UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

APPALACHIAN STAR VENTURES, INC.,
d/b/a APPALACHIAN FLYING SERVICE, INC.
d/b/a APPALACHIAN AVIATION, INC.

v. **Docket No. 16-96-02**

TRI-CITY AIRPORT COMMISSION

FORMAL COMPLAINT NO. 16-96-02
Director's Determination

Introduction

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

Appalachian Star Ventures, Inc. (Hereinafter Appalachian) has filed a formal complaint, pursuant to the FAA Rules of Practice against the Tri-City Airport Commission (Commission), owner and operator of the Tri-City Regional Airport, alleging that the Commission is engaged in activity contrary to its Federal obligations.

The complaint presents the following issues for decision:

- Whether the Commission, by holding Appalachian to the terms of an October 16, 1979, Lease Agreement (Lease) is violating its federal obligations regarding ***Exclusive Rights***, as set forth in 49 U.S.C. § 47107(a)(4) and § 40103(e).

- Whether the Commission, by not allowing Appalachian to pay the same or similar lease payments for its leased premises that the Commission permitted other similarly situated lessees to make for their lease payments, is violating its Federal obligations regarding ***Economic Nondiscrimination***, as set forth in 49 U.S.C. Section 47107(a)(5).

Our decision in this matter is based on the applicable Federal law and FAA policy, review of the arguments and supporting documentation submitted by the parties, and other interested persons, and the administrative record in this proceeding. FAA Exhibit 1.[1]

The Airport

Tri- City Regional Airport is a public-use airport located in Blountville, Tennessee. The airport is owned by Tri-City Airport Commission, airport sponsor and operator of the Tri-City Regional Airport. The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982 (AAIA), as amended, 49 U.S.C. § 47101, *et seq.*

Tri-City Regional Airport is located on land acquired by purchase by a joint venture comprised of the Cities of Johnson City, Tennessee; Kingsport, Tennessee; Bristol, Tennessee; Bristol, Virginia; and Sullivan County, Tennessee. Washington County, Tennessee, later became a member of the joint venture. There was no transfer of surplus property pursuant to the Surplus Property Act of 1944, 49 U.S.C. Section 47151, et seq.

During 1996 there were 75 based aircraft and 84,226 annual operations at the airport. Since 1982, the Airport Sponsor has entered into 20 AIP grant agreements with the FAA and has received a total of $18,962,890 in federal airport development assistance. In 1996, the Airport Sponsor received its most recent AIP grant in the amount of $737,721 to conduct a master plan update, improve apron lighting, relocate taxiway lighting, install visual approach aids and acquire snow removal equipment.

Background

On October 16, 1979, Appalachian entered into a Lease Agreement with the Tri-City Airport Commission (Commission) to lease two buildings for operation of a Fixed Based Operation (FBO). The first building was known as the "East Hangar" and was a then-existing building. Appalachian agreed to purchase the un-amortized value of this building from its prior owner, the Mason Dixon Company, and then lease it from the Commission. The East Hangar consisted of approximately 28,800 square feet and was used for airport storage and office space. The second facility was the "West Hangar," which was constructed by the Commission in 1980 for Appalachian's benefit at a total cost of approximately $785,000. The Commission invested approximately $475,000 and the balance of the cost was funded by a State grant. The Commission concluded that a fourteen percent (14%) return on its investment in this facility would be appropriate. [FAA Exhibit 1, Item 8, par. 2-3]

Under terms proposed by Appalachian, the 14% return on $475,000 over a twenty (20) year term yielded $66,300 annually. At the request of Appalachian, this was adjusted so

[1] FAA Exhibit 1 provides the Index of the Administrative Record in this proceeding.

that as Appalachian's business grew, its lease payments would also increase, thus placing less of a financial burden on Appalachian in its start-up phase. The Commission agreed and under the terms that were placed in the Lease, the first annual rental was $42,000 per year with an annual increase of $2,700 per year each year thereafter. Under this schedule, the annual lease payment increased to the original intended annual level of $66,300 in 1990, the tenth (10^{th}) year of the Lease, and then continued to increase for the remaining years of the twenty (20) year lease, thus compensating the Commission for the reduction in its return taken during the first ten (10) years.

Appalachian's current owners assumed the obligation under the Lease in 1988, after acquiring the company at a negotiated price that took into account the terms of the existing lease. The Commission avers that no objections were lodged by Appalachian at the time of the acquisition dealing with any terms of the Lease or the schedule of payments over the remaining term. [FAA Exhibit 1, Item 8, par. 13]

The rental amount due under the Lease was also subject to a Consumer Price Index (CPI) adjustment every three (3) years. Also, the Lease charged rental rate of $.03 per square foot of unpaved area and $.02 per square foot rental rate for paved area. Appalachian was also charged a fuel flowage fee of $.03 per gallon and a two percent (2%) gross receipts fee. [FAA Exhibit 1, Item 4 (d)]

On May 22, 1992, Appalachian notified the Commission that it was experiencing financial difficulty and requested a rent reduction of the Lease to reflect the rates and charges being paid by other comparable airport tenants, such as Tri-City Aviation. [FAA Exhibit 1, Item 8, par. 14]

On June 25, 1992, the Commission responded to the May 22, 1992 letter from Appalachian which requested a rent decrease due to less than anticipated growth. In their response, the Commission requested the following information in order to determine how much relief Appalachian would require: [FAA Exhibit 1, Item 8-3]

(i) The certified annual financial statement required by the lease agreement to the Airport Commission. The Commission also noted that these statements had been previously requested in letters dated January 20, February 12, and March 17 of 1992.

(ii) Financial statements for Appalachian Flying Service for all of the years Appalachian had been in business.

(iii) Financial projections of Appalachian's business for the following three (3) years.

The Airport Commission contends that for the next year, despite repeated requests, Appalachian continually failed to provide timely financial information adequate to support its request.

In June 1993, Appalachian again requested that the Airport Commission re-negotiate the terms of its Lease. The Commission states that Appalachian's rental payments due under the Lease ceased being paid in June, 1993. [FAA Exhibit 1, Item 8, par. 15]

By letters dated July 29, 1993; August 27, 1993; and November 19, 1993; Appalachian was notified that it was in default under the Lease for failing to pay the rent. [FAA Exhibit 1, Item 8, par. 15-17]

On August 6, 1993, Appalachian states that the Airport Commission agreed to retain FBO Resources Group to conduct an appraisal of the fair market value of Appalachian's leasehold premises. [FAA Exhibit 1, Item 7, par. 24]

On November 19, 1993, the Commission proposed to modify the terms of the Lease. This proposal was turned down and there is no record of an alternate proposal being submitted. The November 19, 1993, letter also served as verification of a meeting on November 18, in which specific actions were discussed including a proposal that the July, August, September, October and November rents be reduced by $6000 per month. Appalachian was also asked to meet certain conditions that (1) all past due accounts be paid up to date and made current; (2)) that Appalachian provide a letter of Credit, Escrow Account or other financial guarantee which assures clean-up of their present fuel farm; (*see other allegations*) and, (3) that Appalachian agree to release approximately 60,000 square feet of leased ramp space adjacent to the Air Cargo Terminal. The proposal also provided notice to Appalachian of the Commission's intention to terminate the Lease as of December 31, 1993, if the Commission's proposal was not implemented by that date. [FAA Exhibit 1, Item 8-6]

At a meeting held on November 23, Appalachian said that they were unable to accept the Commission's offer but noted that they would submit an alternative proposal in writing by November 29, 1993.

On December 14, 1993, Appalachian was notified by the Commission that the Lease Agreement dated October 16, 1979, between Tri City Airport Commission and Appalachian Aviation, Inc. was terminated and, that Appalachian had not submitted an alternative proposal as promised and had remained delinquent in all hangar and ramp rentals due under the Lease for the months of July through December, 1993. This letter also served as notice that the Commission intended to reenter and repossess Appalachian's leased premises as of the close of business, December 31, 1993. [FAA Exhibit 1, Item 8-7]

On December 30, 1993, Appalachian petitioned for bankruptcy protection in the United States Bankruptcy Court for the Eastern District of Tennessee (Case No. 93-35224, Chapter 11). [FAA Exhibit 1, Item 7]

On June 13, 1994, Appalachian filed an informal complaint, pursuant to FAR Part 13.1 against the Airport Commission with the FAA's Airport District Office in Memphis, TN [FAA Exhibit 1, Item 4 k]

By letter dated July 7, 1994, after receiving Bankruptcy Court approval, the Commission notified Appalachian that the Lease was terminated and to vacate the premises by August 8, 1994, so that the Commission could re-enter and repossess such premises.

On August 8, 1994, the Airport Commission re-entered and repossessed Appalachian's leased premises. [FAA Exhibit 1, Item 8, Affidavit of John Hanlin]

After the facilities formerly occupied by Appalachian became available, the Commission prepared requests for proposals (RFP) and contacted a number of major FBO corporations throughout the country requesting that proposals be submitted. Two responses were received, both were rejected because of their failure to meet the required minimum standards.

On August 9, 1994, Tri-City Aviation, another FBO on the Tri City Regional Airport began operating the premises previously leased to Appalachian. [FAA Exhibit 1, Item 8, Affidavit of John Hanlin]

Applicable Law and Policy

The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 40101, *et seq.*, assigns the FAA Administrator broad responsibilities for the safety, security and development of civil aviation.

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

The Airport Improvement Program

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 1983, as amended. 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.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. See, *e.g.*, the Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110, and the Airport and Airway Improvement Act of 1982, as amended (AAIA), 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122.

FAA Order 5190.6A, *Airport Compliance Requirements* (Order), issued on October 2, 1989, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances.

Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the Airport Improvement Program (AIP), established by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47107, *et seq.*, the Secretary of Transportation and, by extension, the Federal Aviation Administration (FAA) must receive certain assurances from the airport sponsor.

49 U.S.C. 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree. These sponsorship requirements, or assurances, are included in every airport improvement grant agreement as set forth in FAA Order 5100.38A, Airport Improvement Program (AIP) Handbook, issued October 24, 1989, Ch. 15, Sec. 1, "Sponsor Assurances and Certification. "Upon acceptance of an AIP grant by an airport sponsor, the assurances become a contractual obligation between the airport sponsor and the Federal government.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations which an airport owners accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of

conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports; rather it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served.

FAA Order 5190.6A, *Airport Compliance Requirements* (Order), sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather, it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition 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 nature of those assurances, addresses the application of these assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

Enforcement of Airport Sponsor Assurances

The Order covers all aspects of the airport compliance program except enforcement procedures.

Enforcement procedures regarding airport compliance matters, absent the filing of a formal complaint under the FAA Investigative and Enforcement Procedures (14 C.F.R. Section 13.5), continue to be set forth in the predecessor order, FAA Order 5190.6 issued August 24, 1973, and incorporated by reference in FAA Order 5190.6A. *See* FAA Order 5190.6, Sec. 5-3, and FAA Order 5190.6A, Sec. 6-2.

Enforcement procedures regarding airport compliance matters are set forth in the *FAA Rules of Practice for Federally-Assisted Airport Proceedings* (14 C.F.R. Part 16). These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and were effective on December 16, 1996.

Airport Owner Rights and Responsibilities

Assurance 5, "Preserving Rights and Powers", of the prescribed sponsor assurances implements the provisions of the AAIA, 49 U.S.C. 47107 et seq, as amended by Pub. L. No. 103-305 (August 23, 1994), and requires, in pertinent part, that the sponsor of a federally obligated airport

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

In addition to obligating the airport sponsor to preserve its rights and powers to carry out all grant agreement requirements, this assurance also places certain obligations on the sponsor regarding land upon which Federal funds have been spent, including the operation and maintenance of airports managed by agencies other than the sponsor.

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

Public Use of the Airport

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination.

Assurance 22, Economic Nondiscrimination, of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport

> will make its airport available as an airport for public use on fair and reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical uses. Assurance 22(a)
>
> may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. Assurance 22(h)
>
> may...limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. Assurance 22(i)

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

FAA Order 5190.6A, *Airport Compliance Requirements*, issued October 2, 1989, (hereinafter Order), describes the responsibilities under Assurance 22 assumed by the owners 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 fair and reasonable terms without unjust discrimination. *See* Order, Secs. 4-14(a)(2) and 3-1.

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. *See* Order, Sec. 3-8(a). The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. *See* Order, Sec. 4-13(a).

The owner of an airport developed with Federal assistance is responsible for operating the aeronautical facilities for the benefit of the public. *See* Order, Sec. 4-7(a). This means, for example, that the owner should adopt and enforce adequate rules, regulations, or ordinances as necessary to ensure the safe and efficient operation of the airport. *See* Order, Secs. 4-7 and 4-8.

The Prohibition Against Exclusive Rights

49 U.S.C. 40103(e) and 47107(a)(4), in relevant part, provide that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

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

> 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...which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity, and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Improvement Act of 1982.

In FAA Order 5190.1A, *Exclusive Rights*, the FAA published its exclusive rights policy and broadly identified aeronautical activities as subject to the statutory prohibition against exclusive rights. While public use airports may impose terms and conditions of use upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. *See* FAA Order 5190.1A, Para. 11.c.

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

Fee and Rental Structure

Assurance 24, "Fee and Rental Structure," of the prescribed sponsor assurances satisfies the requirements of Section 511(a)(9) of the AAIA, 49 U.S.C. 47107(a)(13). It provides, in pertinent part, that the sponsor of a federally obligated airport "agrees that it will maintain a fee and rental structure consistent with Assurance 22 and 23, for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport."

FAA Order 5190.6A describes the responsibilities under Assurance 22, Economic Nondiscrimination, and Assurance 23, Exclusive Rights, assumed by the owners 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 fair and reasonable terms without unjust discrimination and without granting an exclusive right of use. See Order, Secs. 4-14(a)(2) and 3-1.

The obligation of airport management to make an airport available for public use does not preclude the owner from recovering the cost of providing the facility through fair and reasonable fees, rentals or other user charges which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport. See Order, Sec. 4-14(a).

Each commercial aeronautical activity at any airport shall be subject to the same rates, fees, rentals and other charges as are uniformly applied to all other commercial aeronautical activities making the same or similar uses of such airport utilizing the same or similar facilities. See Order, Sec. 4-14(a)(2).

FAA policy provides that, at general aviation airports, variations in commercial aeronautical activities' leasehold locations, leasehold improvements, and the services provided from such leasehold may be the basis for acceptable differences in rental rates, although the rates must be reasonable and equitable. See Order, Sec. 4-14(a)(2)(c).

FAA policy further provides that, all leases with terms exceeding five years, should provide for periodic review and adjustment of the rates and charges based on an acceptable index. This periodic lease review is expected to facilitate parity of rates and charges between new commercial aeronautical tenants and long-standing tenants making the same or similar use of airport facilities and to assist in making the airport as self-sustaining as possible under the circumstances existing at the airport. See Order, Sec. 4-14(a)(2)(f).

Rates and Charges Policy Summary

It is the fundamental position of the Department of Transportation (Department) that the issue of rates and charges is best addressed at the local level by agreement between users and airports. The Department is adopting this policy statement on the standards applicable to airport fees imposed for aeronautical use of the airport to provide guidance to airport proprietors and aeronautical users, to encourage direct negotiation between these parties, to minimize the need for direct Federal intervention and resolve differences over airport fees and to establish the standards which the Department will apply in addressing airport fee disputes under 49 U.S.C. Section 47129 and in addressing questions of airport proprietors' compliance with Federal requirements governing airport fees.

Analysis and Discussion

Appalachian alleges in its complaint that the Commission's refusal to permit Appalachian to make the same or similar lease payments that the Commission has permitted other similarly situated lessees to make for their lease payments is a violation of the exclusive rights provision of Section 308 of the Federal Aviation Act of 1958, re-codified as 49 U.S.C. Section 40103(e), and 49 U.S.C. § 47107(a)(4). Additionally, Appalachian alleges that leasing the premises at a higher rate than charged other FBO's on the airport constitutes a violation of 49 U.S.C. § 47107(a)(5).

The Commission, in its answer and motion to dismiss, denies violating its federal obligations as set forth in 49 U.S.C. § 47107 *et seq.* and 49 U.S.C. 40103(e) or its federal grant assurances. Additionally, the Commission asserts that Appalachian's Chapter 7 Trustee is the real party in interest and thus, Appalachian has no standing to bring this Complaint. Moreover, the Commission contends that because Appalachian is insolvent and is no longer doing business with the Airport, it is without standing to seek relief from the Part 16 complaint process (C.F.R. 16.25,16.23(a)). The Commission further avers that the remedy requested is for damages and that under 49 U.S.C. Section 46101(a)(4), the FAA is without statutory authority to grant an award of damages. [Answer at 10, paragraphs 1-3] [FAA Exhibit 1, Item 7]

Standing

The Commission states in the answer and the motion to dismiss that Appalachian lacks standing to bring this complaint because the lease agreement with the Commission has been terminated for years, and it is no longer doing business with the Commission. They state that there has been no business relationship between the parties since August 9, 1994, when the Commission assumed possession of the premises formerly leased by Appalachian. Additionally, Appalachian had not paid any fees or rentals to the Commission since June of 1993. The Commission argues that Appalachian is therefore,

not "substantially affected" by any alleged noncompliance with 49 U.S.C. Section 40101, et seq. [FAA Exhibit 10, page 4]

Appalachian alleges that that the Commission destroyed their business and therefore, the Commission can not fairly assert that the complainant's lack of an ongoing business relationship deprives it of standing. Appalachian specifically contends that the Commissions grant of a prohibited exclusive right and unjust discrimination in violation of the grant assurances and 49 U.S.C. 40103(e) adversely affected their business and precipitated its insolvency.

Part 16 states in Section 16.23(a) that "A person directly and substantially affect by any alleged noncompliance may file a complaint with the Administrator." It also states in Section 16.23(4) that complaints filed under Part 16 shall "Describe how the complainant was directly and substantially affected by the things done or omitted to be done by the respondents."

We agree with the Complainant that a lack of an ongoing business relationship should not deprive it of standing, especially when the complainant contends that the airport's noncompliance lead to the demise of the business relationship. The complainant did provide the FAA with a description of how it was directly and substantially affected by the things done or omitted to be done by the respondents. But, we maintain that there is a limit to the time between the last business relationship and the filing of a complaint to meet the requirements of Part 16 and to find that the complainant still is substantially affected. The last business encounter between the parties occurred on August 9, 1994. A complaint was filed under Part 16 on December 16, 1996. The amount of time between the filing of the complaint and the last business encounter was almost 28 months. The FAA believes that this is beyond the scope of time to argue that the airports non-compliance has a substantial effect on the complainant.

The FAA could have dismissed this complaint for lack of standing in the initial stage, but we felt that this particular case warranted an investigation prior to the issue of standing being resolved.[2]

Although we believe the complainant lacks standing to file this complaint, we will address the merits of the case for the record.

Exclusive Rights

[2] Having found a lack of standing due to the delay in bringing this matter before the FAA, it is unnecessary for the FAA to resolve the Commission's standing argument based on the application of bankruptcy law. However, we do not view the argument as frivolous. The question presented by the Commission – whether a corporation undergoing a Chapter 7 liquidation has the authority to pursue independently legal claims – may well be relevant to determining whether the corporation may rely on prepetition actions of an airport sponsor to establish standing under Part 16.

The original Lease between the Commission and Appalachian was dated October 16, 1979. (The obligations under the Lease were assumed by the current owners of Appalachian in 1988). In 1979, Appalachian's West Hangar was constructed by the Commission at a cost of $785,000. The Commission's investment of $475,000 was to be repaid by Appalachian to the Commission over the twenty (20) year life of the Lease. The amortization or rental schedule was determined by applying a fourteen percent (14%) rate of return on the Commission's $475,000 investment over the 20 year term to arrive at an annual rental. At the request of Appalachian, and in order to accommodate its projections of higher revenues in later years, the Commission agreed to commence the rent at sixty-three percent (63%) of the average with an annual increase of $2,700. Also, a consumer price index (CPI) adjustment is applied every three (3) years to hangar and ground rents. [FAA Exhibit 1, Item 8, par. 4]

The Commission also entered into a land lease with an additional Fixed Base Operator (FBO), Tri-City Aviation, (TCA) in the early 1970s. The lease allowed TCA to build their own hangar, and included an agreement to transfer ownership of the hangar to the Commission after approximately 15 years to amortize and recoup their building cost. TCA is presently leasing the (their) hangar from the Commission. The land lease agreement, according to the documents provided by the Commission, stated that both FBOs were paying the same cost for paved areas, unpaved areas, hangar space, fuel flowage fees, and share of gross receipts.[FAA Exhibit 1, Item 8 par. 6]

During the summer and fall of 1993, the Commission and Appalachian negotiated a rental adjustment under the Lease in response to a request from Appalachian. The Commission avers that Appalachian would not respond to any proposal made by the Commission and failed to provide the Commission's management with any of the requested current financial information. In December 1993, after Appalachian was six (6) months behind in its rent, the Commission notified Appalachian that it intended to terminate the Lease as of December 31, 1993. On December 30, 1993, Appalachian filed its Chapter 11 petition in bankruptcy court which stayed the efforts of the Commission to terminate the Lease. At that time, Appalachian owed the Commission $81,474.31 in past-due rent.[FAA Exhibit 1, Item 8, Affidavit of John Hanlin]

Against this background, we conclude that even through there was a downturn in the economy and general aviation use, the Commission was still obligated to recoup the cost of building the "West Hangar". The evaluations of fair market value for FBO space made by professional evaluators and the Commission consultants indicated that the rates paid by Appalachian were high and this may be valid. However, the airport owner was not under an obligation to adjust a lease that was negotiated in good faith, thus relinquishing potential revenue from a valid commercial arrangement.

The record shows that the Airport did not deny Appalachian the opportunity to operate at the Airport through and within the terms of its agreed upon Lease. Due to financial difficulties encountered by Appalachian, efforts were made to renegotiate the existing

Leases. Upon review of the record, it becomes clear that the commission participated in these negotiations and presented options to Appalachian that would have provided some measure of relief. Appalachian did not accept any of the options, and failed to submit an alternative proposal. In these circumstances, the failure to complete a renegotiating of Appalachian's lease does not qualify as evidence that the Commission's intent was to enter into or to maintain an express agreement with another operator providing an exclusive right.

The FAA interprets an exclusive right as the granting of any special privilege, power, or right to provide an aeronautical service on the airport to the exclusion of others. Appalachian has provided no supporting evidence to demonstrate that the Airport Commission has granted an exclusive right to any tenant at the airport.

The Commission's grant assurances require that the airport be available as an airport for public use on fair and reasonable terms to all types, kinds, and classes of aeronautical use. The Commission also has the obligation to maintain a fee and rental structure which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport. Based on this proceeding, we cannot conclude that the Tri-City Airport Commission is acting in a discriminatory, unreasonable fashion or is in violation of The Commission's Federal obligations regarding the granting of exclusive rights under its grant agreements.

Economic Discrimination

Appalachian further asserts that Tri-City Aviation's leased premises were comparable to Appalachian's leased premises. [Complaint at 5, paragraph 21] The Commission admits that the square footage of Tri-City Aviation's leased premises were comparable to the square footage in the East Hangar formerly leased by Appalachian. The Commission also avers that the West Hangar formerly leased by Appalachian was not comparable to the size of the premises leased by Tri-City Aviation nor were they comparable in the method in which they were financed. [Answer at 8, paragraph 36]

Tri-City Aviation operated a separate fixed-base operation at the Airport during the time Appalachian was in business. Tri-City executed a renewed Lease Agreement with the Commission on May 8, 1986 which is set to expire on March 31, 2000. The facilities leased by Tri-City Aviation totaled approximately 27,670 square feet. This included a terminal building of approximately 3,050 square feet; an attached hangar of 10,000 square feet; and a secondary facility of 9,500 square feet. Unlike Appalachian's West Hangar, Tri-City Aviation constructed its own facilities at its expense. [Answer at 3, paragraph 6]

FAA agrees with the Airport Commission that the properties leased to both Tri-City Aviation and Appalachian were comparable in size but were markedly different in the way that they were financed [FAA Exhibit 1, Item 4 d)]. In the October 16, 1979, Lease

Agreement between Appalachian and the Airport Commission, and in the Lease assumption in 1988, Appalachian agreed to the terms as set therein to with full knowledge of the previous agreements by which they would be obligated.

As part of the negotiation process, the Airport Commission agreed to retain FBO Resources Group to conduct an appraisal of the fair market value of Appalachian's leased premises on August 6, 1993. FBO Resources Group determined that the Lease payments being charged Appalachian were considerably above Appalachian's competitors and other FBO's around the country. [Complaint at 5, paragraphs 21-24]

The Commission admits that Appalachian did ask to renegotiate its Lease and that these negotiations were ongoing throughout the summer and fall of 1993. Although the Commission did have an appraisal conducted of Appalachian's leased premises, they deny that the fair market value of the leasehold, which was not calculated to take into account the benefits Appalachian received during the early years of the Lease, has any relevance to this matter. [Answer at 9, paragraphs 37-39]

After investigation, we conclude that ***Assurance #22(c), Economic Nondiscrimination*** has not been violated in this case.

Assurance #22 [c] provides in pertinent part that each fixed base operator at any airport owned by the sponsor shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed base operators making the same or similar use of such airport and utilizing the same or similar facilities. However, FAA policy holds that that if one operator rents office and/or hangar space and another builds its own facilities, this would provide justification for different rental and fee structures. These two operators would not be considered essentially similar as to rates and charges even through they offer the same services to the public. Additionally, Assurance #22 notes that the basis for rates and charges is usually related to the costs incurred by the airport owner. [FAA Order 5190.6A , Airport Compliance Requirements (Section 4-14,(2)(a)]

Although both Appalachian and Tri-City Aviation had similar square footage for their leased premises, they were not financed in the same way. The FAA accepts an objective fair market value as one reasonable and nondiscriminatory manner to establish a rental rate within the discretion of the sponsor, but at the same time would expect the sponsor to recoup any up-front expenses through an agreed-upon lease as was done in this case.

Under a lease agreement signed on October 16, 1979, Appalachian agreed to commence operations as a fixed base operator utilizing both the East and West Hangars. Appalachian agreed to meet the terms of the lease by repaying the loan made by the Commission at a 14% return. This resulted in an annual increase of $2,700.00 per year for the first ten (10) years. Under this schedule, the annual lease payment increased to the original intended annual level of $66,300.00 in 1990, the tenth (10th) year of the lease, and then continued to increase for the remaining ten (10) years of the Lease. This would

serve to compensate the Commission for the reduction in its return taken during the first ten (10) years of the Lease. [Answer at 2, paragraph 4, exhibit 1)

After the facilities formerly occupied by Appalachian became available, the Commission prepared requests for proposals for another FBO. Two responses were received and both rejected for failure to meet the required minimum standards. In order to serve the airport customers, the Commission entered into a month-to-month operating agreement with Tri-City Aviation. The Airport Commission notes that this is essentially an operating agreement whereby Tri-City Aviation shares in the hangar rental fees paid by private aircraft owners in consideration for operating the facility.

Motion to Strike Unauthorized Brief

On December 16, 1996, Appalachian filed a formal complaint pursuant to 14 C.F.R. Section 16.23. On January 24,1997, the Commission filed its answer and a motion to dismiss, pursuant to 14 C.F.R. Part 16.23(d), 16.19 and 16.23(j). On February 6, 1997, Appalachian filed a Memorandum in Opposition to Motion to Dismiss, pursuant to 14 C.F.R. Part 16.23(e) and (j) and 16.19(c). On February 19, 1997, the Commission filed a Rebuttal in support of Answer and Motion to Dismiss, pursuant to 14 C.F.R. Part 16.19 and 16.23((f) and (j). On February 23, 1997, Appalachian filed a Motion to Strike Unauthorized Brief. Appalachian argues that it did not file a reply brief in this case, it only filed an answer to the Commissions motion and therefore, the Commission can not file a rebuttal. Appalachian continues to argue that the plain language meaning of 14 C.F.R. Section 16.23(f), which states: "The respondent may file a rebuttal within 10 days of the date of service of the complainant's reply,", is that the filing of a reply is a condition precedent to the filing of a rebuttal and therefore, a rebuttal is not authorized under the 14 C.F.R. Part 16 rules.

The Commission argues that their rebuttal was authorized by the Part 16 regulations. They contend that since FAA allowed the motion to dismiss and the answer to be treated together, it is apparent that there is a substantive relationship between answers and motions to dismiss. Additionally, the Commission points out that Appalachian's memorandum was relevant to both the answer and the motion to dismiss and therefore was interpreted to be a reply.

The FAA believes that the Memorandum in Opposition to Motion to Dismiss, filed by Appalachian is properly treated as a reply and that the Commission was allowed to file a rebuttal. The issues addressed in Appalachian's Memorandum discussed issues that were presented in both the Answer and the Motion to Dismiss. 14 C.F.R. part 16.23(j) allows answers to include motions to dismiss and it also allows a reply to include a response to a motion to dismiss. The objective of the regulation is to provide the agency with as much information to conduct an investigation to determine if the sponsor is in compliance. This objective is achieved in partly permitting the respondent as well as the complainant

to file two rounds of pleadings. The FAA is not prepared to permit a party to frustrate this purpose by artful labeling of a pleading.

Moreover, 14 C.F.R. Part 16.29 addresses what information an investigation may include. 14 C.F.R. Part 16.29(1) states that the investigation may include a review of the written submissions or pleading of the parties, supplemented by any informal investigation the FAA considers necessary and by additional information furnished by the parties at FAA request. Even if Appalachians second pleading was not considered a reply to which the Commission could respond as a matter of right, the FAA could have and would have allowed the Commission to file the rebuttal at the FAA's request during the investigation. The only gain for Appalachian is that a Director's Determination would have been issued 10 days earlier. Thus granting Appalachian's motion to strike would provide the FAA with less information and the expedited process is only shortened to an inconsequential 10 days. Based on the foregoing information, the Motion to Strike Unauthorized Brief is denied.

Remedy

The Commission argues that the agency is without statutory authority to grant an award of damages and therefore can not provide Appalachian with any remedy. They contend that since there is no current business relationship with Appalachian that any Order by the FAA would merely be advisory in nature.

Appalachian argues that its remedy for damages before another forum is not grounds for dismissal of the instant complaint. Additionally, Appalachian requested that the FAA issue an order declaring that the airport had violated 49 U.S.C. 40103(e) and the grant assurances.

The FAA has a statutory mandate to ensure that airport owners comply with the sponsor assurances. See, *e.g.*, FAAct, 49 U.S.C. §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110, and the AAIA, 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122. 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. Once an airport agrees to accept Federal financial assistance, the assurances become a binding contractual obligation between the airport sponsor and the Federal government.
Although the FAA can not provide the complainant with damages as a remedy, it is the contractual relationship between the airport and the FAA that gives the FAA the authority to enforce grant assurances. Even if a complainant is no longer on the airport, the FAA still has a duty to ensure that the airport is following their grant assurances. The FAA does not want a situation to arise where the airport can remove the complainant from the airport in order to moot out a claim that the airport is not abiding by a grant assurance. This would undermine the compliance program. The FAA does have the authority to issue a civil penalty pursuant to 49 U.S.C. Section 46301(a)(1)(A) and Section 46301(d)(2) if it becomes necessary for compliance. Additionally, the FAA may

withhold approval for project grant applications pursuant to 49 U.S.C. Section 47106(d) if there is a violation of a grant assurance. Therefore, the complaint should not be dismissed on the grounds that there is no remedy for the complainant.

Request for an Evidentiary Hearing

Appalachian requests that an evidentiary hearing be held in this matter. An evidentiary hearing is not required under 14 C.F.R. Part 16. 14 C.F.R. Section 16.31(d) provides the respondent with the opportunity for a hearing if the initial determination finds the respondent in noncompliance and proposes the issuance of a compliance order and an opportunity for a hearing required by statute. In all other cases no opportunity for a hearing is provided, except at the discretion of the agency. While complainants are subject to having their complaints investigated, they do not have a property interest sufficient to require an oral evidentiary hearing as part of that investigation, even when the investigation leads to a dismissal of a complaint.

Findings and Conclusions

Upon consideration of the responses and submissions by the parties, and the entire record herein, and the applicable law and for the reasons stated above, the FAA Office of Airport Safety and Standards finds and concludes as follows:

1. The complainant lacks standing to file the complaint.

2. The Tri-City Airport Commission, by holding Appalachian Aviation, Inc. to the terms of an October 16, 1979, lease agreement did not violate its federal obligations regarding *Exclusive Rights*, as set forth in 49 U.S.C. Section 47107(a)(4) and Section 40103(e).

3. The Tri-City Airport Commission, by not allowing Appalachian Aviation, Inc. to pay the same or similar lease payments for it leased premises that the Commission permitted other similarly situated lessees to make for their lease payments, did not violate its federal obligations regarding *Economic Nondiscrimination*, as set forth in 49 U.S.C. Section 47107(a)(5).

ORDER

Accordingly, it is ordered that:

1. The Motion to Strike Unauthorized Brief is denied.

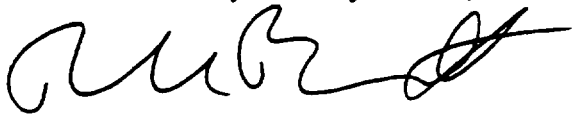
2. The Motion to Dismiss is granted with respect to this determination. The complaint in FAA Docket No. 16-96-02 is hereby dismissed with prejudice pursuant to 14 C.F.R. 16.25(b). These determinations are made under Sections 308(a), 313(a), 1002(a) and

1006(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 40103(b)(1), 44502, 44721, 40103(b)(2), 40103(e), 40113, 40114, 47122, 46104, and 46110, respectively, and Sections 511 (a), 511(b), and 519 of the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. §§ 47107(a) (1)(2)(3)(5)(6), 47107(a)(4), 47107(7)(8), 47107(g)(1) and (i), and 47106(e), 47111(d), 47122, respectively.

RIGHT OF APPEAL

Pursuant to Federal Aviation Regulations, 14 C.F.R. Part 16, this order constitutes an initial determination by the Director, Office of Airport Safety and Standards. Any party adversely affected by the Director's Determination may appeal the initial determination to the Associate Administrator for Airports, Federal Aviation Administration within 30 days after the date of service of the initial determination. A reply to an appeal may be filed with the Associate Administrator within 20 days after the date of service of the appeal. If no appeal is filed within the time period specified, the Director's determination becomes the final decision and order of the FAA without further action.

Issued this twenty-fifth day of June, 1997.



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