 month time frame approximately \$169,037 was due in fees to the Respondent. Given the amount of monies involved, the Director finds it difficult to believe something this significant was not documented.

In *Penobscot Air Service v. Knox County*, FAA Docket No. 16-97-04 (September 25, 1997) (Director's Determination) (Penobscot), the FAA stated: "*The purpose of the grant assurances is to protect the public interest in the operation of Federally obligated airports. The purpose is not to provide alternative or supplemental rights to those normally available to commercial tenants in disputes with their landlords, i.e. negotiation or commercial litigation under applicable state and local laws. The FAA does not consider that Congress intended grant assurances and the FAA compliance process to provide a device by which a commercial aeronautical tenant can abrogate an otherwise valid commercial lease with a sponsor because the operations under the lease are less profitable than the tenant anticipated.*" [Penobscot DD, at page 24, citing the *Sky East Services, Inc. and Hampton Air Transport System Inc. v. Suffolk County, New York*, FAA Docket Nos. 13-88-6 and 13-89-1] [Penobscot at page 24; decision upheld on appeal, *Penobscot Air Service v. FAA*, 164 F3d 713 (1st Cir., 1999)]

The Complainant is asking for a change in the Privilege Permit that is more suitable for their business model. However, the Respondent is not obligated to create a special category or change its uniform practices to suit a specific customer's business model or wishes. The Respondent has an obligation to impose uniform standards and practices that are fair and reasonable without unjust economic discrimination. An airport sponsor is not required to seek out a tenant's business model and accommodate their specific requirements. Nor are they required to create a special category just for the tenant because the lease terms the tenant agreed to isn't working out as well as they thought it would. As stated in *Rick Aviation, Inc. v. Peninsula Airport Commission*, FAA Docket No. 16-05-18, (November 6, 2007) (Final Agency Decision) at 17 (*Rick Aviation*), *"The FAA will not step in to overturn a lease provision simply because the aeronautical tenant has discovered the provision the tenant agreed to has created an undesirable position for the tenant."*

The Director agrees that Evergreen International Airline Inc., and its relationship with EAGLE is not similarly situated to the other cargo carriers at the Airport. The Complainant attempts to provide examples of similarly situated airline/cargo handling businesses that operate at JFK. No example operates with the same business model as the Complainant. The first example is Delta Air Lines and by the Complainant's own admission, is not similarly situated. Both Delta Air Lines and DHL Express utilize their own employees to self-serve and not subject to the fees. When DHL Express, a cargo airline, ground handled Lufthansa they were subject to and paid the five percent gross receipt fees for the work they performed for Lufthansa. [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (c)]

The Port Authority offers the same opportunity to the Complainant when they recommend that a way of meeting the criteria is to change the employees' status from EAGLE to Evergreen International Airlines, Inc., However, the Complainant did not change the status of the employees. [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (c)]

The Administrative Record indicates that EAGLE is a separate company from the Complainant. [FAA Exhibit 1, Item 1, exhibit 1] EAGLE is not an airline, but a company established for the purpose of providing ground handling services to airline clients, which include the Complainant's airline. EAGLE does not operate under any type of FAA certification.¹⁵ EAGLE and Evergreen International Airlines, Inc., are two separate corporate entities, held by the same owner/shareholder and considered a "wholly-owned subsidiary." [FAA Exhibit 1, Item 1, exhibit 4, pg. 2] The Respondent does not consider EAGLE the same company as the Complainant, nor does the Complainant consider EAGLE the same company and refers to them as a "sister company." FAA concludes the same.

FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Given that the *terms and conditions* offered are

¹⁵ Per <http://www.evergreenaviation.com/EAGLE-Lservices.html> ref to FAA Exhibit 1, Item 11, for print out of website.

identical, all parties operating under a Privilege Permit at JFK must adhere to the same terms and conditions as stated. The business models of the various entities determine the payment of the gross receipt fees. Evergreen International Airlines, Inc., has chosen to utilize EAGLE, their ground handling agent to perform their ground handling services. The Complainant was afforded the opportunity to self-serve and chose not to implement the practice. The Complainant, for whatever reason(s), has chosen a business model that does not allow him to forego paying the five percent gross receipt fees under the policies applied by the Respondent to all ground handling companies.

The Director finds that the Privilege Permit is uniformly applied and the interpretation of that agreement is the same. The Complainant and EAGLE are being afforded the same terms and conditions as any other airline and/or ground handling relationship, and in accordance with the applicable permits.

"Agreeing to contract terms with the Respondent, and then complaining later that the contract terms are not similar does not mean the Complainant has been treated in an unjustly discriminatory manner. The Director has routinely found in favor of the airport sponsor in complaints where an aeronautical tenant has negotiated a rental agreement that requires a particular payment and rate schedule, commences doing business and earning profits, and then complains the deal was unfair. Under this type of scenario the Director has rejected buyer's remorse as a rational or justification to support an argument that terms previously negotiated and accepted should be altered. Absent any evidence to demonstrate that the Complainant objected to the terms of the lease or was denied access to pertinent information during negotiations, the Director concludes that there can be no unjust discrimination." [See Sterling Aviation, LLC v Milwaukee County, FAA Docket No. 16-09-03, (April 13 2010), at 14, citing to Adventure Aviation v. City of Las Cruces, New Mexico, FAA Docket No. 16-01-14, (August 7, 2002) (Director's Determination) at 13 (Adventure) and 41 North 73 West, Inc. dba Avitat Westchester v. Westchester County, New York, FAA Docket No. 16-07-13, (June 12, 2008) (Director's Determination) at 25 (Avitat)]

The Record fails to substantiate the Complainant's claim that they were similarly situated and were treated differently. As such, the Director dismisses this allegation.

Issue 2: Complainant's Right to Self-serve

Grant Assurance 22(d) *Economic Nondiscrimination* is clear that an air carrier has the right to self-serve:

Each air carrier using such airport shall have the right to service itself or to use any fixed-based operator that is authorized or permitted by the airport to serve any air carrier at such airport. (~22d)

Grant Assurance 22(t), *Economic Nondiscrimination*, provides that a sponsor

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.

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. FAA Order 5190.6B describes the responsibilities under Grant 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, Section 9.1]

FAA Advisory Circular 150-5190-6, *Exclusive Rights at Federally-Obligated Airports*, dated January 4, 2007, provides further clarity on the definition of self-fueling and self-service:

Self-fueling and other self-services cannot be contracted out to another party. In addition to self-fueling, other self-service activities that can be performed by the aircraft owner with his or her own employees includes activities such as maintaining, repairing, cleaning, and otherwise providing services to an aircraft, provided the service is performed by the aircraft owner or his/her employees with resources supplied by the aircraft owner.

The Complainant alleges that because Evergreen is an airline and its "sister company," EAGLE, is providing ground handling directly for it they should not be subject to gross receipt fees for that service. The Complainant contends this should be viewed as self-servicing and not subject to Port Authority imposed fees. According to the Complainant, the fact that Evergreen and EAGLE are two separate companies should not be considered a material fact. The Respondent disagrees.

The Complainant recognizes that FAA does not define what forms of affiliation will be considered the same operator for purposes of self-handling, it does have such a definition for access to slots. [FAA Exhibit 1, Item 1, pg. 14] The Complainant claims that under a definition contained at 14 CFR § 93.213(c), "FAA and the Respondent would consider the Complainant and EAGLE a single carrier if EAGLE purchased aircraft and sought slots at JFK." The Respondent counters that the Complainant errs in relying on this provision since it "serves a specific role in a regulatory framework that is not applicable to Evergreen Airlines and EAGLE." [FAA Exhibit 1, Item 3 Memorandum, pg. 14]

The Director finds that the definitions under section 93.213(c) are specifically limited to "for purposes of this subpart." The Director did not find the definition helpful or analogous to the circumstance here involving the imposition of a fee to a sister company that would merit concluding the Complainant and EAGLE are a single company.

The FAA concurs with the findings in the informal complaint. FAA recognizes Evergreen International Airlines, Inc., and EAGLE as two separate companies held by the same owner. The business relationship is not unusual in the aviation industry. Evergreen International Airlines Inc., is an airline in the business of transporting cargo and Evergreen Airlines Ground Logistics Enterprises, Inc. (EAGLE) is a ground handling company in the business of providing ground handling services at 35 airports in over 25 states. The Complainant is free to self-service its aircraft or contract with EAGLE or another ground handling company on the Airport to service its aircraft. If the Complainant self-serves, a gross receipt fee does not apply. If the Complainant uses EAGLE or another company to provide ground handling services, a gross receipt fee does apply.

Evergreen Holdings, Inc., has created separate companies to operate and perform specific roles and responsibilities. The Complainant admits that an intercompany billing process is used and that an allocation of the charges is done for tax purposes. This is the business model that Evergreen Holdings, Inc., selected. [FAA Exhibit 1, Item 1, exhibit 1] The Respondent has taken no action to prohibit the Complainant from servicing its aircraft with its own employees. There is no indication that the Port Authority denied the Complainant the opportunity to self-service in accordance with the FAA policies referenced above. This is evidenced in a May 12, 2010 letter from the Respondent to Evergreen Airlines:

"This alternative having Evergreen Airlines employees rather than EAGLE employees do the actual handling was acknowledged by you on April 28. EAGLE employees who now perform those activities on the JFK Building 87 premises could become Evergreen Airlines' employees as a way of satisfying that criterion. A change in those employees' status would be recognized by the Port Authority when their employer became Evergreen Airlines, they surrendered the airport identification issued to them as EAGLE employees, and they were issued airport identification as Evergreen Airlines employee."

"In addition, if Evergreen Airlines obtained a JFK Ground Handling Permit, the 5% ground handling fee would be assessed for services performed for any airline other than Evergreen Airlines. "

"If EAGLE wants to avoid incurring Port Authority ground handling fees by utilizing Evergreen Airline employees to perform its own ground handling at JFK Building 87, Evergreen Airlines staff should contact Ms. Laura A. Garland, of the JFK Properties and Commercial Development Division of the Port Authority Aviation Department, to arrange for Port Authority recognition of the change."
[FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (b)]

The Port Authority again offered the Complainant a solution in a letter dated May 26, 2010. In a letter to the Complainant, the Respondent wrote:

As stated previously, at the April 28, 2010 meeting, Port Authority personnel restated, [sic] its long standing policy that any ground handling company that solely handles a parent airline is not subject to the ground handling gross receipts fee for such activity. However, if that separate handling company services a third party, all gross revenues, including those received from a related company, are subject to the 5% fee on gross receipts." [FAA Exhibit 1, Item 3, exhibit 4, sub-exhibit (e)]

The Respondent again restates the same offer in its submittal to the FAA, "Evergreen remains free to self-handle with its own employees without payment of any fee. [FAA Exhibit 1, Item 3, Memorandum, pg. 9]

The Administrative Records provides no evidence that the Complainant considered this offer.

The Port Authority's policies or enforcement of the terms of EAGLE's Privilege Permit does not hinder Evergreen International Airlines, Inc., from self-servicing. FAA considers the right to self-serve as prohibiting the establishment of any unreasonable restriction on the owners or operators of aircraft regarding the servicing of their own aircraft and equipment. *"Grant assurance 22, Economic Nondiscrimination, prohibits only unjust economic discrimination, not all economic discrimination. The principle of unjust economic discrimination requires a party who has been allegedly discriminated against to be 'similarly situated' to an alleged preferred party in order to establish unjust economic discrimination under assurance 22."* [See *RFT-182, LLC v. Portage County Regional Airport Authority*, FAA Docket No. 16-05-14, (March 29, 2007) (Final Agency Decision), pg. 12]

The Respondent has afforded the Complainant a viable solution to their problem of self-servicing to mitigate the payment of the five percent gross receipt fees. The Port Authority has provided the Complainant with several opportunities consistent with the Airport's policy on ground handling.

The Director finds that the Respondent did not unjustly discriminate against the Complainant. Nor did the Respondent deny the Complainant the opportunity to self-serve or use their ground handling company. Further the Respondent did not subject the Complainant to unreasonable rules and regulations for utilizing its sister company. Going forward, FAA would strongly encourage an aeronautical user to thoroughly comprehend the terms and conditions of purposed commercial leases or operating permits before entering into such agreements. [See *Desert Wings Jet Center v. City of Redmond*, FAA Docket No. 16-09-07, November 19, 2010]

Issue 3: Exclusive Right

The Complainant alleges that by denying the Complainant's right to self-serve and unjustly discriminating against the Complainant by charging EAGLE a gross receipt fee, the Respondent has granted other cargo carriers an exclusive right. The Complainant

objects to the gross receipts fee imposed on EAGLE because the fee is ultimately passed on to Evergreen International Airlines, Inc.

The Complainant states that "Evergreen Airlines may not technically 'own' the ground support equipment and EAGLE's employers are not technically Evergreen Airline's employees ... absent the different corporate structure, ultimately it is the same owner for both, and this owner exercises operational control, exclusive use and long-term contract control over both companies." [FAA Exhibit 1, Item 4, pages 2 and 4]

In support, the Complainant cites to Advisory Circular 150/5190-6, dated January 4, 2007, *Exclusive Rights at Federally-Obligated Airports*, "the FAA does interpret an aircraft owner's right to self-service to include operators." Furthermore, the Complainant is correct that the Advisory Circular does refer to owners and operators when describing the restrictions on self-service. The same Advisory Circular also states "the service must be conducted in accordance with reasonable rules, regulations or standards established by the airport sponsor. Any unreasonable restriction imposed on the owners or operators of aircraft regarding the servicing of their own aircraft may be construed as an exclusive rights violation. In accordance with the FAA grant assurances: (1). An airport sponsor may not prevent an owner or operator of an aircraft from performing services on his/her own aircraft with his/her own employees and equipment. Restrictions imposed by an airport sponsor that have the effect of channeling self-service activities to a commercial aeronautical service provider may be an exclusive rights violation. "

Grant Assurance 23, *Exclusive Rights*, prohibits an airport sponsor from granting to one entity the right to provide a particular aeronautical service to the public while preventing other similarly situated entities from offering the same aeronautical service. The prohibition on exclusive rights is designed to prevent monopolies and to promote competition at federally-obligated airports.

While the Complainant admits that Evergreen Airlines 'is entitled to self-handle upon the same conditions as other airlines who self-handle," it claims it is being treated differently because it chooses to use the employees of its sister company. The Director is not persuaded by the Complainants' premise that the "concept of 'own employees' and 'own equipment' must be seen though [sic] the same prism as applied to aircraft owners who, similarly to the Evergreen Airlines, self-handle through a sister company." [FAA Exhibit 1, Item 4, page 3] Nor is the Director swayed by the Complainant's contention that the "fact that EAGLE was required to execute a Permit to provide third party handling is irrelevant to the issues in this case." The Director considers this relevant.

Moreover, the Director recognizes that EAGLE passes the gross receipts fee on to its customers, but believes that Complainant's use of the employees of its sister companies is an important distinction. Under FAA's policy, one's "own employees" must be used. Based on its own admitted corporate structure, the Complainant has not established that it is similarly situated to any other cargo carrier that self-handles. Thus the Complainant's

claims that by charging EAGLE a gross receipts fee, the Respondent has granted other cargo carriers an exclusive right has no merit.

Therefore, the Record, by a preponderance of reliable and probative documentation and information, does not support the allegation that the Respondent has granted an exclusive right in violation of Grant Assurance 23.

The information submitted by the Complainant fails to persuade the Director that they were unjustly discriminated against or that a violation of Grant Assurance 23, *Exclusive Rights* was incurred.

VII. FINDINGS and CONCLUSION

Upon consideration of the submissions by the parties, relying on the record herein and the applicable law, and for reasons stated above, the Director of the FAA Offices of Airport Compliance and Management Analysis finds and concludes the following:

The Complainant has standing to file a Part 16 Complaint.

Issue 1: The Complainant was unable to make a reasonable comparison of similarly situated air cargo carriers and ground handling companies and no evidence presented demonstrated unjust economic discrimination. The Respondent is not in violation of 49 U.S.C. § 47107(a)(I) and Grant Assurance 22, *Economic Nondiscrimination*.

Issue 2: Based on the evidence presented, at no time did the Respondent attempt to circumvent or disallow the Complainant from self-servicing. No unreasonable restriction on self-servicing was ever demonstrated by the Complainant. The Respondent is not in violation of 49 U.S.C. § 47107(a)(I) and Grant Assurance 22, *Economic Nondiscrimination*.

Issue 3: The evidence presented demonstrates that the Privilege Permit and policy interpretations are uniformly applied by the Respondent and therefore did not put the Complainant at an economic disadvantage. There is no evidence demonstrating the granting of an exclusive right due to actions taken by Respondent. The Respondent is not in violation of 49 U.S.C. § 47107(a) (4) and Grant Assurance 23, *Exclusive Rights*.

ORDER

Accordingly, it is ordered that:

1. The Complaint is dismissed; 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 services of the Director's Determination.

Date APR 02 2012

Director
Office of Compliance and Management Analysis

FAA Exhibit 1

EVERGREEN INTERNATIONAL AIRLINES, INC. McMinnville, OR

v

THE PORT AUTHORITY OF NEW YORK & NEW JERSEY

Docket No. 16~10~04

- Item 1 Complainant's Complaint, dated October 15,2010.
- exhibit 1 Organizational Chart of Evergreen Holdings, Inc., undated.
- exhibit 2 Letter dated May 27, 2012 (intended date of the document May 27, 2010), from McBreen & Kopko Attorneys at Law to Raghubeer, AIP/PFC Program Manager, FAA, regarding Part 13 Complaint Against the Port Authority of New York and New Jersey.
- exhibit 3 Letter dated July 30,2010 from McBreen & Kopko Attorneys at Law to Raghubeer, AIP/PFC Program Manager, FAA, and Kolikoff. Re: Part 13 Complaint against the Port Authority of New York and New Jersey.
- exhibit 4 Letter dated July 26, 2010 from FAA Eastern Region Airports Division to Kirsch, regarding Part 13 Complaint.
- exhibit 5 Letter dated July 15,2010 from Port Authority of New York and New Jersey to Raghubeer, regarding Part 13 Complaint and answers to FAA questions.
- exhibit 6 John F. Kennedy International Airport Privilege Permit AYC-902, dated May 1,1998.
- exhibit 7 Agreement of Lease AYD-618, dated October 9,2006, between the Port Authority of New York and New Jersey and EIA.
- Item 2 Notice of Docketing dated November 5, 2010.
- Item 2A Certificate of Service from counsel for EIA, dated October 30, 2010.
- Item 3 Respondent's Answer dated December 3, 2010, and Respondent's Motion to Dismiss Complaint, Respondent's Statement of Facts in Support of Answer and Motion to Dismiss Complaint, Respondent's Memorandum of Points and Authorities in Support of Motion to Dismiss Complaint.

- exhibit 1 April 1, 2008 (effective May 1, 2008), John F. Kennedy International Airport Privilege Permit AYD-796 for Evergreen Aviation Ground Logistics Enterprises, Inc., (EAGLE).
- exhibit 2 December 1, 2009 (effective January 1, 2010), John F. Kennedy International Airport Space Permit AYD-940 for Evergreen International Airlines, Inc.
- exhibit 3 February 29, 2008 (effective March 1, 2008), John F. Kennedy International Airport Privilege Permit AYD-761 for Evergreen International Airlines, Inc.
- exhibit 4 *sub-exhibits:*
- sub-exhibit (a) Series of emails dated October 7 through 14, 2009, between the Complainant and the Port Authority.
- sub-exhibit (b) Letter dated May 12, 2010 from Korlikoff to Kirsch, regarding Permit AYD-796, and response to attached email dated May 11, 2010.
- sub-exhibit (c) Letter dated May 25, 2010 from Korlikoff to Kirsch, regarding Evergreen International Airlines, Inc., and responding to May 20, 2010 email.
- sub-exhibit (d) FEDEX tracking sheet, dated May 25, 2010.
- sub-exhibit (e) Letter dated May 26, 2010 from Stanton to Kirsch, regarding Permit AYD-796 and monies due to the Port Authorities.
- sub-exhibit (f) Fax cover, receipt and FEDEX tracking information.
- exhibit 5 Letter dated May 19, 2010, from Stanton to Kirsch regarding Permit AYD-796.
- exhibit 6 Notice of default dated June 8, 2010 to EAGLE, from the Port Authority of New York and New Jersey.
- exhibit 7 Letter dated June 28, 2010 to the Port Authority of New York and New Jersey from FAA regarding Part 13 informal complaint, and asking a series of questions.
- exhibit 8 John F. Kennedy International Airport Privilege Permit AYE-022 for Delta Air Lines (DAL), April 15, 2009.

- Item 3A The Complainant's Letter, dated November 24, 2010, requesting extension of time.
- Item 3B FAA Letter dated December 7, 2010, granting extension of time.
- Item 4 The Complainant's Reply and Memorandum of Points in Response to Respondent's Motion to Dismiss the Complaint, dated December 22, 2010.
- Item 5 Bureau of Transportation Statistics, U.S. Department of Transportation (2009). "America's Freight Transportation Gateways"
[http://www.bts.gov/publications/americas freight transportation gateways/2009/highlights of top 25 freight gateways by shipment value/jik international airport/index.html](http://www.bts.gov/publications/americas_freight_transportation_gateways/2009/highlights_of_top_25_freight_gateways_by_shipment_value/jik_international_airport/index.html)
- Item 6 Airports International Council Final Rankings for 2011
http://www.aci.aero/cda/aci_content07_c.jsp?zn=aci&cp=1-5-54-55-666-2
- Item 7 FAA Form 5010
- Item 8 Grant History for the Airport, dated August 9, 2011
- Item 9 Airline Certificate Information from <http://aviation.faa.gov/ops/cert.asp?Search=Location>
- Item 10 FAA Extensions Granted as follows:
- (a) On May 10, 2011, the FAA extended the due date of the Director's Determination to on or before August 12, 2011.
 - (b) On August 9, 2011, the FAA extended the due date of the Director's Determination to on or before November 18, 2011.
 - (c) On October 27, 2011, the FAA extended the due date of the Director's Determination to on or before January 18, 2012.
 - (d) On February 8, 2012, the FAA extended the due date of the Director's Determination to on or before February 20, 2012.
 - (e) On February 16, 2012, the FAA extended the due date of the Director's Determination to on or before March 30, 2012.