

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

SCOTT AVIATION, INC.  
Complainant

V.

DUPAGE AIRPORT AUTHORITY  
Respondent

Docket No. 16-00-19

DIRECTOR'S DETERMINATION

I. INTRODUCTION

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

Scott Aviation, Inc., (Scott Aviation/Complainant) has filed a formal complaint, pursuant to 14 CFR Part 16 against the DuPage Airport Authority (Airport Authority/Respondent), operator of DuPage Airport, alleging that the Airport Authority is in violation of 49 U.S.C. § 47101, et seq., and FAA Order 5190.6A, § 3-9(e)(1) and (e)(2)<sup>1</sup> pertaining to restrictions on self-servicing aircraft. Scott Aviation asserts that the Airport Authority has placed restrictions on self-fueling so severe that the restrictions result in unjust economic discrimination against the Complainant.<sup>2</sup>

<sup>1</sup> FAA Order 5190.6A provides guidance to FAA personnel on policies and procedures related to airport compliance and is not binding on the public. Therefore, FAA will construe this complaint to allege the Airport Authority has engaged in economic discrimination and failed to comply with 49 U.S.C. §47107(a)(1), (5) and Federal Grant Assurance #22(a) (d)(f)(h) and has violated the prohibition on Exclusive Rights, 49 U.S.C §§ 40103(e), 47107(a)(4) and Federal Grant Assurance #23.

<sup>2</sup> FAA Exhibit 1 is a record of the documents filed by all parties in this Complaint.

Specifically, Scott Aviation objects to the Airport Authority's requirement that Scott Aviation: (a) pay a \$.025 fuel flowage fee (per gallon of fuel pumped), (b) use off-Airport parking for its fuel truck, (c) maintain a \$1,000,000 environmental liability insurance policy, (d) deposit the deductible amount associated with the \$1,000,000 environmental liability insurance policy with the Airport Authority, (e) obtain hazardous materials licenses for drivers of its fuel truck, and (f) pay a \$5,000 per year permit fee in order to drive its fuel truck on the airport to perform self-fueling activities.<sup>3</sup>

In its answer, the Airport Authority denies the allegations that its actions constitute a violation, and states that it is meeting its responsibilities to serve airport users and maintain the airport's infrastructure. The Airport Authority also notes that airport safety is of paramount concern to DuPage Airport given the substantial and continuing investment of Federal, state, and local funds and the extensive operations at the airport.<sup>4</sup>

With respect to the allegations presented in this Complaint, under the specific circumstances at the DuPage Airport as discussed below, and based on the evidence of record in this proceeding, we find that the DuPage Airport Authority is not currently in violation of its Federal obligations regarding unjust economic discrimination or exclusive rights.

We find the minimum standards and the fees established by the Airport Authority for self-fueling operations are generally reasonable, including (a) payment of a \$.025 fuel flowage fee, (b) using off-airport parking for its fuel trucks, (c) maintaining a \$1,000,000 environmental liability insurance policy, (d) depositing the deductible amount associated with the \$1,000,000 environmental liability insurance policy with the Airport Authority, and (e) enforcing special licensing requirements for fuel truck drivers.

In addition, we agree that having an annual permit fee to drive a fuel truck on airport property is reasonable. Based on the record evidence presented, the permit fee charged to Scott Aviation – when converted to a cost per gallon of fuel pumped – does not raise the Complainant's total cost for using the airfield above the cost that could be properly allocated to the Complainant. However, the methodology used by the Airport Authority to arrive at the amount of the permit fee charged to Scott Aviation for the 35,000 pound truck is not transparent, and, under different circumstances, the amount of the permit fee could be determined to be unreasonable. While the imposition of this fee presently does not rise to the level of unjust economic discrimination, we encourage the Airport Authority to review its rate setting methodology in regard to permit fee amounts.

Furthermore, we do not find that the Airport Authority has exercised its proprietary exclusive fueling operation in a manner to constitute an impermissible exclusive right.

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<sup>3</sup> Aeronautical users providing their own fuel for their exclusive consumption.

<sup>4</sup> FAA Exhibit 1, Item 5, page 2

## II. THE 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, as amended, 49 U.S.C. § 47101, *et seq.*<sup>5</sup>

The Airport is a public-use general aviation airport located in West Chicago, Illinois. The airport is owned and operated by the DuPage Airport Authority. The Airport Authority exercises its proprietary exclusive right to be the sole provider of aviation fuel at the airport. This exclusive right does not preclude individual aeronautical users from self-servicing their own aircraft.

The airport sponsor, DuPage Airport Authority, has entered into 15 AIP grant agreements with the FAA and has received a total of \$50,786,998 in Federal airport development assistance since 1983. In 1993, the airport sponsor received its most recent AIP grant for \$8,659,140 to acquire land and make airfield improvements.<sup>6</sup> During the twelve-month period ending in August 1998, there were 447-based aircraft and 203,351 operations annually at the airport.

## III. BACKGROUND

Complainant Scott Aviation is a commercial air charter operator on DuPage Airport. Scott Aviation owns and operates aircraft based at the airport. The Complainant does business with the Airport Authority inasmuch as they are leasing land on DuPage Airport for a hangar facility, and paying fees and rentals to the Airport Authority.

In its Complaint, Scott Aviation is alleging that through local ordinances and airport rules and regulations, the Airport Authority has enacted impermissible restrictions on self-fueling. Specifically, Scott Aviation objects to the Airport Authority's requirement that Scott Aviation: (a) pay a \$.025 fuel flowage fee (per gallon of fuel pumped), (b) use off-Airport parking for its fuel truck, (c) maintain a \$1,000,000 environmental liability insurance policy, (d) deposit the deductible amount associated with the \$1,000,000 environmental liability insurance policy with the Airport Authority, (e) obtain hazardous materials licenses for drivers of its fuel truck, and (f) pay a \$5,000 per year permit fee in order to drive its fuel truck on the airport to perform self-fueling activities.

On January 12, 1998, the DuPage Airport Authority passed Ordinance 1998-122, setting a permit fee for vehicles transporting fuel on the restricted areas of the airport at \$1,000 per year for vehicles weighing less than 30,000 pounds GVW<sup>7</sup> and \$5,000 per year for vehicles weighing 30,000 pounds GVW or more.<sup>8</sup>

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<sup>5</sup> FAA Exhibit 1, Item 1

<sup>6</sup> FAA Exhibit 1, Item 2

<sup>7</sup> Gross Vehicle Weight

<sup>8</sup> FAA Exhibit 1, Item 3, Ex. B

On September 13, 1999, DuPage Airport Authority passed Ordinance 1999-135.<sup>9</sup> This Ordinance states in pertinent part, that anyone desiring to exercise the owner's right to self-fuel aircraft must provide as a minimum the following:

- A. Proof of ownership of the aircraft to be fueled.
- B. Proof of ownership of refueller(s), weighing less than 35,000 lbs, properly licensed by the State of Illinois to transport fuel, and equipped with a meter certified to measure gallons pumped.
- C. Proof that the person(s) who will be transporting fuel and performing the fueling of aircraft is the owner of the aircraft and/or are employees of the owner of the aircraft, and that they are properly licensed by the State of Illinois to transport fuel.
- D. A plan (meeting all local, state and Federal regulations) for the containment and clean up of any inadvertent spills shall be submitted to the Authority.
- E. All licenses and permits required by Federal, state, or local governments for transportation of fuel shall be secured and kept current; copies of all required certificates, permits or licenses shall be submitted to the Authority.
- F. Insurance coverage in an amount not less than \$1,000,000 per occurrence to protect against environmental damages caused by accident, mishap or otherwise and to cover clean up costs; and vehicle insurance coverage in an amount not less than \$1,000,000 shall be submitted to the Authority.
- G. A deposit or bond equal to the deductible amount of the environmental damage insurance.
- H. Off-airport storage for the refueling truck.
- I. A daily log listing the quantity of fuel pumped by individual aircraft for the prior month, submitted not later than the 15<sup>th</sup> of every month.
- J. Notification to the airport at least 20 minutes prior to the self-fueling operation, to allow the airport the opportunity to observe the before and after readings on the flow meter.

On November 28, 2000, Scott Aviation filed its formal complaint against the Airport Authority and included copies of the above-cited ordinances as part of the record. The Complainant also included a letter to the Airport Authority dated September 11, 2000,

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<sup>9</sup> FAA Exhibit 1, Item 3, Ex. A

wherein Scott Aviation listed the aircraft it owned or leased and intended to self-fuel. This list shows that Scott Aviation is leasing 14 aircraft, including jets, twin- and single-engine aircraft.<sup>10</sup>

The Complainant also included a letter dated October 16, 2000, from counsel for Scott Aviation to the Executive Director of the DuPage Airport Authority. The letter stated Scott Aviation believes the DuPage Airport Authority's Ordinances 1998-122 and 1999-135 are in violation of both the spirit and letter of FAA Order 5190.6A (Airport Compliance Handbook), which defines the responsibilities and written assurances that an airport must make to the Secretary of Transportation regarding public availability of the airport and the right to self-fuel.<sup>11</sup>

The letter also stated Scott Aviation's belief that the permit fee provisions of Ordinance 1998-122 were directed against self-fueling activities and were a barrier to self-fueling. Scott Aviation also argues that this restriction is so onerous that it will have the effect of putting an economic burden on Scott Aviation and will divert Scott Aviation's refueling activities to the commercial operation owned by the Airport Authority itself.<sup>12</sup>

Regarding Ordinance 1999-135, Scott Aviation asserts that the Airport Authority operates its own commercial fueling operation, and no fuel flowage fee is charged to patrons of the airport's fueling operation. The Complainant further asserts that the \$0.25 fuel flowage fee charged to self-fueling entities is an impermissible fee under FAA Order 5190.6A, § 3-9(e)(2).<sup>13</sup>

On January 11, 2001, the Airport Authority answered the Complaint and denied Scott Aviation's allegations that the Authority is in violation of its Federal obligations. The Airport Authority contended that its method of operation and regulations embody certain general principals guiding the Airport Authority, including:

- The Airport Authority recognizes the right of aircraft owners and operators to self-fuel their own aircraft;
- The Airport Authority's fueling operation is not a separate or commercial operation, but rather is an integral part of the overall operation and maintenance of the airport for the public; and,

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<sup>10</sup> FAA Exhibit 1, Item 3, Ex. C

<sup>11</sup> FAA Exhibit 1, Item 3, Ex. D

<sup>12</sup> FAA Exhibit 1, Item 3, Ex. D

<sup>13</sup> Throughout the pleading, Scott Aviation and the Airport Authority refer to the FAA's Airport Compliance Handbook (FAA Order 5190.6A) as regulatory. As noted in Footnote #1, this document is an internal Order providing guidance to FAA staff in interpreting the grant assurances.

- All profit from the Airport Authority's fueling activities is used to fund airport operations; thereby obviating any need for taxes or fees commonly imposed by other airports upon the aviation community and general public that uses the airport.<sup>14</sup>

Included in the Airport Authority's answer are records reflecting the amount of fuel sold by the Airport Authority between 1992 and 2000,<sup>15</sup> a copy of the DuPage Airport Minimum Standards dated September 13, 1999,<sup>16</sup> Airport Rules and Regulations adopted in June 1994,<sup>17</sup> a statement of airport revenue and expenses dated January 9, 2001,<sup>18</sup> and proof of environmental liability and fuel storage coverage.<sup>19</sup>

In its answer, the Airport Authority responded to the Complainant's six specific objections:

(A) Airport Fuel Flowage Fee

Regarding Complainant's objection to paying a \$0.25 fuel flowage fee, the Airport Authority states, "As the Authority is the only provider of fuel to the public on the airport, it does not charge a flowage fee to itself. It does, however, incur substantial direct and indirect expenses in connection with providing fuel to the public. In 2000, the Authority incurred operational expenses of over \$1,200,000 exclusive of the wholesale cost of fuel, or approximately 37 cents per gallon for such expenses...The Authority's general profit margin of 43 cents per gallon on fuel that it sells remains substantially in excess of the 25 cents per gallon flowage fee paid by self-fuelers. Thus, self-fueling may save the aircraft operator money.

(B) Off Airport Parking of Fuel Trucks

Regarding Complainant's objection to being required to use off-airport parking for its fuel truck(s), the Airport Authority asserts, "While it is a tenant of the airport, Scott Aviation does not have sufficient leased property around its building for parking fuel trucks, and parking in its building would violate state and local fire codes. Nor would it be safe or appropriate for Scott Aviation to park unattended fuel trucks for lengthy periods of time on public ramp areas."<sup>20</sup>

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<sup>14</sup> FAA Exhibit 1, Item 5, page 3

<sup>15</sup> FAA Exhibit 1, Item 5, Ex. A

<sup>16</sup> FAA Exhibit 1, Item 5, Ex. B

<sup>17</sup> FAA Exhibit 1, Item 5, Ex. C

<sup>18</sup> FAA Exhibit 1, Item 5, Ex. D

<sup>19</sup> FAA Exhibit 1, Item 5, Ex. E

<sup>20</sup> FAA Exhibit 1, Item 5, pages 4, 5 and 6

(C) Environmental Liability Insurance Coverage and (D) Deposit of Deductible

Regarding Complainant's objection to maintain a \$1,000,000 environmental liability insurance policy and the requirement to place a deposit with the Airport Authority equal to the amount of the deductible of that policy, the Airport Authority states, "Clearly, requiring that appropriate funds and protection are available in the event of environmental damage at the airport is reasonably necessary for the protection of the public interest."<sup>21</sup>

(D) Hazardous Material License

Regarding Complainant's objection to maintaining hazardous material licenses for drivers of its fuel truck(s), the Airport Authority asserts, "Fuel trucks coming from off-airport locations are required by state law to have drivers with Commercial Driving Licenses and hazardous materials licenses. Thus, the licensing requirement is not an attempt by the Authority, as Scott Aviation asserts, to place an unreasonable burden upon self-fuelers."<sup>22</sup>

(E) Fuel Truck Permit Fee

Regarding Complainant's objection to paying a \$5,000 per year permit fee for its fuel truck, the Airport Authority argues, "The extensive damage which can be caused by heavy trucks, like fuel tankers, to concrete pavement is well known...Under these circumstances, imposition of a permit fee for heavy fuel trucks is certainly appropriate."<sup>23</sup>

On January 25, 2001, Scott Aviation replied to the Airport Authority's answer to the Complaint and stated, "The Respondent, DuPage Airport Authority, has made a public relations release-like statement of affirmative matters in its reply but does not deny any of the key allegations."<sup>24</sup> In addition, Scott Aviation states that the Airport Authority's argument is that its actions are based primarily in safety. However, the Complainant asserts that the Airport Authority provides no argument or evidence to show that any sort of fuel flowage fee is based in the desire for increased safety.<sup>25</sup>

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<sup>21</sup> FAA Exhibit 1, Item 5, page 5

<sup>22</sup> FAA Exhibit 1, Item 5, page 7

<sup>23</sup> FAA Exhibit 1, Item 5, pages 6 and 7

<sup>24</sup> FAA Exhibit 1, Item 5, page 1

<sup>25</sup> FAA Exhibit 1, Item 6, page 5

Scott Aviation continues to argue in its reply that the required \$1,000,000 environmental liability insurance policy may be necessary for large fueling operations, such as the DuPage Airport Authority, which has a fuel farm and runs a 24-hour fueling business, but not for small entities. Scott Aviation asserts that making the same \$1,000,000 environmental liability insurance policy a requirement for small entities "...is obviously meant to saddle self-fuelers of all types, kinds and sizes with the same fixed expenses that the Airport Authority has." Scott Aviation also states that there is no logical rationale for depositing the deductible amount with the Airport Authority. Scott Aviation argues that no reasoning for the deposit has been given.<sup>26</sup>

Scott Aviation also continues to argue that location restrictions on its fuel trucks, fuel truck permit fees, and fuel truck driver requirements are arbitrary and capricious. Specifically, Scott Aviation argues that the sole authority for denying Scott Aviation the right to park its refueling truck inside its own hangar is the Airport Authority, which passed ordinances dealing with self-fueling operations. Scott Aviation asserts that any such limitation on parking the fuel truck inside an aircraft hangar is "nonsensical and is meant merely to make using the fuel truck more difficult, and thereby to make self-fueling operations less economically viable."<sup>27</sup>

Scott Aviation contends that the requirements imposed on self-fueling by the Airport Authority represent an effort to force self-fuelers to abandon their self-fueling efforts. Scott Aviation asserts that the Airport Authority accomplishes this by making the requirements too complex and making self-fueling too expensive to continue. Scott Aviation argues that all of DuPage Airport Authority's restrictions on self-fueling are aimed at establishing a de facto monopoly on aeronautical activity in violation of the grant assurances.<sup>28</sup>

The DuPage Airport Authority did not file a rebuttal to Scott Aviation's reply as allowed in 14 CFR 16.23(f).

On June 15, 2001, the Director issued a Notice of Extension, extending the time for a Director's Determination to August 8, 2001.<sup>29</sup>

On August 10, 2001, the Director issued a Notice of Extension (Errata), extending the time for a Director's Determination to October 15, 2001.<sup>30</sup>

November 2, 2001, the Director issued a Notice of Extension, extending the time for Director's Determination to December 15, 2001, in order to obtain additional information from the DuPage Airport Authority pursuant to 14 CFR 16.29(b)(1).<sup>31</sup>

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<sup>26</sup> FAA Exhibit 1, Item 6, pages 6 and 7

<sup>27</sup> FAA Exhibit 1, Item 6, page 8

<sup>28</sup> FAA Exhibit 1, Item 6, page 11

<sup>29</sup> FAA Exhibit 1, Item 7

<sup>30</sup> FAA Exhibit 1, Item 8

<sup>31</sup> FAA Exhibit 1, Item 10

On November 2, 2001, FAA's Airport Compliance Division sent a letter to DuPage Airport Authority requesting additional information on airport operational expenses and costs covered by the \$0.25 fuel flowage fee. Specifically, the letter requested (a) a list of operational items and costs, both direct and indirect, covered by the fuel flowage fees charged to self-fueling entities in Fiscal Year (FY) 2000, and (b) the total number of gallons of aviation fuel pumped into aircraft on the Airport for (i) fuelers providing fueling service to the public and (ii) those individuals or entities self-fueling.<sup>32</sup>

On November 13, 2001, DuPage Airport Authority submitted a written response to the FAA's request for additional information. The Airport Authority stated that the fuel flowage fee charged to self-fueling entities, along with revenues from the airport's own fueling operations, is transferred into the DuPage Airport operating account and those monies are then used for airport operational expenses, including all direct and indirect expenses for fuel operations.<sup>33</sup>

The Airport Authority also stated that during FY 2000, it pumped 2,827,093 gallons of Jet A fuel and 445,125 gallons of 100 LL<sup>34</sup> fuel for public consumption. The Airport Authority noted that Scott Aviation, the only self-fueling entity during FY 2000, reported 41,502 gallons of Jet A fuel pumped during the months of November and December 2000.<sup>35</sup>

On December 19, 2001, counsel for the DuPage Airport Authority responded by letter to a telephone inquiry made by the FAA Airport Compliance Division. The inquiry regarded the rate-setting methodology for self-fueling operations at the Airport. In its response, the Airport Authority stated that the current fuel flowage fee of \$0.25 per gallon was recommended to the Airport Authority's Board of Commissioners by the Airport Authority's staff. The fee was adopted by ordinance effective February 1, 1998. The Airport Authority said the amount of the fee has not changed since its adoption. Additionally, the Airport Authority provided some historical financial data for its fuel operation for 1998, 1999, and 2000.<sup>36</sup>

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<sup>32</sup> FAA Exhibit 1, Item 10

<sup>33</sup> FAA Exhibit 1, Item 11

<sup>34</sup> LL means Low Lead fuel

<sup>35</sup> FAA Exhibit 1, Item 11. (The Airport Authority reported that Scott Aviation, the only self-fueler on the airport, pumped 384,889 gallons for FY2001. See Exhibit 1, Item 15.)

<sup>36</sup> FAA Exhibit 1, Item 12

The Airport Authority also affirmed that the estimated year-end FY 2001 financial reports for the airport and its fuel operations were consistent with the historical record. The Airport Authority asserts that, based on this historical financial data, the \$0.25 fuel flowage fee is below the net income per gallon achieved by the airport's fueling operation. For example, based on estimated revenue and expenses for 2001, the Airport Authority asserts the net income from its own fuel operation is equivalent to \$0.525 per gallon. The Airport Authority states that its estimated net income from its own fuel operation would be \$5,069,004 for 2001. The Airport Authority asserts that although this amount will contribute significantly to the Airport Authority's overall cost of operations and capital improvements at DuPage Airport, the airport will still have an estimated overall deficit in excess of \$1,800,000 for 2001.<sup>37</sup>

The Airport Authority concluded by stating that the \$0.25 per gallon fuel flowage fee charged for self-fueling is appropriate and is in conformity with all applicable Federal laws, regulations, and guidelines.

On January 15, 2002, the Director issued a Notice of Extension, extending the time for a Director's Determination to March 15, 2002.<sup>38</sup>

Also on January 15, 2002, FAA's Airport Compliance Division sent a letter to the Airport Authority requesting additional information on the reasonability of the \$0.25 fuel flowage fee. Specifically, the letter stated that the FAA needed additional information to determine whether the \$0.25 fuel flowage fee charged to self-fueling operations is reasonable and not unjustly discriminatory. The letter stated that while the Airport Authority had indicated the fee is necessary to cover the overall costs of the airport, the Airport Authority had not provided sufficient information for the FAA to determine whether or not the fuel flowage fee required self-fuelers to pay costs properly allocable to other users or user groups.<sup>39</sup>

On February 15, 2002, the Airport Authority responded to the FAA's January 15, 2002, letter and provided information on its rate setting methodology. The letter stated in part that the Airport Authority used a cost allocation methodology that includes the following assumptions: (a) the cost allocation methodology may not require any aeronautical user or user group to pay costs properly allocable to other users or user groups; (b) costs associated with the Airport Authority's proprietary exclusive fuel operation cannot be included in the fuel flowage fee; and (c) the Airport Authority may not include costs of facilities leased on a preferential or exclusive use basis to other aeronautical users in the fuel flowage fees.<sup>40</sup>

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<sup>37</sup> FAA Exhibit 1, Item 12

<sup>38</sup> FAA Exhibit 1, Item 13

<sup>39</sup> FAA Exhibit 1, Item 14

<sup>40</sup> FAA Exhibit 1, Item 15

On May 8, 2002, the Director issued a Notice of Extension extending the date for a Director's Determination to June 15, 2002.<sup>41</sup>

#### **IV. ISSUES**

Upon review of the allegations brought forth in the Complaint and the relevant airport-specific circumstances summarized above in the Background Section, the FAA has determined that the following issues require analysis in order to provide a complete review of the Sponsor's compliance with applicable Federal law and FAA policy:

Whether the Airport Authority's requirements for self-fueling aircraft are unreasonable and constitute unjust discrimination by the Airport Authority in violation of Title 49 U.S.C. § 47107 (a)(1) and (5) and Federal Grant Assurance #22, regarding unjust economic discrimination.

Whether the Airport Authority has exercised its proprietary exclusive fuel operation in such a manner as to constitute an impermissible grant of an Exclusive Right in violation of Title 49 U.S.C. §§ 40103(e), 47107(a)(4) and related Federal Grant Assurance #23.

Our decision in this matter is based on the applicable Federal law and FAA policy, our review of the arguments and supporting documentation submitted by the parties, and the Administrative record reflected in the attached FAA Exhibit 1.

#### **V. APPLICABLE LAW AND POLICY**

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

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<sup>41</sup> FAA Exhibit 1, Item 16

FAA Order 5190.6A, *Airport Compliance Requirements*, (hereinafter Order) provides policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to Federally obligated airport owners' compliance with their grant assurances.

### **A. The Airport Grant Assurances**

As a condition precedent to providing airport development assistance under the Airport and Airway Improvement Act of 1982 (AAIA), the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 U.S.C. § 47107(a), *et seq.*, sets forth requirements to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. These sponsorship requirements are included as assurances in every airport improvement grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal government.

Three grant assurances apply directly to this complaint. These assurances relate to (1) Airport Owner Rights and Responsibilities, (2) Use on Reasonable and Not Unjustly Discriminatory Terms, and (3) The Prohibition of the Establishment of an Exclusive Right

#### **(1) Airport Owner Rights and Responsibilities**

Assurance 5, "Preserving Rights and Powers," of the prescribed grant assurances implements the provisions of the AAIA, 49 U.S.C. § 47107(a), *et seq.*, 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."

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

#### **(2) Use on Reasonable and Not Unjustly Discriminatory Terms**

Assurance 22, "Economic Nondiscrimination," of the prescribed grant 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 reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport." [Assurance 22(a)]

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

"...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)]

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

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

Subsection (h) qualifies 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 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 reasonable terms without unjust discrimination. [See Order, Secs. 4-14(a)(2) and 3-1.]

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 reasonable terms, and without unjust discrimination. [See Order, Sec. 4-13(a).]

The Order also provides "...an aircraft operator, otherwise entitled to use the landing area, may tie-down, adjust, repair, refuel, clean and otherwise services its own aircraft, provided it does so with its own employees in accordance with reasonable rules or standards of the sponsor relating to such work." [See Order, Sec 4-15(a).]

### (3) The Prohibition of the Establishment of an Exclusive Right

Section 308(a) of the FAA Act, 49 U.S.C. § 40103(e), provides, in relevant part, 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."

Section 511(a)(2) of the AAIA, 49 U.S.C. § 47107(a)(4), similarly provides, in pertinent part, that "there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

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

"...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public...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 the Order, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities subject to the statutory prohibition against exclusive rights. While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right to the entity or entities not subject to the same requirements or standards. However, a sponsor is under no obligation 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, Sec.3-9 (e)]

Servicing one's own aircraft is not an aeronautical activity that can be preempted by the airport owner that elects to exercise the exclusive right to sell fuel. Quite apart from the prohibition against exclusive rights, the sponsor of a Federally obligated airport is required to operate the airport for the use and benefit of the public on fair and reasonable terms. It may not, as a condition for the use of its airport, impose unreasonable requirements on aircraft operators to procure parts, supplies or services from specified sources. It can however, require the self-fueler, both individuals and operators, to pay the same fuel flowage fee as those operators on the airport who provide fueling services to the public. As long as the aircraft operators do not attempt to offer commodities or services to others, they have a right to furnish their own supplies and to do what is necessary to their aircraft in order to use the facilities of a public use airport. [See Order, Sec. 3-9(e)(2)]

The leasing to one enterprise of all available airport land and improvements planned for aeronautical activities 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, Sec. 3-9(c).]

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).]

### **B. The FAA Airport Compliance Program**

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

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

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

## VI. ANALYSIS

We conducted our review and analysis to determine whether the Airport Authority is currently in violation of its Federal obligations regarding unjust economic discrimination with respect to the self-fueling requirements imposed on Scott Aviation and whether the the Airport Authority has exercised its proprietary exclusive fuel operation in such a manner as to constitute an impermissible Exclusive Right.

Federal Grant Assurance #22 provides protection from unjust economic discrimination to aeronautical activities only. Federal Grant Assurance #22(f) requires that an airport 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:

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 reasonable terms, and without unjust discrimination. [See Order, Sec. 4-13(a)] The Sponsor is expected to manage the airport efficiently and safely at all times.

Federal Grant Assurance #23 is designed to prevent the granting of an exclusive right either by an express agreement, or by the imposition of unreasonable standards or requirements, or by any other means which exclude or debar another from enjoying or exercising a like power, privilege or right at a Federally-assisted airport. The "Exclusive Rights," grant assurance requires, in pertinent part, that the sponsor of a Federally obligated airport:

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

In this case, the Airport Authority has assessed a \$0.25 fuel flowage fee, as well as other requirements, relating to self-fueling. Although the Complainant objects to these requirements, it has been complying with each one.

Specifically, Scott Aviation objects to six requirements imposed by the Airport Authority for self-fueling: (a) a fuel flowage fee of \$0.25 per gallon, (b) a requirement to use off-airport parking for its fuel truck, (c) a \$1,000,000 environmental liability insurance policy, (d) a deposit to cover the deductible on the environmental liability insurance policy, (e) a requirement to obtain hazardous materials licenses for drivers of the fuel truck, and (f) a \$5,000 annual permit fee based on the weight of the truck.<sup>42</sup>

<sup>42</sup> FAA Exhibit 1, Item 3, pages 2 and 3

The Airport Authority denies that its requirements<sup>43</sup> are unjustly discriminatory. It stresses that these standards and rules address airport safety issues. The Airport Authority also argues that it recognizes the right of aircraft owners and operators to self-fuel their own aircraft, but the Airport Authority has an obligation to regulate self-fueling based on safety. The Airport Authority also notes that all profit from the airport's own fueling activities is used to fund airport operations.<sup>44</sup>

Against this background, the FAA considered the issues presented in the Issues Section above:<sup>45</sup>

(1) Whether the Airport Authority's requirements for self-fueling aircraft are unreasonable and constitute unjust discrimination by the Airport Authority in violation of Title 49 U.S.C. § 47107 (a)(1) and (5) and Federal Grant Assurance #22, regarding unjust economic discrimination.

(2) Whether the Airport Authority has exercised its proprietary exclusive fuel operation in such a manner as to constitute an impermissible grant of an Exclusive Right in violation of Title 49 U.S.C. §§ 40103(e), 47107(a)(4) and related Federal Grant Assurance #23.

### Issue (1)

As discussed above, Grant Assurance #22(f) provides that the 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. Consistent with this grant assurance, FAA policy provides, in relevant part, that "...an aircraft operator, otherwise entitled to use the landing area, may tie down, adjust, repair, refuel, clean, and otherwise service its own aircraft, provided it does so with its own employees in accordance with reasonable rules or standards of the sponsor relating to such work."<sup>46</sup>

<sup>43</sup> Self-fueling regulations are reflected in several airport documents: DuPage Airport Minimum Standards (9/13/99), Ordinances 1999-135 (9/13/99) and 1998-122 (1/12/98), and the Rules and Regulations adopted July 8, 1996. Throughout the Complaint, Scott Aviation does not specifically refer to documents other than Ordinances 1999-135 and 1998-122. In its Reply, the Airport Authority provides these documents for review.

<sup>44</sup> FAA Exhibit 1, Item 5, page 3

<sup>45</sup> During the Analysis, the Director evaluated the allegations of violations of Grant Assurances #22 and #23. Throughout the pleadings, both parties have repeatedly referred to FAA's internal Order, 5190.6A, *FAA Compliance Requirements* (Order). As stated previously, 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. The Order analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

<sup>46</sup> FAA Order 5190.6A, Sec. 4-15(a).

The Complainant alleges that the Airport Authority, although allowing self-fueling activities on the airport, requires that tenants comply with "very specific, restrictive, and unfair criteria for allowing individuals and other entities on the field to fuel their own airplanes."<sup>47</sup>

The Complainant objects to six (6) specific criteria for self-fueling on the airport. Following is an analysis of each requirement that Scott Aviation alleges violates the Airport Authority's Federal obligations.

#### **A. Airport Fuel Flowage Fee**

The Complainant objects to paying a \$0.25 fuel flowage fee for each gallon of fuel pumped. The Authority argues that this fee is reasonable based on costs associated with the operation of the airport.

We have reviewed the Airport Authority's February 15, 2002, response to our questions regarding airfield costs, the cost of the fuel operation at the airport, and the number of gallons of fuel consumed by airfield operators at DuPage Airport.<sup>48</sup> The Airport Authority has indicated that 100 % of costs for the Field Maintenance Department, which maintains the entire airfield, including all runways, taxiways, ramps, turf areas, and lighting system, are included in airfield costs. In addition, 75% of equipment maintenance, 30% of administrative costs, and 25% of accounting costs are included in the total airfield cost. We accept this allocation by the DuPage Airport Authority.

The Airport Authority has indicated that capital expenditures for airfield improvement should also be included in the airfield cost. We reject this position. Capital expenditures should be capitalized and depreciated over a period of time. The applicable portion of the depreciation expense could be included in the airfield cost annually.

Based only on the accepted costs for the airfield, and rejecting capital expenditures, the Airport Authority has reported pre-audit actual airfield expense for 2001 at \$1,107,339.

In allocating airport costs, the following three issues prevail:

- 1) The cost allocation methodology may not require any aeronautical user or user groups to pay costs properly allocable to other users or user groups;
- 2) Costs associated with the Airport Authority's proprietary exclusive fuel operation cannot be included in the fuel flowage fee for those who self fuel; and,

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<sup>47</sup> FAA Exhibit 1, Item 3

<sup>48</sup> FAA Exhibit 1, Item 15

- 3) The Airport Authority may not include costs of facilities leased on a preferential or exclusive use basis to other aeronautical users in the fuel flowage fee.

Airfield costs may be allocated to all airfield users, including those who self fuel. One acceptable methodology for allocating airfield costs is to distribute the cost evenly among all airfield users based on the number of gallons of fuel sold or consumed by each. Using this methodology, the total airfield cost of \$1,107,339 would be divided by the total gallons of fuel used. The Airport Authority reported selling 2,939,690 gallons of fuel (2,460,543 gallons of Jet A fuel and 479,147 gallons of 100LL fuel), and reported that self-fuelers consumed 384,889 gallons of fuel.<sup>49</sup> Dividing the total of 3,324,579 gallons by the total airfield cost results in a per-gallon fee of \$0.33. This fee may be properly charged to all airfield users as long as this fee alone is relied upon to cover all airfield costs.

For the same period, the Airport Authority has reported the cost of fuel operations at \$1,288,166. The cost of fuel operations may be allocated only to those airfield users who benefit from the fuel operations by purchasing fuel from the airport. Dividing this cost by the 2,939,690 gallons of fuel sold by the Airport Authority results in a per gallon fee of \$0.44 to cover the cost of the fuel operations. This fee may be reasonably charged to airfield users who purchase fuel from the Airport Authority. This would be in addition to the \$0.33 fee per gallon for airfield costs.

The Airport Authority has assessed a fuel flowage fee for self-fuelers at \$0.25 per gallon. This fee is below the reasonable allocation of \$.33 per gallon to cover the accepted airfield costs. Based on our calculations, the fuel flowage fee does not appear to include an assessment for the airport's fueling operation. The Airport Authority is not required to use the methodology presented here in assessing fees, and may use any acceptable methodology, provided one group of aeronautical users is not subsidizing another group.

The Airport Authority reported that self-fueler Scott Aviation contributed a significantly smaller share of the airfield costs for FY 2001. Of the four largest consumers of fuel on the airport, three contributed a total of \$330,332, paying approximately \$.49 per gallon toward the airfield cost. (Since this is reported as "net contribution," we assume the cost of the fuel operation is not included in this amount.) The Airport Authority reports that Scott Aviation, by paying only the \$0.25 fuel flowage fee, contributed \$95,719<sup>50</sup> toward airfield costs when it would have contributed as much as \$188,596 had it purchased fuel directly from the Airport Authority. Based on this data, the Airport Authority determined that self-fueler Scott Aviation saved \$92,374 for fiscal year 2001.

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<sup>49</sup> FAA Exhibit 1, Item 15

<sup>50</sup> Using this calculation ( $\$95,719/\$0.25$ ), the number of gallons pumped by Scott Aviation, the only self-fueler, would have been 382,876 gallons. However, the Airport Authority reported self-fuelers pumped 384,889 gallons for FY2001. We used 384,889 gallons in our calculations throughout this review.

This argument fails to consider the cost of fuel paid by Scott Aviation to whatever fuel source used. Regardless, it has no bearing on the outcome of this determination. An aeronautical user is allowed to self-fuel and cannot be forced or coerced into purchasing fuel from a propriety exclusive fuel operation.

Based on a review of the record and analysis of additional data from the DuPage Airport Authority provided at our request, we have determined that the \$0.25 fuel flowage fee charged to self-fueler Scott Aviation is reasonable and is not discriminatory.

### **B. Off Airport Parking of Fuel Trucks**

In its Complaint, Scott Aviation states that the Airport Authority's Ordinance 1999-135 mandates that its fuel truck be parked off airport property, even though the DuPage Airport Authority parks its own fueling equipment in areas built with Federal assistance. Scott Aviation goes on to argue that the Airport Authority does not cite any regulations or statute that would prohibit the Authority from permitting Scott Aviation from parking its fuel truck in its hangar. Scott Aviation alleges that there is no such statute or regulation mandating this requirement, other than Ordinance 1999-135. Scott Aviation also believes that it should not be prohibited from parking fuel trucks in the hangar when there are aircraft parked inside carrying much larger amounts of fuel.

Scott Aviation further argues that it should not be prohibited from parking fuel trucks on Federally funded public ramps on the grounds of safety when the Airport Authority uses the ramp to park its own vehicles.

In its Answer, the Airport Authority does not dispute that it requires self-fuelers to park their fuel trucks off airport property when the trucks are not in use. Rather, the Airport Authority asserts that Scott Aviation does not have sufficient leased property around its building for parking fuel trucks, and parking in its building would violate state and local fire codes.

The Airport Authority's Ordinance 1999-135 states in part that anyone desiring to exercise the owner's right, under the Federal Aviation Administration's Airport Compliance Requirements, to self fuel aircraft must provide as a minimum the following:

- Proof of ownership of any [refueling vehicle] weighing less than 35,000 lbs, properly licensed by the State of Illinois to transport fuel, and equipped with a meter certified to measure gallons pumped;
- Proof that the person(s) who will be transporting fuel and performing the fueling of aircraft is the owner of the aircraft or an employee of the owner of the aircraft, and is properly licensed by the State of Illinois to transport fuel.
- Off Airport storage for the refueling truck.

We do not agree with Scott Aviation when it asserts that it should be permitted to park its fuel truck, when not in use, in its hangar or on public ramp areas used by the Authority to park its fuel trucks.

We find Scott Aviation's contention that it should be permitted to store the fuel truck in the hangar simply because aircraft also stored in the hangar carry much larger amounts of fuel to be without merit. The National Fire Protection Association's Standard for Aircraft Fuel Servicing (NFPA 407, 3-18) states, "Parking areas for unattended aircraft fuel servicing tank vehicles shall be arranged to provide the following: ... A minimum of 50 feet from any parked aircraft and buildings other than maintenance facilities and garages for fuel servicing tank vehicles."

Additionally, we find that the Authority is under no Federal obligation to allow Scott Aviation to park its unattended fuel truck on Federally funded public aircraft ramp, even though the Authority parks its fuel truck on the same.

Scott Aviation's argument fails to consider significant differences between its fueling operation and that of the Authority. The Authority, as the airport proprietor, is providing aircraft fueling services to the public. All profits received by the Authority from its fuel sales must be used for the capital and operating costs of the airport as required by Federal law.

The Director is not persuaded that the requirement defined in the Ordinance to park fuel trucks not owned by the Airport Authority off the airport is unreasonable. The Director agrees with the Airport Authority that airport sponsors can restrict fueling or certain other types of equipment to specific locations. Although Scott Aviation argues that it should be able to park its fuel truck on the public ramp area, the Airport Authority is under no obligation to allow this.

The Director is not persuaded that Scott Aviation is being unjustly discriminated against by the Airport Authority's refusal to allow it to park its fuel truck in its aircraft hangar.

### **C. Environmental Liability Insurance Coverage**

In its Complaint, Scott Aviation objects to the requirement imposed by the Airport Authority that airport tenants who self-fuel must maintain insurance coverage of \$1,000,000 per occurrence for environmental damage. Scott Aviation argues that the restriction is contrary to FAA Order 5190.6A....<sup>51</sup> Scott Aviation also questions the legitimacy of the Ordinance directive requiring self-fuelers to secure a bond for the coverage of the deductible.<sup>52</sup>

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<sup>51</sup> FAA Exhibit 1, Item 3, page 3

<sup>52</sup> FAA Exhibit 1, Item 3, page 3

The Airport Authority stated that it believes \$1,000,000 insurance coverage is necessary for the protection of the public interest in the event of environmental damage. The Airport Authority also argues that the requirements imposed on Scott Aviation are modest compared to its own insurance coverage. The Airport Authority maintains a \$200 million general liability policy for operations, \$1 million for fuel storage liability, a \$5 million policy for environmental damage, and a \$50 million policy covering fuel and fuel trucks from its supplier.

Scott Aviation included in the pleadings a list of the aircraft it owns or leases. This list shows that Scott Aviation fuels 14 aircraft, including 10 jets.<sup>53</sup> These aircraft have the capability of holding from 4,000 to 10,000 pounds of fuel. A fuel spill resulting from fueling an aircraft of this size could have a significant impact on the local environment. It is reasonable to expect Scott Aviation to provide some level of insurance to protect the airport in the event of a fuel spill. It is also reasonable for the Airport Authority to require an insurance level that would be sufficient to cover the type of environmental damage that could result from an operation as large as Scott Aviation. Scott Aviation provides no evidence to establish that the level of insurance required by the Authority is unreasonable given the types of aircraft being refueled by Scott Aviation.

Moreover, there is no evidence to suggest this type of insurance coverage, in this amount, is not obtainable. In fact, the record shows that Scott Aviation *has* obtained the liability insurance in the required amount, as well as posted the bond in the amount of the deductible. The Director cannot find that the level of insurance required is unobtainable, or is so high that it is cost prohibitive.

#### **D. Deposit of Insurance Deductible**

Scott Aviation objects to having to post a bond for the deductible amount associated with the \$1,000,000 environment insurance policy, especially since the Airport Authority does not have this same requirement for itself.

An October 16, 2000, letter from Scott Aviation's counsel to the DuPage Airport Authority states, "...the ordinance requires that the refueller provide a deposit or bond equal to the deductible of the environmental damage insurance. While the airport asserts that it has purchased insurance, which includes coverage for environmental damage, it does not post a bond or deposit in an amount equal to the deductible."<sup>54</sup> In its Answer to the Complaint, the Airport Authority is silent on the allegation that it has not posted a bond equal to its own deductible for its environmental liability insurance policy.

The fact that the Airport Authority has not posted a bond does not raise questions on its ability to have appropriate funds available, as needed, for undertaking a comprehensive response to a spill or incident. A tenant of the Airport, on the other hand, may not have

<sup>53</sup> FAA Exhibit I, Item 3, Ex. C

<sup>54</sup> FAA Exhibit I, Item 3, Ex. D

funds as readily available to cover the costs associated with a fuel spill or incident. Therefore, it is reasonable, even prudent, for the Airport Authority to require a tenant to post a bond in an amount sufficient to cover the insurance deductible, as well as to guarantee that appropriate insurance coverage is in place and could be invoked if necessary. This is an acceptable way for an airport sponsor to ensure that any costs relating to environmental damage resulting from the acts of airport tenants or their agents are handled appropriately.

The Director is not persuaded that it is unreasonable for the Airport Authority to require a bond equivalent to the amount of the deductible of the insurance policy. Again, the record shows that Scott Aviation *has* posted the appropriate bond. There is no evidence in the record to suggest that this type of bond is not obtainable or that the amount of the bond is excessively high for the coverage provided.

#### **E. Hazardous Material License**

Scott Aviation objects to the requirement that the drivers of its fuel truck(s) must obtain hazardous materials licenses, especially since drivers of fuel trucks for the Airport Authority do not have the same requirement.

Scott Aviation states that while its fuel truck drivers are required to have a hazardous materials license under Ordinance 1999-135, there is no comparable requirement for such licensing for fuel truck drivers employed by the Airport Authority. Scott Aviation goes on to argue, "there is no justification or rational basis for these discriminatory and unequal restraints."<sup>55</sup> Scott Aviation further argues that these restrictions impose an unreasonable economic burden on its ability to self-fuel and forces self-fuelers to abandon their efforts as too complex and too expensive to pursue.<sup>56</sup>

In its Answer, the Airport Authority contends that since the drivers of the Airport Authority's fuel trucks do not leave the airport premises, those drivers are not required to have commercial driving licenses or hazardous materials licenses as is required for drivers coming from off-airport locations and as mandated by state law. The Airport Authority argues that it trains, screens, monitors, and controls its employees to ensure safe actions and compliance with applicable laws and procedures.<sup>57</sup>

Scott Aviation asserts that if it were allowed to park its fuel truck on Airport property, on many occasions the fuel truck would not need to leave Airport property. "This would then place Scott Aviation's tanker truck driver in the same category as the driver of the Airport Authority's fuel truck..."<sup>58</sup>

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<sup>55</sup> FAA Exhibit 1, Item 3, page 2

<sup>56</sup> FAA Exhibit 1, Item 6, pages 10 and 11

<sup>57</sup> FAA Exhibit 1, Item 5, page 7

<sup>58</sup> FAA Exhibit 1, Item 6, page 10

The Airport Authority disputes Scott Aviation's contention that the licensing requirement is an attempt to place an unreasonable burden upon tenants that self-fuel. The Airport Authority also disputes Scott Aviation's assertion that the licensing requirements are contrary to law, stating that its self-fueling regulations, similar to the Airport Authority's other standards and regulations, are appropriate measures under the FAA Order designed to ensure the protection and general safety of a heavily used aviation facility. The Airport Authority also notes, "Fuel trucks coming from off-airport locations are required by state law to have drivers with Commercial Driving Licenses and hazardous materials licenses. Thus, the licensing requirement is not an attempt by the Airport Authority, as Scott Aviation asserts, to place an unreasonable burden upon self-fuelers."<sup>59</sup>

In conducting our review, we compared and considered the requirements for these two groups of fuel truck drivers.

- 1) The Airport Authority indicates it has developed its own training and monitoring plan for its drivers. In addition, because these drivers transport fuel only on the Airport, and do not drive on public roads, state licensing requirements do not apply.
- 2) Scott Aviation has not described a plan for training or monitoring its drivers independently of state regulations. In addition, Scott Aviation drivers transport fuel both on and off the airport. The State of Illinois requires these drivers to meet licensing requirements for the transportation of hazardous materials.

Based on these two different descriptions, it seems reasonable that the requirements would be different for each. However, Scott Aviation argues that if it were allowed to park its fuel truck on the Airport, the requirement for commercial licensing would not be a factor. This assumes that Scott Aviation drivers would *never* be driving fuel trucks on public roads. Since Scott Aviation states that "on many occasions" the fuel truck would not need to leave Airport property, it leaves open the possibility that its fuel truck would need to leave airport property at least sometimes. If so, the drivers would be required to comply with all applicable state laws for commercial drivers transporting hazardous materials.

Unless Scott Aviation is purchasing fuel directly from the Airport Authority, there will be an issue of transporting fuel from off-airport to on-airport. Either Scott Aviation or another fuel provider will need to bring fuel onto the airport for Scott Aviation's use. In either case, the driver will need to meet the requirements established by the State of Illinois for transporting hazardous materials on public roads, and will have to comply with Airport Authority requirements.

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<sup>59</sup> FAA Exhibit 1, Item 5, page 7

The Director is not persuaded that the requirement for Scott Aviation fuel truck drivers to obtain hazardous materials licenses is unreasonable, even though the Authority's drivers do not have this same licensing requirement.

#### **F. Fuel Truck Permit Fees**

In its Complaint, Scott Aviation objects to the fuel truck permit fee charged by the Airport Authority. The Airport Authority charges \$1,000 for an annual permit fee for vehicles weighing less than 30,000 pounds gross weight and \$5,000 for vehicles weighting 30,000 pounds or more. Scott Aviation alleges that there is no rational basis for the fee, especially since the Airport Authority does not assess a fee against its own vehicles.<sup>60</sup> In further support of this contention, Scott Aviation asserts that aircraft weighing twice the weight of a fuel truck park on the same aprons and ramps.

Scott Aviation contends that DuPage Airport Authority cites the damage that "may be caused" by heavy trucks on pavement in justifying the permit fee, based on weight, for fuel vehicles. The Scott Aviation fueling truck weighs approximately 35,000 pounds, and so is subject to the \$5,000 permit fee. However, Scott Aviation asserts that airplanes similar to the Gulfstream G-2 often frequent the ramp areas and other concrete pavement the Authority wants to protect. Scott Aviation states the Maximum Ramp Weight (MRW) of the Gulfstream aircraft is 62,300 pounds, approximately two times the weight of Scott Aviation's fuel truck. The ramps and taxiways of DuPage Airport are rated by the amount of weight load they can carry. According to Scott Aviation, the maximum weight restriction on all these areas is 90,000 pounds, almost three times the weight of its fuel truck.<sup>61</sup>

Scott Aviation argues that "with the weight limits on the pavement three times the weight of the fully laden vehicle, and regular traffic on the same concrete more than twice as heavy as the fueling truck, any reasonable restriction... would certainly allow [fueling trucks] without such a large annual penal tax."<sup>62</sup>

In its Answer, the Airport Authority contends that the extensive damage that can be caused by heavy trucks, like fuel tankers, to concrete pavement is well known. The Airport Authority cites FAA Order, Section 3-9(e)(4)(d), noting that "weight limitations should be imposed on delivery trucks (including fuel trucks)... where needed to protect airport roads and paving." The Airport Authority admits it does not charge itself a permit fee. However, the Airport Authority maintains the airport, including ramp repairs, so there is no need to pay itself a fee to cover these repairs. In addition, the Airport Authority uses all profit from fueling operations to fund the maintenance of the airport.

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<sup>60</sup> FAA Exhibit 1, Item 3, page 3

<sup>61</sup> FAA Exhibit 1, Item 6, pages 8 and 9

<sup>62</sup> FAA Exhibit 1, Item 6, page 9

Under these circumstances, the Airport Authority asserts the imposition of a permit fee for heavy fuel trucks is appropriate.<sup>63</sup>

We agree that the imposition of a permit fee for heavy fuel trucks is appropriate. The permit fee, plus the fuel flowage fee, contributes to the overall revenue of the airport, which is used to support airport operations. However, the Airport Authority's methodology in arriving at the permit fee amount is not transparent.

The Airport Authority has not provided a basis for establishing the substantially higher rate for fuel trucks weighing 35,000 pounds as opposed to trucks weighing 29,999 pounds.<sup>64</sup> In fact, comparing these two weights, the Airport Authority charges 400 percent more in permit fees for just 17 percent more in weight. The steep increase in price for the relatively small increase in weight could be construed as excessive under certain circumstances.

Table 1 below provides a comparison of the percent increase in truck weight and the percent increase in permit fees.

**Table 1: Comparison of the Percent Increase in Truck Weight and Permit Fees**

Scenario	A Fuel Truck Weight in Pounds	B Annual Permit Fee Based on Weight	C Fee per Pound [col. B / col. A]
#1	29,999	\$1,000	\$0.0333
#2	35,000	\$5,000	\$0.1429
Percent Increase in Fuel Truck Weight [(2a - 1a) / (1a)]	16.67%		
Percent Increase in Total Annual Permit Fee Based on Weight [(2b - 1b) / (1b)]		400.00%	
Percent Increase in Fee per Pound [(2c - 1c) / (1c)]			329.13%

<sup>63</sup> FAA Exhibit 1, Item 5, pages 6 and 7

<sup>64</sup> We used 29,999 pounds for our comparison because the record reflects a set fee was established for trucks weighing less than 30,000 pounds and another fee for trucks weighing 30,000 pounds or more.

We considered some approaches the Airport Authority might have used in setting the permit fee for the different weights in our comparison. Using three different approaches, we calculated a fee for the 35,000 pound fuel truck between \$1,165.50 and \$1,1714.64, substantially less than the \$5,000 fee imposed by the Airport Authority. Even the highest fee under the three approaches was less than double the fee for the first 29,999 pounds. The three approaches we used are shown below:

- 1) *Setting the total permit fee based on a per-pound fee established for the first 29,999 pounds.*

We multiplied the per-pound fee of \$0.0333 [see Table 1, column C] by the weight of Scott Aviation's fuel truck (35,000 pounds). Using this approach, the annual permit fee for Scott Aviation's fuel truck would be \$1,165.50.

- 2) *Adding to the base fee of \$1,000 an amount equal to the percent increase in weight over 29,999 pounds.*

We multiplied the percent increase in weight (16.67%) by the flat fee of \$1,000 to determine the add-on amount, which came up to \$166.70. We then added this to the \$1,000 flat fee. Using this approach, the annual permit fee for Scott Aviation's fuel truck would be \$1,166.70.

- 3) *Adding to the base fee of \$1,000 an amount calculated using the higher fee-per-pound for the last 5,001 pounds.*

We multiplied the higher per-pound rate of \$0.1429 [see Table 1, column C] by 5,001 pounds to determine the add-on, which came up to \$714.64. We then added this to the \$1,000 flat fee. Using this approach, the annual permit fee for Scott Aviation fuel truck would be \$1,714.64.

There are many methods the Airport Authority might adopt in determining a reasonable permit fee based on weight. We are not advocating any particular approach, and we recognize the approaches used in our analysis were somewhat superficial based on the limited information we had available to us. However, based on this analysis, the permit fee established by the Airport Authority does not appear to be closely tied to the weight of the vehicle.

Absent any evidence to support the steep increase from \$1,000 for 29,999 pounds to \$5,000 for 30,000 pounds or higher, the fuel truck permit fee has the potential to result in the assessment of unreasonable and unjustly discriminatory rates among self-fuelers.

We do not conclude, however, that the Complainant was, in fact, subjected to an unreasonable and unjustly discriminatory fee when the Airport Authority charged the

Complainant \$5,000 for the permit fee. The permit fee, in addition to the fuel flowage fee, pays for Scott Aviation's shared use of the airfield. As discussed more fully above, we calculated that the total airfield cost results in a per-gallon fee of \$0.33 that may be properly charged to all airfield users. However, the Respondent charged Scott Aviation only \$0.25 per gallon. The permit fee could be used to make up the difference between \$0.25 and \$0.33 per gallon. Dividing the \$5,000 permit fee charged to Scott Aviation by the total number of gallons of fuel pumped by Scott Aviation (384,889 gallons) and adding the result to the fuel flowage fee, the total cost per gallon charged to Scott Aviation is approximately \$0.263; or \$0.067 below the \$0.33 that the Respondent could have charged Scott Aviation.

While the steep increase in the permit fee could, on its face, result in unjust discrimination among self-fuelers by allocating a disproportionate share of the airfield costs to those self-fuelers using fuel trucks weighing over 29,999 lbs., the record reflects that Scott Aviation is the only self-fueler at the Airport. Scott Aviation does not argue that another entity at the Airport enjoys the lower permit fee of \$1,000. Consequently, we conclude that the Respondent is not currently engaging in unjust discrimination against the Complainant.

The Airport Authority is encouraged, however, to review its current pricing methodology and to reassess the reasonableness of its permit fee structure to ensure the Authority remains in compliance with its Federal obligations. Under different circumstances, this disparity in permit fee charges – without a transparent methodology for arriving at such a difference – could result in a future finding that the Airport Authority has unjustly discriminated against a complainant. For example, should a complainant paying a \$5,000 permit fee show that the Airport Authority has charged another self-fueler the lower permit fee of \$1,000, it could appear on its face that the Authority has unjustly discriminated against the complainant paying the higher fee.

The Airport Authority should also have sufficient controls to ensure that the total cost of the fuel truck permit plus fuel flowage fees do not exceed the maximum allowable airfield costs properly allocable to aeronautical users.

## Issue (2)

Whether the Airport Authority has exercised its proprietary exclusive fuel operation in such a manner as to constitute an impermissible grant of an Exclusive Right in violation of Title 49 U.S.C. §§ 40103(e), 47107(a)(4) and related Federal Grant Assurance #23.

Scott Aviation has contended that the Airport Authority's onerous self-fueling restrictions will "divert Scott's refueling activities to the commercial operation owned by the Airport

Authority” and this “amounts to the establishment of an exclusive monopoly of an aeronautical activity which is contrary to law.”<sup>65</sup>

Airport sponsors are allowed to exercise proprietary exclusive fueling operations. Under the "proprietary exception" the owner of a public-use airport may elect to provide any or all of the aeronautical services needed by the public at the airport. The statutory prohibition against exclusive rights, as detailed in 49 U.S.C. §§ 40103(e) and 47107(a)(4) and Grant Assurance #23, does not apply to these owners and they may exercise, but not grant, the exclusive right to conduct any aeronautical activity. [See FAA Order 5190.6A (3-9)(d)] Grant Assurance #22(g) states, "In the event the sponsor itself exercises any of the rights and privileges referred to in [assurance 22], the services involved will be provided on the same conditions as would apply to the furnishing of such services by commercial aeronautical service providers." If the airport owner reserves unto itself the exclusive right to sell fuel, it can prevent an aeronautical tenant from selling fuel to others, but it must deal reasonably in permitting such tenant to refuel its own aircraft. It is consistent with FAA policy and the grant obligations for an airport sponsor to exercise a proprietary exclusive on fuel sales.

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 qualifications and minimum standards upon those who engage in aeronautical activities, the FAA has taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [See e.g. Pompano Beach v FAA, 774 F.2d 1529 (11th Cir., 1985)]

Compliance with Grant Assurance #22(f) requires that an airport 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. If the Airport Authority imposed unreasonable requirements on Scott Aviation in violation of Grant Assurance #22, the exclusive right prohibition could be invoked against the Authority, putting it in violation of its Federal obligations and grant assurances.

As stated above, the statutory prohibition against exclusive rights does not apply to a proprietary exclusive fueling operation. Having said that, however, an airport sponsor must deal reasonably to permit aeronautical tenants to self-fuel their own aircraft. Accordingly, it is impermissible for an airport sponsor to enact overly restrictive requirements on self-fueling in an attempt to divert self-fuelers to the airport's own

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<sup>65</sup> FAA Exhibit 1, Item 3, ex. D

proprietary exclusive fueling operation. This would result in an improper exercise of the proprietary exclusive and could place the airport sponsor in non-compliance.

The Director concluded under Issue (1) above that the Airport Authority's restrictions on self-fueling did not rise to a level of being unjustly discriminatory. Consequently, Scott Aviation has failed to make a showing that the Airport Authority improperly exercised its proprietary exclusive in such a manner as to constitute an impermissible constructive grant of an Exclusive Right in violation of Title 49 U.S.C. §§ 40103(e), 47107(a)(4) and related Federal Grant Assurance #23 to the Airport Authority.

## VII. FINDINGS AND CONCLUSIONS

Upon consideration of the pleadings and other submissions by the parties, the entire record herein, and the applicable law and policy, and for the reasons stated above, the FAA Office of Airport Safety and Standards has determined that the Complainant has not been denied the opportunity to self-fuel his aircraft. Although the record suggests the methodology for arriving at the fuel truck permit fee is not transparent, the Director does not find that this isolated instance rises to a level that would compel this office to find the Authority to be in violation of its Federal obligations currently. There is no record evidence to suggest the minimum standards for self-fueling are, or would be, applied differently to different tenants. Therefore, the Director finds as follows:

- The Airport Authority has not unjustly discriminated against the Complainant through the application of its minimum standards for self-fueling, and is not in violation of Federal Grant Assurance #22 regarding unjust economic discrimination.
- The Airport Authority is currently in compliance with the exclusive rights prohibition, 49 U.S.C. § 40103(e), 49 U.S.C. § 47107(a)(4), and Federal Grant Assurance #23 and is not exercising its proprietary exclusive fuel operation in an improper manner.

These Determinations are made under Sections 313(a), 1002(a) and 1006(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 40103(e), 44502, 40113, 40114, 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. §§ 47105(b), 47107(a)(1) and (4), 47107(g)(1), 47110, 47111(d), and 47122, respectively.

**ORDER**

**ACCORDINGLY**, the FAA finds the DuPage Airport Authority is not currently in violation of applicable Federal law and its Federal grant obligations.

1. The Complaint is dismissed.
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 a final agency action subject to judicial review under 49 U.S.C. § 46110. [See 14 CFR 16.247(b)(2)] Any party to this proceeding adversely affected by the Director's Determination may appeal this initial determination to the FAA Associate Administrator for Airports, pursuant to 14 CFR 16.33(b), within thirty (30) days after service of the Director's Determination.



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

July 19, 2002  
Date