

UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, DC

Brown Transport Co.**Complainant,**

v.

City of Holland, Michigan,**Respondents.****DIRECTOR'S DETERMINATION****I. INTRODUCTION**

This matter is before the Federal Aviation Administration (FAA) based on the Complaint filed under *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings*, 14 Code of Federal Regulations (14 CFR) Part 16, by the Brown Transport Co. (Brown/Complainant). The Complaint was filed against the City of Holland (City/Respondent/Sponsor), which owns and operates the Tulip City Airport (BIV/Airport) in Holland, Michigan.

In this Part 16, the Complainant contends that some of the self-fueling requirements imposed by the City of Holland at the Tulip City Airport, namely the \$1 million additional ability to pay and the \$5 million liability coverage, are unreasonable and unjustly discriminatory and that as a result, the City has granted an exclusive right, all in violation of the sponsor's FAA grant assurances.¹ The City denies the Complainant's allegations and maintains that its fueling rules and regulations are reasonable and do not unjustly discriminate against Complainant and so do not violate the City's Federal obligations.²

Under the particular circumstances existing at the Airport and the evidence of record, as discussed below, we conclude that:

- The \$1 million additional ability to pay requirement contained in Section 3E of the Fueling Rules and Regulations imposed by the City on Complainant for the right to self-fuel at the Tulip City Airport is unreasonable and contrary to Grant Assurance 22, *Economic Nondiscrimination*, 49 USC 47107(a).
- By imposing the \$1 million in additional ability to pay requirement contained in Section 3E of the Fueling Rules and Regulations and the \$5 million in liability protection contained in Section 3G of the Fueling Rules and Regulations on Complainant but not other self-fuelers, and by imposing the

¹ "Additional ability to pay" is used throughout the decision but it refers to Section #E of the Tulip City Airport Fueling Rules and Regulations which require "Evidence of applicant's financial ability to pay for curing any other violations of these regulations or for damages or injury resulting from any release of contamination or other violation of these regulations ..." See FAA Exhibit 1, Item 1, Exhibit 3, p. 2. We note here that the Tulip City Airport Fueling Rules and Regulations cover many requirements for self-fueling, but only some of the insurance requirements and the additional ability to pay are questioned by Complainant. Complainant has no complaint about the safety requirements for self-fueling at the Tulip City Airport, FAA Exhibit 1, Item 3, p. 6. Also see FAA Exhibit 1, Item 1, p. 1-2, 6-11.

² FAA Exhibit 1, Item 2, p. 12.

\$1 million additional ability to pay requirement contained in Section 3E of the Fueling Rules and Regulations on Complainant but not on the FBO, the City is unjustly discriminating in violation of Grant Assurance 22, *Economic Nondiscrimination*, 49 USC 47107(a).

The FAA's decision in this matter is based on the applicable Federal law and FAA policy, and review of the pleadings and supporting documentation submitted by the all the parties, which comprise the administrative record reflected in the attached FAA Exhibit 1.

II. THE COMPLAINANT

The Complainant in this proceeding is Brown Transport Co., a Michigan corporation. Brown Transport Co. is the aviation department of Metal Flow Corporation, its parent company.³ Brown Transport Co. owns and operates a Cessna Citation II C-550 registered as N26CB, and is also the owner of the fuel facilities used for self-fueling that aircraft.⁴ The aircraft is hangared in a private hangar (not open to the public) owned by ADB & Associates, LLC (ADB), whose parent company is also Metal Flow Corporation.⁵ The ADB hangar is located south of runway 08/26 across from the main public ramp areas of the Airport.⁶

III. THE AIRPORT AND ITS OBLIGATIONS

BIV is a public-use airport owned and operated by the City of Holland, Michigan. The Airport, which is used by general aviation and executive aircraft, has a 6,263-foot runway 08/26, and is home to approximately 60 aircraft. It accounts for more than 53,000 annual operations.⁷ The Tulip Air Service is the Fixed Base Operator (FBO) for the Airport.⁸

Because the City is barred from spending any tax revenues on the Airport [see A, Sub-Issue (5)], capital improvements are funded by State and Federal Airport Improvement Program (AIP) grants with the local match raised from corporate and individual contributions. All airport operations are handled by the FBO and are paid for by the revenue it raises, which is derived, in part, from a flowage fee assessed on each gallon of fuel dispensed at the Airport.⁹ FAA records indicate that the planning and development of the Airport has been extensively financed with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 USC § 47101, *et seq.* Between 1985 and 2005, the Airport received a total of \$30.87 million in Federal airport development assistance in the form of AIP grants.¹⁰ Since land was acquired with AIP funds, the Airport is obligated so long as the land is used as an airport.

IV. ISSUES UNDER INVESTIGATION

The two main issues under investigation before the FAA in this complaint are:

A. Whether the City's application of a \$1 million additional ability to pay requirement in Section 3E and the \$5 million insurance requirement in Section 3G of its Fueling Rules and Regulations is consistent with Grant Assurance 22 *Economic Nondiscrimination*, 49 USC 47107(a) which requires the

³ FAA Exhibit 1, Item 1, p. 1, and FAA Exhibit 1, Item 1, Exhibit 1. The relationship of two other entities with the Complainant needs to be mentioned, they are ADB, the hangar owner and Metal Flow Corporation, the parent company to ADB and Brown Transport Co. FAA Exhibit 1, Item 1, Exhibit 1.

⁴ FAA Exhibit 1, Item 8, and FAA Exhibit 1, Item 1, Exhibit 1, p. 1.

⁵ FAA Exhibit 1, Item 1, Exhibit 1.

⁶ FAA Exhibit 1, Item 1, Exhibit 1A.

⁷ FAA Exhibit 1, Item 7, FAA Form 5010 "Airport Master Record" for BIV.

⁸ <http://www.cityofholland.com/Brix?pageID=657>

⁹ FAA Exhibit 1, Item 2, Exhibit H, letter dated October 26, 2004, p. 1-2.

¹⁰ FAA Exhibit 1, Item 16.

City to make the Airport available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination.

B. Whether the City has granted an exclusive right for the use of the Airport in violation of Grant Assurances 23, *Exclusive Rights*, 49 USC § 40103(e) and 49 USC § 47107(a)(4).

V. BACKGROUND

In 1986, the City purchased the Tulip City Airport from a private entity, Prince Corporation.¹¹ On October 23, 1986, the City entered into a 20-year Fixed Base Operator (FBO) agreement with Tulip City Air Service, Inc. for aeronautical services and for the operation of the Airport.¹² On February 7, 1989, the City entered into a 47-year lease with the Prince Corporation for certain property at the Airport to be used as a site for an airplane hangar, allowing maintenance and servicing of those aircraft owned by lessee and permitting fuel storage.¹³ Today, Tulip City Air Service is still the FBO at the Airport. In 1992, the City entered into a 30-year Land Lease with Tulip City Air Service, Inc.¹⁴ In 1995, the FBO agreement between the City and the FBO was amended.¹⁵

On June 27, 2000, the City of Holland published fueling rules and regulations that incorporated certain self-fueling requirements.¹⁶ These self-fueling requirements included: (1) proof of insurance for contamination no less than \$1 million for each fuel tank, (2) an additional ability to pay of \$1 million and (3) proof of liability insurance requirement for not less than \$5 million.¹⁷ In addition, all self-fuelers are required to “pay a flowage fee to the City equal to the flowage fee paid by the FBO(s).”¹⁸

Sometime in the year 2000, Complainant approached the City of Holland with a proposal to build a hangar and fueling facility at the Tulip City Airport.¹⁹ Following a lull in the discussions between Complainant and City, Complainant went ahead with its hangar proposal and self-fueling application process.²⁰ In September 2002, the City’s Airport Advisory Board met to review the Complainant’s hangar proposal and notified Complainant about the status and steps that still needed to be taken in order to reach an agreement that would result in a property lease, a hangar, and self-fueling. Among the details described, the City cited the requirements regarding insurance and additional ability to pay.²¹

On October 21, 2002, in a letter addressing Complainant’s request for a lease and self-fueling, the City’s Assistant City Attorney noted, *inter alia*, the need for the City to require \$1 million in additional ability to pay in addition to contamination and liability insurance requirements. The City’s Assistant City Attorney added that the additional ability to pay “may be well too burdensome for those using little fuel but such operators can obtain fuel from the FBO (which has to meet these standards) without increasing the number or locations of fuel tanks at the airport, thereby increasing the risk to the City.”²²

On November 8, 2002, the City notified Complainant that “although it is unlikely that an incident at the fueling facility would not be covered by insurance, the intent of the City’s regulations is to ensure that the

¹¹ FAA Exhibit 1, Item 2, Exhibit H, letter dated October 26, 2004, p. 1.

¹² FAA Exhibit 1, Item 11.

¹³ See FAA Exhibit 1, Item 13, Exhibit 2. Over the years, the Prince Corporation would eventually evolve into Westshore Aviation and then Wingspan, LLC (present day). See FAA Exhibit 1, Item 5, p. 2, footnote 1 and FAA Exhibit 1, Item 2, p. 5 and FAA Exhibit 1, Item 13, p. 1.

¹⁴ FAA Exhibit 1, Item 13, Exhibit 3.

¹⁵ FAA Exhibit 1, Item 13, p. 2 and Exhibit 3.

¹⁶ FAA Exhibit 1, Item 1, Exhibit 3.

¹⁷ FAA Exhibit 1, Item 1, Exhibit 3, p. 2.

¹⁸ FAA Exhibit 1, Item 1, Exhibit 3, p. 7.

¹⁹ FAA Exhibit 1, Item 1, p. 2 and FAA Exhibit 1, Item 1, Exhibit 1, p. 1.

²⁰ FAA Exhibit 1, Item 2, Exhibit G and FAA Exhibit 1, Item 1, p. 5.

²¹ FAA Exhibit 1, Item 2, Exhibit G.

²² FAA Exhibit 1, Item 1, Exhibit 4.

City would not accept any risk from a private fueling facility” and that “there is not a need for the City to assume any additional risk for a private fueling facility” since “it is the lessee’s [Complainant] choice to not use the fuel provided by the FBO and to construct their own fueling facility.”²³ The City processed the Complainant’s proposal for a hangar along with self-fueling capability until November 2002. This was followed by several contacts between the parties, which resulted in an agreement that covered Complainant’s ability to meet the City’s self-fueling requirements, notably, the ability to meet the City’s insurance and additional ability to pay requirements.²⁴ Other requirements, including a sub-lease between Complainant and a related company (ADB), and a building permit were also addressed.²⁵

On December 6, 2002, the City executed a 25-year land lease with ADB for a total of approximately 56,000 square feet. On that property, ADB would eventually construct the hangar, which is used to house and service Complainant’s aircraft. The ADB lease was subordinated to the provisions of any existing or future agreement between the City and the Federal Aviation Administration (FAA), and permitted ADB to fuel “aircraft owned by Lessee or by a Sublessee that also owns the fueling facilities within the premises...” and required a fuel permit in accordance “with the Tulip City Airport Fueling Rules and Regulations as amended from time to time.”²⁶

On February 7, 2003, Complainant submitted an application for a self-fueling permit under the premise that all necessary information would be submitted.²⁷ At the February 11, 2003 meeting of the Airport Advisory Board, the application by Complainant for self-fueling was considered and adopted. The requirements for a self-fueling permit were discussed and included insurance requirements and evidence of an additional ability to pay.²⁸

On April 1, 2003, the Airport Advisory Board approved the self-fueling permit and facility proposed by Complainant. The fueling facility consisted of a doubled-walled 12,000-gallon aboveground unit, with an outer shell that can hold 125% of the fuel capacity of the inner tank. The system includes a containment area with a capacity of 3,000 gallons to handle leaks or over-fueling. Finally, the fueling system also includes an alarm system for fuel leaks and a *Spill Prevention Control and Countermeasure Plan* (SPCC).²⁹

On April 4, 2003, ADB entered into a 25-year sublease with Complainant,³⁰ which permitted self-fueling of Complainant’s aircraft. It also incorporated the Tulip City Airport fueling rules and regulations.³¹ On April 23, 2003, the City Council finally approved the self-fueling permit proposed by Complainant.³² On May 7, 2003, the City notified Complainant that the self-fueling permit for Brown Transport on the ADB & Associates leased site was approved.³³ All approvals granted by the City were conditioned on Complainant meeting the insurance and additional ability to pay requirements contained in the fueling rules and regulations.³⁴ In meeting the requirement of Section 3E (additional ability to pay) of the fueling rules and regulations, Complainant entered into a *Continuing Guarantee Agreement* (executed on May 12, 2003).³⁵ The guarantor for this personal guarantee was Mr. Marc Brown, president of Brown Transport Co.

²³ FAA Exhibit 1, Item 1, Exhibit 1B.

²⁴ FAA Exhibit 1, Item 1, Exhibit 1, p. 2.

²⁵ FAA Exhibit 1, Item 2, Exhibit C, Minutes of April 1, 2003 meeting.

²⁶ FAA Exhibit 1, Item 2, Exhibit A.

²⁷ FAA Exhibit 1, Item 2, Exhibit F.

²⁸ FAA Exhibit 1, Item 2, Exhibit C and F.

²⁹ FAA Exhibit 1, Item 2, Exhibit C, Minutes of April 1, 2003 meeting, FAA Exhibit 1, Item 1, Exhibit 1, p.3 and FAA Exhibit 1, Item 2, Exhibit F.

³⁰ FAA Exhibit 1, Item 2, Exhibit B.

³¹ FAA Exhibit 1, Item 2, Exhibit B.

³² FAA Exhibit 1, Item 2, Exhibit C, Notice of Referral, April 23, 2003 and Memorandum to Mayor and Members of the City Council, April 23, 2003.

³³ FAA Exhibit 1, Item 2, Exhibit K.

³⁴ FAA Exhibit 1, Item 2, Exhibits F and K.

³⁵ FAA Exhibit 1, Item 1, Exhibit 6, p. 1.

In July 2003, the City published a new version of its Fueling Rules and Regulations. With regards to the self-fueling requirements for insurance and additional ability to pay, these new requirements changed very little.³⁶ In addition, they did not change the exemptions and requirements affecting established fuelers at the Airport. In the second half of 2003, following the agreement between the parties, Complainant completed its facility, which included an aboveground, doubled-walled alarm system-equipped fueling capability.³⁷

The death of Mr. Brown in August 2003³⁸ effectively terminated the *Continuing Guarantee Agreement* executed by the City and Complainant on May 12, 2003.³⁹ As a result, the City informed Complainant that a substitute financial security was needed to replace Mr. Brown's May 2003 personal guarantee.⁴⁰ This request for a substitute in meeting the additional ability to pay as well as certain insurance requirements contained in the Tulip City fueling rules and regulations caused the present complaint. Specifically, Complainant argued that the requirement for additional ability coverage in the form of a personal guarantee and the \$5 million in coverage for injury to any person or to any property⁴¹ were contrary to the City's Federal obligations.⁴² The City justified its actions by stating that it was necessary to "ensure that the City does not accept any risk from a private fueling facility" because the City's "charter restriction prohibiting the use of local tax dollars to support the airport" and the City's "very limited resources to cure any violation or damages."⁴³ The parties were unable to reach an agreement.

As a result, both parties sought the assistance of the Michigan Department of Transportation, Multi Modal Transportation Services Bureau (Bureau of Aeronautics). On October 26, 2004, in response to an informal complaint by Complainant, the City presented the Bureau of Aeronautics with its position on the matter and the reasons behind its self-fueling requirements.⁴⁴ On November 11, 2004 and again on January 26, 2005, Complainant asked the Bureau of Aeronautics for assistance in evaluating what it considered to be unreasonable self-fueling requirements at the Tulip City Airport, namely the fuel flowage fee, the \$5 million insurance requirement, and the \$1 million ability to pay personal guarantee.⁴⁵

On February 14, 2005, the Bureau of Aeronautics concluded that the City was not in violation of its Federal obligations. Specifically, the Bureau of Aeronautics stated that (1) "the nine cent per gallon fuel flowage fee is charged to all users of the airport," (2) "the \$5 million insurance requirement is a recent requirement adopted by the City which will be required of all tenants dispensing fuel at the occasion of the renewal of those agreements now in effect," and (3) "that the \$1 million personal guarantee pledge was the option selected by the previous owner of your business in his negotiation with the City. Other options showing the ability to cover a loss were presented by the city at that time. Once again this is a recent requirement adopted by the city which will be required of all tenants dispensing fuel at the occasion of the renewal of those agreements now in effect."⁴⁶

On June 1, 2005, the FAA received the Complainant's formal complaint filed with the FAA under the *Rules of Practice for Federally Assisted Airport Enforcement Proceedings*, Title 14, Part 16 of the Code of Federal Regulations.⁴⁷ On June 24, 2005, the FAA dismissed the complaint without prejudice as incomplete under

³⁶ FAA Exhibit 1, Item 1, Exhibit 3 and FAA Exhibit 1, Item 2, Exhibit D

³⁷ FAA Exhibit 1, Item 1, Exhibit 1, p. 2-3 and FAA Exhibit 1, Item 1, p. 5.

³⁸ FAA Exhibit 1, Item 17.

³⁹ FAA Exhibit 1, Item 1, Exhibit 6.

⁴⁰ FAA Exhibit 1, Item 2, p. 6.

⁴¹ FAA Exhibit 1, Item 1, Exhibit 3, p. 2.

⁴² FAA Exhibit 1, Item 1, Exhibit 1, p. 3 and FAA Exhibit 1, Item 1, p. 2, 4, 9.

⁴³ FAA Exhibit 1, Item 1, Exhibit 1B.

⁴⁴ FAA Exhibit 1, Item 2, Exhibit H.

⁴⁵ FAA Exhibit 1, Item 1, Exhibit 7 and FAA Exhibit 1, Item 12.

⁴⁶ FAA Exhibit 1, Item 1, Exhibit 7.

⁴⁷ FAA Exhibit 1, Item 5.

14 CFR § 16.27 and allowed Complainant to correct the deficiencies noted and to refile.⁴⁸ On July 1, 2005, the Complainant filed an amended formal complaint⁴⁹ and on July 25, 2005, the Complaint was docketed as FAA Docket No. 16-05-09.⁵⁰ On August 22, 2005 the FAA received the Answer to the Complaint filed by the City⁵¹ while Complainant filed a Reply to the Respondent's Answer on August 24, 2005.⁵² The Respondent did not file a Rebuttal as permitted under Part 16. On December 5, 2005, the Director issued a Request for Additional Information and Notice of Extension of Time.⁵³ The Respondent on January 4, 2006, submitted additional information in response to this Request.⁵⁴

VI. APPLICABLE LAW AND POLICY

A. The Airport Improvement Program and the Airport Sponsor Assurances

Title 49 USC § 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 (AAIA), as amended. Section 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 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.⁵⁵ FAA Order 5190.6A, *Airport Compliance Requirements*, issued on October 1, 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.

B. Public Use of the Airport – Grant Assurance 22

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. Grant Assurance 22, *Economic Nondiscrimination*, of the prescribed sponsor assurances implements the provisions of 49 USC § 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)]

...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)]

The owner of any airport developed with Federal assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination.⁵⁶ FAA Order 5190.6A describes in detail the responsibilities assumed by the owners of public-use airports developed with Federal assistance. Among

⁴⁸ FAA Exhibit 1, Item 6.

⁴⁹ FAA Exhibit 1, Item 1.

⁵⁰ FAA Exhibit 1, Item 4.

⁵¹ FAA Exhibit 1, Item 2.

⁵² FAA Exhibit 1, Item 3.

⁵³ FAA Exhibit 1, Item 14.

⁵⁴ FAA Exhibit 1, Item 13.

⁵⁵ See, e.g., 49 USC § 40101, 40103(e), 40113, 40114, 46101, 46104, 46105, 46106, 46110, 47104, 47105(d), 47106(d), 47106(e), 47107, 47108, 47111(d), 47122.

⁵⁶ See Order, Sec. 4-13(a).

these is the obligation to treat in a uniform manner those aeronautical 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.⁵⁷

For example, the airport owner should adopt and enforce adequate rules, regulations, or ordinances as necessary to ensure the safe and efficient operation of the airport.⁵⁸ The Order also provides "...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."⁵⁹

C. The Prohibition Against Exclusive Rights – Grant Assurance 23

Title 49 USC § 40103(e), in which Congress re-codified and adopted substantially unchanged the exclusive rights prohibition prescribed in Section 303 of the Civil Aeronautics Act of 1938 and in Section 308(a) of the Federal Aviation Act of 1958, as amended, prohibits exclusive rights at certain facilities and states, in pertinent part, that "[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended." 49 USC § 47107(a)(4), similarly provides, in pertinent part, that "a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport."

Grant Assurance 23, *Exclusive Rights*, of the prescribed sponsor 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 person providing, or intending to provide, aeronautical services to the public... It further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities..."

An exclusive right is defined as a power, privilege, or other right excluding or debaring another from enjoying or exercising a like power, privilege, or right. An exclusive right can be conferred either by express agreement, by the imposition of unreasonable standards or requirements, or by any other means. Such a right conferred on one or more parties, but excluding others from enjoying or exercising a similar right or rights, would be an exclusive right.⁶⁰

Therefore, it is FAA's policy that the sponsor of a federally obligated airport will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public and 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. FAA Order 5190.6A clarifies the applicability, extent, and duration of the prohibition against exclusive rights under 49 USC § 40103(e) with regard to airports developed with FAA-administered grant assistance and Federal property conveyances. The exclusive rights prohibition remains in effect as long as the airport is operated as an airport.

D. Self-Fueling

As mentioned in Grant Assurance 22, an aircraft owner who is entitled to use the landing area of an airport may tie-down, adjust, repair, refuel, clean, and otherwise service his/her own aircraft, provided the service is performed by the aircraft owner or his/her employees with resources supplied by the aircraft

⁵⁷ See Order, Sections 3-1 and 4-14(a)(2).

⁵⁸ See Order, Sections 4-7 and 4-8.

⁵⁹ See Order, Sec 4-15(a).

⁶⁰ See FAA Advisory Circular 5190-5 Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities, June 10, 2002.

owner.⁶¹ Servicing one's own aircraft, including fueling, is not an aeronautical activity that can be preempted by the airport owner. Since 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, without unjust discrimination and without granting an exclusive right (Grant Assurance 23), it may not, as a condition for the use of its airport, impose unreasonable requirements on aircraft operators to self-serve, including self-fuel. 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.⁶²

An airport sponsor can require a self-fueler, both individuals and operators, to meet reasonable requirements such as paying the same fuel flowage fee as those operators on the airport who provide fueling services to the public, and ensuring safe fueling operations. Self-services, including self-fueling, must be conducted in accordance with reasonable rules or standards established by the sponsor. However, any unreasonable restriction imposed on the owners or operators of aircraft regarding the servicing of their own aircraft may violate the exclusive rights prohibition.⁶³ Restrictions imposed by a sponsor that have the effect of channeling self-service activities to a commercial operator may violate the exclusive rights prohibition (Grant Assurance 23).

An airport owner is under no obligation to permit aircraft owners to introduce on the airport any equipment, personnel, or practices that would be unsafe, unsightly, or detrimental to the public welfare or that would affect the efficient use of airport facilities by others.⁶⁴

E. The FAA Airport Compliance Program

The FAA ensures that airport owners comply with their Federal grant obligations through the FAA's Airport Compliance Program. The program is based on the 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; 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. The FAA Compliance Program is designed to achieve voluntary compliance with Federal obligations.

In addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is currently in compliance with the applicable Federal obligations. FAA will make a judgment of whether the airport sponsor is reasonably meeting the Federal obligations. FAA may also take into consideration any action or program the sponsor has taken or implemented, or proposed action or program the sponsor intends to take, which in FAA's judgment is adequate to reasonably carry out the obligations under the grant assurances.⁶⁵

⁶¹ See Grant Assurance 22 (f).

⁶² See Order, Sec. 3-9(e)(2).

⁶³ See FAA Advisory Circular 5190-5.

⁶⁴ See FAA Advisory Circular 5190-5.

⁶⁵ See FAA Order 5190.6A, Sec. 5-6.

Thus, the FAA can take into consideration reasonable corrective actions by the airport sponsor as measures to resolve alleged or potential violations of applicable Federal obligations, and as measures that could prevent recurrence of noncompliance and ensure compliance in the future.

VII. ANALYSIS AND DISCUSSION

Based on the pleadings and arguments presented by the parties, and as discussed in the following pages in detail, two Issues are before the Director. Issue “A” discusses compliance with Grant Assurance 22 *Economic Nondiscrimination*, 49 USC 47107(a) while Issue “B” covers compliance with Grant Assurances 23, *Exclusive Rights*, 49 USC § 40103(e) and 49 USC § 47107(a)(4).

In addressing allegations of noncompliance, the Director takes into consideration not only the arguments presented by the parties, but also the particular circumstances existing at the airport. However, the Director considers only those that are related to issues under FAA jurisdiction. The review of certain self-fueling requirements, such as ascertaining the reasonableness of certain insurance and additional ability to pay requirements, and whether the fuel flowage fee is applied in an unjustly discriminatory manner, are within the Director’s duties. Claims for monetary reimbursement⁶⁶ which are made by both parties here, are outside the scope of the Director’s authority and thus are rejected.

Issue A. Whether the City’s application of the a \$1 million additional ability to pay requirement in Section 3E and the \$5 million insurance requirement in Section 3G of its Fueling Rules and Regulations is consistent with Grant Assurance 22 *Economic Nondiscrimination*, 49 USC 47107(a) which requires the City to make the Airport available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination.

In ascertaining whether the City has made BIV available to the public on reasonable terms and without unjust discrimination pursuant to its statutory obligation under Grant Assurance 22, *Economic Nondiscrimination*, the Director has organized the analysis into the following Sub-issues:

- (1) Conflict of Interest
- (2) Complainant’s Company and Affiliates
- (3) Discouraging Self-Fueling
- (4) Previous Acceptance of the Fueling Rules
- (5) City Charter Prohibiting Airport Expenditures
- (6) Reasonableness
- (7) Unjust Discrimination

(1) Conflict of Interest

In support of its arguments that the City’s self-fueling insurance requirements are contrary to the City’s obligations, Complainant cites a conflict of interest, namely that the Assistant City Attorney is also counsel for the FBO.⁶⁷ Complainant argues that this relationship drives “potential self-fuelers to buy fuel from the FBO” instead of self-fueling.⁶⁸ The record confirms that the Assistant City Attorney has been involved in both the writing and interpretation of the Tulip City Airport fueling regulations,⁶⁹ and it also contains a statement from the Assistant City Attorney that “one of my partners did a little work for the FBO,

⁶⁶ FAA Exhibit 1, Item 1, p. 12 and Item 2, p. 17.

⁶⁷ See FAA Exhibit 1, Item 1, pgs. 4 and 6.

⁶⁸ FAA Exhibit 1, Item 1, p. 4.

⁶⁹ See FAA Exhibit 1, Item 1, p. 6 and FAA Exhibit 1, Item 1, Exhibit 4.

primarily collection matters and not relating to the Fueling Rules or representing the FBO in matters involving the City.”⁷⁰

This potential conflict would not, per se, be related to violation of the grant assurances. The City can contract out legal services and employ a private attorney in the capacity of Assistant City Attorney. The FBO can also obtain counsel for its legal needs. The City’s actions as the airport sponsor are under review, not the City’s contracting actions with regards to legal counsel. The City may compensate a legal firm for legal advice and then choose whether or not to take action, just like a private party could. In any event, a review of the record, namely the correspondence written by the Assistant City Attorney and presented here by both parties, does not reveal any actions that would, in the Director’s opinion, have a bearing or an impact in this case.

For these reasons the Director finds the allegation of a conflict of interest is not relevant to the FAA’s review of the Respondent’s compliance with its federal obligations.

(2) Complainant’s Company and Affiliates

In support of its argument that it must protect itself from liability and exposure, the City objects to the relationship between Complainant and its sister companies, namely the relationship between Brown Co., ADB, and their parent company, Metal Flow. The City states that after it entered into a lease of land with ADB to build and operate a hangar, it was informed that there would be a sublease to Complainant (Brown) that included a fueling system. The City is concerned because “Brown has taken every step it can to isolate its affiliates’ assets from any liabilities arising from its aircraft and its self-fueling operations.”⁷¹

The City also states that “Brown is legally separate from Metal Flow” and believes Complainant “to have no net asset value from which to satisfy claims while Metal Flow is a successful corporation that, based on its extensive operations, likely has substantial net asset value” and that “aircraft owners set up these shell corporations for the very purpose of protecting their assets from liabilities so it is not unreasonable for the airport sponsor to want other financial protection against claims and losses.”⁷²

The City is speculating about a private company’s particular choice in corporate organization, and this does not have any bearing on the issues. Under section 24 of the land lease between the City and ADB, ADB could not assign, sublease or transfer the lease without the written consent and approval of the City. The City consented to the sublease and ultimately the City specifically permitted ADB to sublease the premises to a sublessee and permit self-fueling.⁷³ Therefore, it is not reasonable now for the City to protest since through its own actions it agreed to a sublease without limitations based on the relationship between lessee and sublessee. Thus, there is no basis to object to a sublease between two related companies. In addition, the fact that Complainant and ADB are related companies belonging to the same parent company, Metal Flow Corporation, is not unusual. It is common not only in the aviation industry, but also in many other industries.,

Accordingly, the relationship between Complainant and its related companies does not, on its face, constitute an unreasonable practice, constitute a violation of any Federal obligation, or undermine any claims made by Complainant.

⁷⁰ See FAA Exhibit 1, Item 2, p. 10

⁷¹ FAA Exhibit 1, Item 2, p. 1.

⁷² FAA Exhibit 1, Item 2, p. 14, footnote 13.

⁷³ FAA Exhibit 1, Item 2, Exhibit A, p. 4, See Section 7(D).

(3) Discouraging Self-Fuel

Complainant argues that the City's application process for a self-fueling permit is onerous and that the "City of Holland makes it so difficult to comply with its rules that it discourages companies from basing their aircraft on the airport"⁷⁴ and that "during the application process, the City of Holland actively discouraged Brown Transport from self-fueling."⁷⁵

The Director finds the claim by Complainant that the City discouraged self-fueling to be unsubstantiated. First, a review of the record indicates that the City understands the Federal requirements associated with self-fueling. For example, the City recognizes that "the federal law governing grants to airports, as interpreted by the Federal Aviation Administration, requires allowing the owner of an aircraft to service that aircraft, including self-fueling, subject to reasonable terms and conditions, without unjust discrimination."⁷⁶

Second, the record shows that Complainant applied for a self-fueling permit and requested changes in the Fueling Rules to accommodate its self-fueling operation⁷⁷ and that at the Airport Advisory Board meeting of April 2003, the City acquiesced and changed the Fueling Rules to allow Complainant's operations.⁷⁸ Thirdly, a review of the correspondence between the City and Complainant clearly indicates that in processing Complainant's request, the City generally maintained an attitude of accommodating the Complainant.⁷⁹

Given this background, the Director rejects Complainant's claim that the City openly opposed or discouraged Complainant's plans to install self-fueling at its hangar at the Airport. The record shows that the City took action to modify its self-fueling requirements to allow Complainant's operation, although the City imposed some requirements with which Complainant did not agree.

(4) Previous Acceptance of the Fueling Rules

As part of its defense, the City states that Marc Brown had accepted the Fueling Rules during his lifetime, that only after he died did Complainant initiate the Complaint, that "the underlying issue appears to be the personal animosity between Gary VanderVeen, Brown's pilot and representative, and Ron Ludema, the president of the FBO," and that "these gentlemen used to be partners and had quite a falling out..."⁸⁰.

It is not in dispute that Mr. Brown was able to sign and did sign a personal guarantee document⁸¹ in meeting the requirements of Section 3E of the Fueling Rules and Regulations. However, because an airport user is able to meet a particular requirement for use of the airport does not necessarily mean that the requirement is reasonable under the grant assurances. Moreover, that fact that two participants, one

⁷⁴ FAA Exhibit 1, Item 3, p. 2.

⁷⁵ FAA Exhibit 1, Item 1, p. 4. Also see FAA Exhibit 1, Item 1, Exhibit 4. Allegations by the Complainant that prior to applying to self-fuel, another company [Trendway] had attempted, "at least once, without success, to navigate the City's approval maze to build a hangar and self-fuel at the airport" and that Trendway's "experience with unreasonable and highly expensive rules caused it to give up" are rejected. These allegations deviate from the issue at hand, which is to determine whether the City applied unreasonable conditions upon the Complainant, not upon an entity not named as a complainant. In any event, Trendway is not a Complainant in this case and the FAA will not involve itself into the reasons behind the failed negotiations between the City and Trendway in 1994-1995. FAA Exhibit 1, Item 1, p. 3, FAA Exhibit 1, Item 1, Exhibit 2. Also, see FAA Exhibit 1, Item 2, Exhibit L.

⁷⁶ FAA Exhibit 1, Item 2, p. 10. Having said this, the Director rejects the position by the City implying that its self-fueling requirements are acceptable because, in part, for the way other airports in the region address self-fueling and that "Most of these other airports said they did not allow self-fueling." It is generally irrelevant since, on its face, those practices are contrary to Federal law. FAA Exhibit 1, Item 2, p. 7.

⁷⁷ FAA Exhibit 1, Item 2, p. 12-13.

⁷⁸ FAA Exhibit 1, Item 2, Exhibit C, Minutes of April 1, 2003 meeting. Also see FAA Exhibit 1, Item 2, p. 8, 15-16.

⁷⁹ See FAA Exhibit 1, Item 2, Exhibit G, p. 3.

⁸⁰ FAA Exhibit 1, Item 2, p. 16.

⁸¹ FAA Exhibit 1, Item 3, p.3.

representing Complainant and another representing Respondent, do not get along, for whatever reason, is irrelevant to the case at hand.

(5) City Charter Prohibiting Airport Expenditures

Prior to acquiring the Tulip City Airport, the City amended its Charter barring the use of the City's tax revenues for operations or capital improvements at the Airport. Effectively, the City prohibited itself from spending money on its airport.⁸² Complainant argues that the Charter restriction is a "convenient" excuse for imposing these self-fueling rules the City chooses to apply to Complainant.⁸³

The City argues that the difficulty of changing the Charter restricts the City's actions and the fact that the Airport must be operated with funds generated from its operations, grants, gifts, or donations "puts the City in a uniquely delicate position with regard to risks at the Airport" and that the Charter restriction "is an inescapable fact for the City and the Airport, which dictates the need for liability and financial protection for its operations."⁸⁴ The City adds that it "had to consider the interests of other airport users, the airport, and City, especially, in light of the Charter restriction, the need to avoid unfunded liabilities for environmental and/or safety risks associated with fueling."⁸⁵ In other words, the City contends that the Charter restriction is in part the justification for the insurance requirements it has imposed upon self-fueling operations, including those self-fueling operations conducted by Complainant.

Whether the Charter restriction is valid or not is not at issue since it is outside FAA's jurisdiction. Having said this, the use of the Charter restriction as a justification for an action that has an impact upon the City's ability to comply with its Federal obligations is of concern to the FAA. The City is claiming that the prohibition on use of City funds at the Airport "compels the City to take a cautious approach to anything that increases risk of liability to the City,"⁸⁶ such as self-fueling, does not, per se, eliminate the City's requirement to comply with its Federal obligations. An unnecessary level of caution at the expense of airport tenants can result in unreasonable costs for the use of the airport.

The fact that the City of Holland is prohibited by its Charter from spending money on its airport⁸⁷ implies that the Airport must be self-sustaining, and this is not unlike many other airport sponsors in the country, many of which are independent airport authorities that must rely solely upon their ability to produce revenue. In other words, the City's financial situation is not unique. Moreover, the fact that the City opts, for whatever reason, not to spend funds at the Airport and rely on the Airport being self-sustainable is not contrary to its AIP grant assurances or FAA policy.

However, the City, as a municipality, has the ability to maintain separate insurance requirements of its own, without relying solely on an individual user of the Airport, as it claims. This could include a general liability policy for operations and supplemental coverage for environmental damage. The Director views this ability to secure insurance as a valid argument since, in its Fixed Base Operator Agreement, the City has accepted the need for some insurance since the City is required "to obtain and maintain insurance coverage on the real property improvements owned by the City..."⁸⁸ An airport may supplement insurance coverage for additional risks it fears and assess all airport aeronautical users a fee to pay for the added insurance (i.e. addition to a fuel flowage fee).

⁸² FAA Exhibit 1, Item 1, p.2, FAA Exhibit 1, Item 2, p. 3-4, and FAA Exhibit 1, Item 2, Exhibit H, letter dated October 26, 2004, p. 1.

⁸³ FAA Exhibit 1, Item 1, p.2.

⁸⁴ FAA Exhibit 1, Item 2, p. 4.

⁸⁵ FAA Exhibit 1, Item 2, p. 6.

⁸⁶ FAA Exhibit 1, Item 2, p. 10.

⁸⁷ FAA Exhibit 1, Item 1, p.2. See FAA Exhibit 1, Item 2, p. 3-4.

⁸⁸ FAA Exhibit 1, Item 11, p. 16.

Based on this, the Director rejects the claim by the City that the Charter restriction in any way justifies the insurance and financial requirements it has imposed upon self-fueling operations, including those self-fueling operations conducted by Complainant.

(6) Reasonableness

Grant Assurance 22, *Economic Nondiscrimination*, of the prescribed sponsor assurances implements the provisions of 49 USC § 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport make its airport available 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.⁸⁹

Based on arguments presented in this case, in addressing whether the City's self-fueling requirements are reasonable in a manner consistent with Grant Assurance 22, *Economic Nondiscrimination*, the Director discusses three main issues: (a) whether the \$5 million liability insurance requirement is reasonable, (b) whether the requirement for a \$1 million additional ability to pay is reasonable and (c) whether the requirement for a personal guarantee is reasonable (if in fact the City required the proof of ability to pay in the form of a personal guarantee, which, as discussed below, appears was not the case.)

(a). Whether the \$5 Million Liability Insurance Requirement is Reasonable⁹⁰

A review of the self-fueling requirements for Tulip City Airport shows that the insurance imposed on all self-fuelers, regardless of size, type of aircraft, or amount of fuel dispensed, includes a liability insurance requirement for not less than \$5,000,000 covering injury to any person or to any property.⁹¹ Complainant argues that imposing \$5 million in liability for self-fueling is unreasonable, "particularly where a \$1 million spill policy is perfectly acceptable." Complainant also argues that the insurance requirement is not tailored for the size of the tank, and hence is unreasonable for a self-fueler operating a single-engine type of aircraft.⁹² Moreover, Complainant contends that it attempted to find another airport in the United States that has a \$5 million liability insurance requirement and was unsuccessful.⁹³

The City disagrees and argues that it did not reduce the amount of the requirement "because it believed those requirements to be reasonable."⁹⁴ The City contends that the Fueling Rules requirement for \$5 million liability insurance "is not unusual in leases of land involving fueling systems" and that "jury awards in personal injury cases, such as people hurt in fires or explosions, often exceed \$1 million and the trend is toward still higher awards" and that "in consulting other airports, the City looked to Oakland County, Michigan. It requires \$5 million liability insurance for anyone storing fuel at its airports."⁹⁵

In its defense, the City states that "Federal law does not require the City to encourage or subsidize self-fueling by setting insurance rates lower than the risks justify."⁹⁶ This argument however, fails to acknowledge that the risk is not the same for all operations. The issue in this case is not a subsidization of self-fuelers, but rather whether or not the City's requirements are reasonable as viewed from the City's Federal obligations. The FAA does not find a requirement for liability insurance coverage for self-fueling

⁸⁹ Grant Assurance 22(a).

⁹⁰ We note that the first insurance requirement, proof of insurance for contamination no less than \$1 million for each fuel tank, is not challenged by Complainant. Indeed, Complainant states that "They [City] require a self-fueler to have a \$1 million insurance liability policy for a spill, something that may be reasonable for larger self-fuelers such as Complainant... Complainant believes Wingspan and the FBO have a similar requirement) and Complainant, for itself only, does not object to that term." FAA Exhibit 1, Item 1, p. 3.

⁹¹ FAA Exhibit 1, Item 2, Exhibit D.

⁹² FAA Exhibit 1, Item 1, p. 9.

⁹³ FAA Exhibit 1, Item 1, p. 10.

⁹⁴ FAA Exhibit 1, Item 2, p. 2.

⁹⁵ FAA Exhibit 1, Item 2, p. 13.

⁹⁶ FAA Exhibit 1, Item 2, p. 13.

operations to be inherently unreasonable. It is not unusual for an airport sponsor to require liability and environmental insurance as a condition for fueling at airports. These insurance requirements are generally imposed to protect the airport against any loss, cost, or expense incurred by a sponsor as the result of any activity related to fueling, be it private or commercial.

It would be expected that the amounts of insurance requirements would vary from airport to airport and could depend on several variables, such as the type of operation being addressed, type of aircraft being fueled, and amount of fuel being stored or dispensed. In some cases, airports may require a \$500,000 combined single limit for designated self-fueling areas. In other cases, an FBO could be asked to hold \$5 million in products liability and \$5 million comprehensive liability insurance for aircraft servicing, including fueling. In some cases involving jet aircraft, airports have required tenants that self-fuel to maintain insurance coverage of \$1 million per occurrence for environmental damage.⁹⁷ The \$1 million per occurrence for environmental damage is generally available from insurance agencies for the type of aircraft operated by Complainant.⁹⁸

As such, the Director does not find it unreasonable for the City to expect fuelers to provide some level of insurance to protect the Airport in the event of a fueling mishap. It is also reasonable for the City to require an insurance level that would be sufficient to cover the type of environmental damage that could result from an operation such as the one conducted by Complainant; an operation that involves an aircraft fuel capability of 5,000 lbs of fuel.⁹⁹ A review of the record indicates that Complainant provides no evidence to establish that the level of insurance required by the City is unreasonable given the type of aircraft being fueled by Complainant. Moreover, there is no evidence to suggest this type of insurance coverage, in this amount, is not obtainable. In fact, the record shows that Complainant *has* obtained the liability insurance in the required amount.

The Director cannot find that the level of insurance required is unobtainable, or is so high that it is cost prohibitive. In researching the matter in this case, the Director has found that the \$1 million contamination or pollution protection is rather common and that the \$5 million liability, albeit not very common, is not unusual, can be found to be offered by insurance companies for self-fueling operations such as that conducted by Complainant.¹⁰⁰

A typical \$1 million contamination or pollution coverage, as required under Section 3D of the fueling regulations, is generally available from aviation insurance companies with a \$5,000 deductible and would generally cost between \$3,500 and \$5,000 annually. A \$5 million liability coverage as described in Section 3G of the fueling regulations, the insurance requirement disputed by Complainant, and applied to a professionally flown Cessna C-550 aircraft such as that flown by Complainant, is available in the industry and will cost approximately \$25,000 per year and could carry no deductible.¹⁰¹

Therefore, based on the facts of this case, and without discounting the fact that the premium payments on a \$5 million liability coverage are not negligible, the Director finds that the \$5 million in liability for self-fueling is not inherently unreasonable when applied to an operation such as that conducted by

⁹⁷ The FAA conducted an Internet search in order to sample insurance requirements at several airports. In addition, the FAA has dealt with such requirements in past cases. An example is FAA Part 16 Decision, Scott Aviation v. Dupage, FAA Docket 16-00-19, (July 19, 2002), p. 21-22.

⁹⁸ The FAA contacted several insurance companies that were able to provide information to this effect. See FAA Exhibit 1, Item 9.

⁹⁹ The Cessna Citation II Model 550 has a fuel load of 5,008 lbs. of Jet A fuel. Since the fuel density of jet A is 6.75 lb, the total fuel in gallons is approximately 740 gallons under specified temperature conditions. See Cessna Citation II, Operating Manual, May 1988, FAA Exhibit 1, Item 18.

¹⁰⁰ See Footnote 102 and FAA Exhibit 1, Item 9. For example, see self-fueling insurance requirements for the Glendale Municipal Airport, California, <http://www.ci.glendale.az.us/airport/documents/Self-Refueling-Permit.pdf>.

¹⁰¹ One agent advised that the deductible on a \$5 million liability coverage involving a Cessna Citation could, because of the nature of the operation, be as low as \$0.

Complainant, and finds it consistent with the requirements of Grant Assurance 22, *Economic Nondiscrimination*.

However, the \$5 million in liability for self-fueling can be unreasonable if it is applied to all users wanting to self-fuel at the airport. A blank \$5 million liability to all self-fuelers can be inherently unreasonable. Complainant characterizes the City’s self-fueling requirements as “one size fits all” regardless of types of aircraft being fueled or size of fuel tank used for fuel storage.”¹⁰² The Director agrees.

In practicality, there is some expectation that the level of insurance, as with other self-fueling requirements, should reflect the risk of the operation being conducted. That is, the risk of a self-fueling operation involving a 48-gallon single-engine Cessna 172 cannot be compared to the risk involving Complainant’s C-550 jet that can involve over 740 gallons (5,000 lbs of jet A fuel) in a single fueling operation.¹⁰³

The City’s self-fueling requirements apply to “any fueling facility” and specifically define self-fueling facilities covered by its requirements, to include fixed-location fuel tanks, pipes, pumps and fuel-transport vehicles.¹⁰⁴



The City makes no distinction between a 500-gallon truck that could be used to fuel a single-engine aircraft and a 5,000-gallon truck used to fuel a C-550 jet. Figures 2A and 2B, above, illustrate the difference between a 740-gallon C-550 jet and a 48-gallon Cessna C-172 single-engine aircraft. It is obvious that the level of risk associated with fueling these aircraft is not the same at all.¹⁰⁵ Moreover, a \$5 million in liability coverage applied to a single-engine Cessna 172 may not be available from insurance companies. This would make the requirement essentially unreasonable for aircraft such as a Cessna 172.

In summary, while the Director finds that in this case, the \$5 million in liability for self-fueling is not inherently inconsistent with Grant Assurance 22, *Economic Nondiscrimination*, the City should reassess its insurance requirements to ensure the coverage required reflects the level of risk that is reasonable in terms of type of aircraft, amount of fuel dispensed, and type of fuel facility.

¹⁰² FAA Exhibit 1, Item 1, p. 3.

¹⁰³ See Cessna Citation II, Operating Manual, May 1988, FAA Exhibit 1, Item 18.

¹⁰⁴ FAA Exhibit 1, Item 2, Exhibit D.

¹⁰⁵ These requirements make no distinction between a 500-gallon truck that could be used to fuel a single-engine aircraft and a 5,000-gallon truck used to fuel a Citation 550 jet. The City’s self-fueling regulations establish a minimum size of 5,000 gallons for fixed location fuel tanks, which is consistent with Complainant’s 12,000 gallon tank for the Citation type jet operation.

(b). Whether the requirement for a \$1 million additional ability to pay is reasonable

A review of the self-fueling requirements for Tulip City Airport shows that the City imposes on all self-fuelers, regardless of size, type or aircraft, or amount of fuel dispensed, an additional ability to pay requirement of \$1 million for risks not covered by the self-fueling insurance.¹⁰⁶

Complainant objects to the requirement for \$1 million additional ability to pay.¹⁰⁷ Complainant states that imposing a “\$1 million self-fueling personal guarantee on any aircraft owner and operator...is simply not reasonable.”¹⁰⁸ Complainant states that it attempted to find any other airport in the United States that has a \$1 million personal guarantee or “additional ability to pay” requirement for airport tenants who wish to self-fuel and was unsuccessful.¹⁰⁹

The City states that the \$1 million additional ability to pay is “for curing any violations of the Fueling Rules the cost of which would not be covered by insurance and covering damages or injury resulting from contamination or other violation of the Fueling Rules not covered by insurance for any reason to the extent of \$1 million (Fueling Rules §3 E).”¹¹⁰ In addition, the City justifies its ability to pay requirements, in addition to the other insurance requirements, “because (1) the City has a Charter restriction that bars it from spending its tax revenues on the Airport; (2) there are obligations in the Fueling Rules that would not typically be covered by insurance and insurance has deductibles, exceptions, and exclusions; and (3) the corporations that own (or lease) the aircraft and fueling systems are typically thinly capitalized – that is, they have few if any net assets against which to satisfy claims, which certainly appears to be the case with Brown.”¹¹¹

Although the FAA does not find that the concept of an airport sponsor taking some measures to ensure that a self-fueler is in fact able to assume the financial implications of a fuel spill beyond the simple insurance requirements to be unreasonable per se, the Director notes that the FAA was not able to locate another airport that requires an additional ability to pay of \$1 million. The only case found was an airport where the additional ability to pay existed in the form of a bond for the coverage of the insurance deductible,¹¹² but it was not a fixed requirement that exceeded the realistic costs in covering a deductible. Insurance companies contacted by the FAA investigator indicated that such a requirement is not found in airport leases or in self-fueling requirements.¹¹³

A \$1 million additional ability to pay is a significant sum by any standard. The amount of the requirement is the issue at hand. Requiring any self-fueler to have at least \$1 million set aside in pledged personal assets or a letter of credit or bond in order to self-fuel, is, on its face, unreasonable. This is especially true when combined with a \$5 million liability and \$1 million contamination insurance requirement. In most cases, the typical deductible associated with a \$1 million contamination or pollution coverage, as required under Section 3 of the Fueling Rules and Regulations, would range between \$3,500 and \$5,000 annually.¹¹⁴ In the case of the Complainant’s contamination policy of \$1 million, the deductible is \$5,000.

¹⁰⁶ FAA Exhibit 1, Item 2, Exhibit D.

¹⁰⁷ FAA Exhibit 1, Item 1, p. 2, 4, 9.

¹⁰⁸ FAA Exhibit 1, Item 1, p. 9.

¹⁰⁹ FAA Exhibit 1, Item 1, p. 10.

¹¹⁰ FAA Exhibit 1, Item 2, p. 8-9.

¹¹¹ FAA Exhibit 1, Item 2, p. 13-14.

¹¹² See Scott v. Dupage, FAA Docket 16-00-19, p. 21-22. In this case, FAA found that an airport sponsor requiring a bond equivalent (or other form of valuation) to the amount of the deductible of an insurance policy is not necessarily unreasonable. FAA also found that “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”, see FAA Docket 16-00-19, p. 22-23.

¹¹³ See footnote 102 and FAA Exhibit 1, Item 9.

¹¹⁴ Complainant submitted its insurance information at the request of the FAA investigator. See FAA Exhibit 1, Item 15.

Therefore, it seems unlikely that the potential risk to the City is near \$1 million. All in all, requiring a reasonable deposit or bond equal to the deductible (i.e. \$5,000) is very different from a requirement of a \$1 million additional ability to pay. This larger amount appears to be arbitrary and not associated with the level of risk to the City.¹¹⁵ In addition, the Complainant's \$5 million liability coverage has no deductible.¹¹⁶ In fact, \$5 million liability coverage with no deductible is available if applied to a professionally operated C-550 like Complainant's.¹¹⁷

The City has not provided sufficient supporting information to justify the \$1 million additional ability to pay requirement. The record contains no information that would suggest that the City is exposed to a risk that would justify requiring all self-fuelers to provide a \$1 million in additional ability to pay. Even if we were to assume that in some cases a requirement for a \$1 million additional ability to pay can complement an insurance requirement in covering events not covered by insurance or permitting the payment of a high deductible, the actual amount of the requirement (\$1 million) remains critical in this case as it applies to all self-fuelers.

Finally, the Director has concern regarding the City's justification for the additional ability to pay requirement since the City stated that "it is unlikely that an incident at the fueling facility would not be covered by insurance..."¹¹⁸ This erodes the City's concerns about risk and liability and hence its justification for such a high self fueling requirement. In the case of the Complainant, the City has failed to identify the risk that warrants the \$1 million additional ability to pay other than the Complainant's deductible for the \$1 million contamination policy.

In addition, applying a \$1 million additional ability to pay on all self-fuelers regardless of aircraft or fueling operation can result in unreasonable outcomes. For example, holding an owner of a single-engine self-fueled Cessna C-172 to the same standard as an FBO fueling high performance jet aircraft would be unreasonable.

Therefore, based on the above, the Director finds that the \$1 million additional ability to pay requirement imposed by the City on Complainant for the right to self-fuel at the Tulip City Airport is unreasonable and contrary to Grant Assurance 22, *Economic Nondiscrimination*.

(c). Whether the requirement for a personal guarantee is reasonable

In addition to objecting to the requirements for a \$1 million additional ability to pay¹¹⁹ as discussed above, Complainant argues that the requirement is to be met in the form of a personal guarantee is in itself an unreasonable term.¹²⁰ Complainant argues that "well after publication of the 'ability to pay' rule," the City issued an interpretation that the "ability to pay" could not be complied with through insurance "– it required a personal guarantee, and the City would examine the assets of the guarantor, so only multi-millionaires could self-fuel."¹²¹ Complainant is referring to Section 3E, which addresses evidence of applicant's [Complainant's] additional financial ability to pay.¹²² In other words, Complainant contends that the City "imposed" an unreasonable requirement for a personal guarantee upon Complainant as the

¹¹⁵ The actual deductible for the \$1 million pollution coverage is \$5,000. See FAA Exhibit 1, Item 15.

¹¹⁶ See FAA Exhibit 1, Item 15.

¹¹⁷ Insurance representative stated that the deductible on a \$5 million liability coverage involving a Cessna Citation could, because of the nature of the operation, be as low as \$0. Complainant's aircraft is professionally flown and operated, and that it can be described as a typical small company corporate flight department. See FAA Exhibit 1, Item 10.

¹¹⁸ FAA Exhibit 1, Item 1, Exhibit 1B.

¹¹⁹ FAA Exhibit 1, Item 1, p. 2, 4, 9.

¹²⁰ FAA Exhibit 1, Item 1, p. 9.

¹²¹ FAA Exhibit 1, Item 1, p. 4.

¹²² FAA Exhibit 1, Item 2, Exhibit D.

sole means of meeting the insurance requirements in Section 3E. The City denies these claims and adds that “the City gave Brown several alternative ways to satisfy this requirement.”¹²³

The Director disagrees with Complainant’s argument. A review of Section 3E and the record shows that there is no *requirement* [emphasis added] for a personal guarantee, and that the personal guarantee is one of the options available in order to meet the additional ability to pay requirement. In addition, there is evidence that the City did provide options to meet the requirements of Section 3E, including valuation of an asset, surety bond, letter of credit, corporate guarantee, or a personal guarantee.¹²⁴

Complainant recognizes this to some extent when it states “the City requires either a surety bond for the same amount or a very restrictive personal guarantee.”¹²⁵ Moreover, it is inconsistent for Complainant on one hand to argue that the City required a personal guarantee and on the other hand to reject all other options to meet the additional ability to pay. By stating that the other options the City has available as a means to meeting the \$1 million additional ability to pay are not accessible, that it could not acquire a surety bond at a reasonable cost, and that a letter of credit was equally costly and out of range,¹²⁶ Complainant is indeed admitting that it was an option, not a requirement. In any event, a review of the record indicates that Complainant opted for a personal guarantee as a means of meeting the requirements of Section 3E. This is reflected in the *Continuing Guarantee Agreement* executed by the City and Complainant on May 12, 2003.¹²⁷

In addition, Complainant states that it was after construction of its hangar and fueling facility was started that Complainant “saw the new and improved personal guarantee that it had the option to sign or have spent the entire cost of construction in vain.”¹²⁸ In other words, Complainant represents that the requirement for additional ability to pay that the City ultimately adopted, came about after Complainant started construction of its facilities at the Airport and that in a way, contributes to the City’s unreasonable self-fueling practices. Moreover, since (1) in September 2002, before construction began, the City had notified Complainant of the additional ability to pay requirement, and (2) because by April 1, 2003, Complainant was already engaged with the City in finalizing the “personal guarantee.”¹²⁹

Therefore, based on the above, the Director finds that the City did not impose the requirement for a personal guarantee on Complainant as the sole means of meeting the insurance requirements in Section 3E and that the issue of the \$1 million requirement for additional ability to pay is the main issue, not the manner in which that requirement is met, e.g. personal guarantee or by other methods.

(d). Conclusion on Reasonableness

Therefore, based on the above, the Director finds that the \$1 million additional ability to pay requirement imposed by the City on Complainant for the right to self-fuel at the Tulip City Airport is unreasonable and contrary to Grant Assurance 22, *Economic Nondiscrimination*, 49 USC 47107(a).

¹²³ FAA Exhibit 1, Item 2, p. 14.

¹²⁴ FAA Exhibit 1, Item 1, Exhibit 4, FAA Exhibit 1, Item 2, p. 9, 14-15, FAA Exhibit 1, Item 2, Exhibit E, p. 4-5.

¹²⁵ FAA Exhibit 1, Item 3, Exhibit 7.

¹²⁶ FAA Exhibit 1, Item 3, p. 4-5.

¹²⁷ FAA Exhibit 1, Item 1, Exhibit 6, p. 1. The City’s statements that “Brown chose not to use this because it purposely keeps its aircraft in a shell company with few assets to protect Metal Flow’s assets from liability for problems arising in connection with its aircraft or fueling system. An aircraft owner can satisfy this requirement by either providing a letter of credit or bond to back up its obligations or being willing to stand behind those obligations itself. Brown does not want to pay the premium for the letter of credit or bond or to stand behind its obligations itself” (FAA Exhibit 1, Item 2, p. 14-15) is speculative and not relevant in this case. Neither the City nor the FAA is in position to second-guess the financial or legal reasons behind the decision by a particular user of the airport to choose a particular method of meeting a financial requirement.

¹²⁸ FAA Exhibit 1, Item 3, p. 3.

¹²⁹ FAA Exhibit 1, Item 2, Exhibit G and FAA Exhibit 1, Item 2, Exhibit C.

(7). Unjust Discrimination

Grant Assurance 22, Economic Nondiscrimination, of the prescribed sponsor assurances implements the provisions of 49 USC § 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.¹³⁰ In this case, Complainant alleges three counts of unjust discrimination. First, Complainant argues that the City has unjustly discriminated against Complainant in favor of another self-fueler by not imposing the same additional ability to pay and insurance requirements.¹³¹ Second, Complainant argues that the City has unjustly discriminated against Complainant by not imposing similar insurance requirements on the FBO. Third, Complainant argues that it is being unjustly discriminated against because the City does not impose the fuel flowage fee on other users of the Airport.¹³²

Based on this, three issues are discussed in this section: (a) whether imposing \$1 million in additional ability to pay and the \$5 million in liability protection on Complainant but not other self-fuelers, is unjustly discriminatory in violation of Grant Assurance 22, *Economic Nondiscrimination*, (b) whether imposing the \$1 million additional ability to pay on Complainant but not on the FBO, is unjustly discriminatory and in violation of Grant Assurance 22 *Economic Nondiscrimination*, and (c) whether the City's self-fueling practice of assessing a fuel flowage fee is unjustly discriminatory and contrary to Grant Assurance 22 *Economic Nondiscrimination*.

(a). Whether imposing \$1 million in additional ability to pay and the \$5 million in liability protection on Complainant but not other self-fuelers, is unjustly discriminatory in violation of Grant Assurance 22, *Economic Nondiscrimination*, 49 USC 47107(a).

In arguing unjust discrimination, Complainant claims that the self-fueling agreement between the City and another self-fueler, Wingspan LLC (as an assignee of a self-fueling agreement which predates the year 2000) did not contain the same requirements imposed upon Complainant when it sought to self-fuel.¹³³ Specifically, Complainant alleges that the requirement for \$1 million in additional ability to pay and the \$5 million in liability protection were never imposed upon Wingspan LLC.¹³⁴

The record shows that in addition to Complainant, Wingspan LLC also self-fuels at the Airport¹³⁵ and that Wingspan LLC does not have the same self-fueling insurance requirements the City has imposed upon the Complainant. The City admits this when it states that Wingspan LLC's lease predates the Fueling Rules and that it has a long-term lease that includes the right to continue using its existing fueling system for it and its affiliates.¹³⁶ The classification of Wingspan LLC as an entity that can self-fuel is determined by a review of its lease with the City in that (1) Wingspan LCC is permitted to service its aircraft (which includes fueling) and service aircraft stored in its hangar and (2) is permitted to store fuels on the premises.¹³⁷ Having the ability to service its aircraft along with the ability to store fuel and not being permitted to sell fuel implies self-fueling.¹³⁸

¹³⁰ Grant Assurance 22(a).

¹³¹ FAA Exhibit 1, Item 1, p. 11.

¹³² FAA Exhibit 1, Item 1, p. 12.

¹³³ FAA Exhibit 1, Item 1, p. 11.

¹³⁴ FAA Exhibit 1, Item 1, p. 4, footnote 2, FAA Exhibit 1, Item 3, p. 8.

¹³⁵ FAA Exhibit 1, Item 2, p. 5.

¹³⁶ FAA Exhibit 1, Item 2, p. 5-6.

¹³⁷ FAA Exhibit 1, Item 13, Exhibit 2, p. 4.

¹³⁸ FAA Exhibit 1, Item 13, Exhibit 2, p. 4, para 6.

In defending its position for not imposing the same self-fueling requirements on Wingspan LLC as it has imposed upon Complainant, the City argues that all fuel going in and out of Wingspan LLC's fueling system "is pumped by the FBO essentially the same way the FBO uses its own tanks" and that "the FBO fills Wingspan's fueling system and then uses that fuel in fueling aircraft owned by Wingspan."¹³⁹ In other words, the City argues that the fueling arrangement in place for Wingspan LLC differs from that used by Complainant and therefore implies that this somehow justifies the different manner in which both entities are treated. The Director does not agree. Wingspan LLC is a self-fueler.¹⁴⁰ The fact that it chooses to have the FBO fill its tanks or dispense fuel is irrelevant since it has, under its agreement, the right to procure its own fuel and hence self-fuel.¹⁴¹ Simply because Wingspan LLC currently does not exercise its right to fuel its own aircraft and has the FBO fill its tanks and fuel its aircraft does not mean it has given up the right to self-fuel.

In any event, Wingspan stores fuel and must provide adequate fuel containment on its premises,¹⁴² which in by itself is one if not the most important elements of self-fueling. It seems obvious that there is a genuine issue as to whether Wingspan is self-fueling or not, even though Wingspan chooses to have the FBO provide some of its fueling activities. The fact that the FBO fills tanks or even dispenses fuel may reduce risk when compared to other self-fueling activities such as Complainant, but it does not eliminate risks associated with fueling and storing fuel. As a result, although the City may demonstrate that the risk with regards to fueling is somewhat lower with Wingspan, it does not justify imposing a requirement for \$1 million in additional ability to pay and the \$5 million in liability protection on Complainant while exempting other self-fuelers from any such requirements.

The City also defends its position by stating that "when the Wingspan lease is up for renewal, or next assigned, the lessee or assignee will be required to meet the insurance and financial assurance requirements of the Fueling Rules as then applicable"¹⁴³ and that the City "could not legally impose additional requirements on Wingspan LLC" because of its original agreement.¹⁴⁴ With these statements, the City is arguing that it will correct the situation in 2036 when the Wingspan LLC lease expires.¹⁴⁵ The Director does not agree that "it would be unreasonable to compel the owner or operator of an existing fueling system to immediately comply with a newly adopted rule"¹⁴⁶ and that it cannot "unilaterally impose fueling system requirements on those with pre-existing agreements regarding fueling systems..."¹⁴⁷ because these requirements are established by general rule, not by contract.

The net effect of adopting the 2000 Fueling Rules and Regulations, and specifically exempting Westshore Aviation [later became Wingspan] is that the City required Wingspan to comply with a newly adopted requirement, the \$1 million in contamination insurance contained in the 2000 Fueling Rules and Regulations.¹⁴⁸ This in turn appears to confirm that the City imposed a new fueling requirement on a pre-existing agreement which appears to be consistent with provisions of Wingspan's agreement with the City

¹³⁹ FAA Exhibit 1, Item 2, p. 5.

¹⁴⁰ The Director notes that, although the fueling activities of Wingspan are generally in line with the concept of self-fueling, some information in the record raises some concerns. This is because Wingspan appears to be able to fuel not only its own aircraft but also those aircraft of another company, JCI. FAA Exhibit 1, Item 2, p. 5. In addition, in its fueling regulations, the City addresses Wingspan's fueling operations under *Commercial Fueling* and in fact allows Wingspan to "continue selling fuel for use in aircraft it manages and to Johnson Controls..." FAA Exhibit 1, Item 2, Exhibit D. This appears to indicate that Wingspan can sell fuel, although the City limits profitability. FAA Exhibit 1, Item 2, Exhibit D. In summary, although the Director does not find that the actual type of fueling conducted by Wingspan (actual self-fueling or commercial or a combination of the two) is critical to this case since it does not conflict with the arguments that are the basis for the Complaint, namely reasonableness and unjust discrimination, the City should reassess the manner in which it classifies fuelers at the Airport in order to prevent future issues regarding tenant's fueling activities at the Airport in a manner contrary to the FAA's policy on self-fueling.

¹⁴¹ See FAA Exhibit 1, Item 13, Exhibit 2 Section 6 C, p. 4.

¹⁴² Wingspan's has its own fueling system, see FAA Exhibit 1, Item 2, p. 5 and FAA Exhibit 1, Item 13, Exhibit 2, p. 4.

¹⁴³ FAA Exhibit 1, Item 2, p. 5-6.

¹⁴⁴ FAA Exhibit 1, Item 2, p. 5.

¹⁴⁵ FAA Exhibit 1, Item 2, Exhibit H, letter dated October 26, 2004, p. 2.

¹⁴⁶ FAA Exhibit 1, Item 2, p. 11.

¹⁴⁷ FAA Exhibit 1, Item 2, p. 11.

¹⁴⁸ See FAA Exhibit 1, Item 1, Exhibit 3, Section 1 *Commercial Fueling*.

requiring compliance with “regulations adopted for the operation of Tulip City Airport...”¹⁴⁹ Based on this, the City can and did change fueling requirements on an existing fueler.

Nothing prevents the City from imposing reasonable safety and environmentally related fueling requirements on all its fuelers, or conditioning the terms of an assignment, especially if it is truly concerned about its exposure to risk. It does not have to wait for existing leases to expire before doing so. For example, FAA would agree that an obsolete fuel system need not be replaced until the expiration of a fueler’s contract, but if that fuel system leaks and is contaminating the airport grounds, the airport sponsor is obligated to address this risk and not wait until the fueler’s contract expires. An airport sponsor is obligated to address risk. It can’t apply solutions to risk to one party and not to other similarly situated parties that also present risk to the City.

Moreover, as the City agreements with its fuelers are “subject and subordinate to the provisions of any existing or future agreement between the City and the United States,”¹⁵⁰ the City has the ability to change existing agreements to meet its Federal obligations. For example, the land lease between the City and Prince Corporation specifically states that the “lease is subordinate to the provisions of any existing or future agreement between the Lessor and the United States relative to the operation or maintenance of the Airport.”¹⁵¹

Although the charter restriction may impact the City’s ability to expend funds at the Airport and the City may therefore have “heightened” concerns about safety, liability, and environmental impacts,¹⁵² the fact of the matter is that the City can impose safety and environmental rules and regulations on its airport users, commercial or not. At issue is the fact that fuel is dispensed and that the activity represents a potential risk to the City. An airport imposing a new set of fueling safety and environmental requirements in response to a defined risk must treat all fuelers that represent that risk in a non-discriminatory fashion. That is, the City can’t apply requirements to one party and ignore the risk of the activities of other similarly situated parties.

Based on the above, the Director finds that although the fueling operations by Wingspan are not exactly the same as those conducted by Complainant, the City remains exposed to some risk associated to Wingspan’s fueling operations. As a result, imposing \$1 million in additional ability to pay and the \$5 million in liability protection on Complainant but not other self-fuelers, is unjustly discriminatory and in violation of Grant Assurance 22, *Economic Nondiscrimination*, 49 USC 47107(a).

(b). Whether imposing the \$1 million additional ability to pay on Complainant but not on the FBO, is unjustly discriminatory in violation of Grant Assurance 22 *Economic Nondiscrimination*, 49 USC 47107(a).

On October 23, 1986, the City entered into a Fixed Base Operator (FBO) agreement with Tulip City Air Service, Inc. for aeronautical services and for the operation of the Airport.¹⁵³ Although the agreement predates the City fueling rules and regulations (established in 2000 and 2003), Complainant alleges, that (1) the City did not and does not impose the \$5 million liability coverage on the FBO and (b) that the City did not and does not impose the \$1 million additional ability to pay.¹⁵⁴ Complainant argues this to be unjustly discriminatory.

¹⁴⁹ See FAA Exhibit 1, Item 13, Exhibit 2 Section 11, p. 7.

¹⁵⁰ See FAA Exhibit 1, Item 13, Exhibit 2, Section 13, p. 9.

¹⁵¹ FAA Exhibit 1, Item 13, Exhibit 2, Section 13, p. 9

¹⁵² FAA Exhibit 1, Item 2, p. 10.

¹⁵³ FAA Exhibit 1, Item 11.

¹⁵⁴ FAA Exhibit 1, Item 1, p. 4, footnote 2, FAA Exhibit 1, Item 3, p. 8.

It is common that FBOs engaged in aircraft fueling to be required to purchase and maintain appropriate levels of insurance to protect themselves and the airport from claims that may arise out of or result from the fueling services performed. A review of the FBO's lease at Tulip City Airport indicates that since 1986 and through the subsequent amendments (1992-1995), the insurance requirements imposed upon the FBO for fueling operations included \$5 million for bodily injury, \$5 million for property damage, \$5 million for products liability and \$5 million for comprehensive public liability and property damage, \$3 million for passenger liability, \$1 million for hangar's keepers insurance.¹⁵⁵ Based on this, it is clear that the agreement between the City and the FBO contains significant insurance coverage regarding fueling operations. As such, the claim by Complainant that the City did not impose the \$5 million liability coverage on the FBO but did so on Complainant is rejected.

However, a review of the FBO's lease and its amendments indicates that the City has not and does not impose on the FBO an additional ability to pay requirement of \$1 million for any of its fueling operations. Therefore, the question before the Director is whether not imposing the \$1 million additional ability to pay upon the FBO but doing so on Complainant is unjustly discriminatory.

In analyzing whether unjust discrimination has taken place, the Director must first address an important core issue: whether or not Complainant and FBO are similarly situated. Along these lines, the Director recognizes that a private entity like Complainant engaged in self-fueling of a C-550 jet and an FBO engaged in public commercial fueling operations are obviously not the same type of entities. Nonetheless, the important similarity in this case is the act of fueling, along with its risks, liability and safety concerns. Both entities are affected. In fact, this is also the City's view since it regulates all fueling with its *Tulip City Airport Fueling Rules and Regulations*.

As argued throughout this Complaint, the City is concerned about the potential for exposure to risk and liability due to fueling at the Airport. This exposure to risk exists for the operation of both operators and therefore, for the purpose of fueling aircraft, Complainant and FBO are similarly situated. Moreover, the City has not objectively qualified or quantified a difference in risk between the fueling by the FBO and that of the Complainant that would justify a different treatment in its insurance requirements.

An airport sponsor is obligated to address risk but can't apply solutions to risk to one party and not others. Since the City agreement with the FBO is "subject and subordinate to the provisions of any existing or future agreement between the City and the United States,"¹⁵⁶ the City has the ability to change existing agreements to meet its Federal obligations. The Complainant's fueling facility fuels one aircraft and is located well away from the FBO/terminal where the vast majority of the activity on the Airport takes place.¹⁵⁷ The FBO is "on a much higher trafficked area of the airport, pumps much more fuel, more frequently than Brown [Complainant] and the public has access to the area."¹⁵⁸ Since the FBO, which is obligated by terms of its FBO Agreement with the City "to provide fuel to everyone at the Airport"¹⁵⁹ it becomes apparent that the exposure of the City to risk related to FBO operations would equal or exceed the risk of the Complainant's operations.

The record also shows that Complainant's facility is state of the art. It is composed of a 12,000-gallon above-ground unit, doubled-walled, with an outer shell that will hold 125% of the fuel capacity of the inner tank and includes a containment area with a capacity of 3,000 gallons to handle any leaks or over-fueling. The fueling system also includes an alarm system for fuel leaks and that a *Spill Prevention Control and Countermeasure Plan* which was reviewed by the City. This suggests, according to Complainant, that the risk

¹⁵⁵ FAA Exhibit 1, Item 11, p. 16 and Exhibit I of agreement.

¹⁵⁶ See FAA Exhibit 1, Item 11, p. 18.

¹⁵⁷ FAA Exhibit 1, Item 1, p. 4-5.

¹⁵⁸ FAA Exhibit 1, Item 3, p. 8.

¹⁵⁹ FAA Exhibit 1, Item 2, p. 5.

of a spill is “far less with this tank than it is with the various tanks [underground fuel tank] owned by the FBO...”¹⁶⁰

In its defense, the City claims that the “the FAA encourages the sponsor to establish generic standards and not to tailor them to legitimize what existing users are doing” and that “this necessarily creates the situation that new users will be subject to different rules than grandfathered users” and that “it would be unreasonable to compel the owner or operator of an existing fueling system to immediately comply with a newly adopted rule.”¹⁶¹ The City also adds that it cannot “unilaterally impose fueling system requirements on those with pre-existing agreements regarding fueling systems...”¹⁶²

The Director disagrees with the City’s argument that it cannot require the FBO to meet the new fuel insurance requirements because the FBO agreement was signed in 1986, and therefore predates the Fueling Rules currently in effect at the Airport.¹⁶³ Nothing prevents the City from imposing reasonable safety and environmentally related fueling insurance requirements, especially if it is truly concerned about its exposure to risk for fueling operations on the Airport. The City can impose safety and environmental rules and regulations on Airport users, commercial or not. It does not have to wait for the FBO lease to expire before doing so. While the Airport would not require an FBO to replace a dated fueling system until the FBO contract expires, the Airport is obligated to act if the fuel system presents a risk. If the fuel system is at risk for leaking, the City is not powerless to address the risk before the expiration of the FBO contract.

From the above, we conclude that the City has in fact exempted the FBO from the fueling requirement it imposes on the Complainant, and it did so despite its claim that it must require the insurance and additional ability to pay requirements to protect itself due to its vulnerability stemming from the City Charter. Since exposure to risk from fueling is the issue of concern according to the City, the City cannot, on one hand, impose a \$1 million additional ability to pay requirement on a private self-fueling Citation C-550 jet operator and at the same time exempt the FBO which fuels all of the other aircraft using the Airport.

In summary, the City has not applied its fueling requirements “uniformly to all similarly situated users,” that is, entities that fuel. Based on the above, the Director finds that the City by imposing the \$1 million additional ability to pay on Complainant but not on the FBO, the City has imposed on Complainant an unjustly discriminatory term and condition for the use of the Tulip City Airport in violation of Grant Assurance 22 *Economic Nondiscrimination*, 49 USC 47107(a).

(c). Whether the City’s self-fueling practice of assessing a fuel flowage fee is unjustly discriminatory and contrary to Grant Assurance 22 *Economic Nondiscrimination*, 49 USC 47107(a).

Complainant expresses concern that it pays a fuel flowage fee to the City with every load of fuel it receives as part of its compliance with the City’s fueling requirements, and has yet to see any evidence that the FBO or Wingspan LLC pays or has paid a fuel flowage fee to the City.¹⁶⁴ The City disagrees with Complainant’s claim that the City charges Complainant fuel flowages fees but not other fuelers (FBO and Wingspan LLC).¹⁶⁵

¹⁶⁰ FAA Exhibit 1, Item 1, p. 5 and FAA Exhibit 1, Item 1, Exhibit 1, p. 3, FAA Exhibit 1, Item 2, Exhibit C, Minutes of April 1, 2003 meeting.

¹⁶¹ FAA Exhibit 1, Item 2, p. 10-11.

¹⁶² FAA Exhibit 1, Item 2, p. 10-11.

¹⁶³ FAA Exhibit 1, Item 2, p. 5.

¹⁶⁴ FAA Exhibit 1, Item 3, p. 9

¹⁶⁵ FAA Exhibit 1, Item 2, p. 15.

At issue here is not the amount of the fuel flowage fee, but rather whether or not it is being applied to all those that fuel at the Tulip City Airport.¹⁶⁶ Fuel flowage fees per gallon are normally imposed on commercial and non-commercial fueling activities at an airport. It is a typical manner by which airports collect revenue that is commensurate with airport use and activity. In this case, the Tulip City Airport fueling requirements state that self-fuelers “shall pay a flowage fee to the City equal to the flowage fee paid by the FBO(s)” and that the fuel flowage fee “shall then apply equally to all self-fuelers...”¹⁶⁷ This indicates self-fuelers and the FBO alike are required to pay the fuel flowage fee.

A review of the record indicates that all three entities that fuel aircraft at the Airport pay the fuel flowage fee. The record shows that in 2004, Complainant paid fuel flowage fees in 2004 while the FBOs’ income statement for 2004 shows fuel flowage fee collection from other entities, including Westshore/Wingspan).¹⁶⁸ Based on this, it becomes apparent that all fuelers pay the fuel flowage fee.

Therefore, the Director finds that the City’s practice of assessing a fuel flowage fee is not unjustly discriminatory and contrary to Grant Assurance 22 *Economic Nondiscrimination*, 49 USC 47107(a).

(d). Conclusion on Unjust Discrimination

Based on the above, the Director finds that by imposing the requirements for \$1 million in additional ability to pay and \$5 million in liability protection on Complainant but not other self-fuelers, and by imposing the \$1 million additional ability to pay on Complainant but not on the FBO, the City is unjustly discriminating in violation of Grant Assurance 22, *Economic Nondiscrimination*, 49 USC 47107(a).

B. Whether the City has granted an exclusive right for the use of the Airport in violation of Grant Assurances 23, *Exclusive Rights*, 49 USC § 40103(e) and 49 USC § 47107(a)(4).

In its complaint, Complainant contends that imposing the \$1 million additional ability to pay requirement in Section 3E and the \$5 million insurance requirement the City of Holland has granted an exclusive right, all in violation of the sponsor’s FAA grant assurances.¹⁶⁹

The City denies Complainant’s allegations. The City explains that it has not granted an exclusive right to fuel aircraft at the Airport and that “given the relatively small size of the Airport, there is only one FBO at this time, but owners of aircraft are allowed to obtain a fueling permit to fuel their own aircraft.”¹⁷⁰ As discussed in more detail above, the City also states that the self-fueling requirements, including those in Sections 3E and 3G, “may well be too burdensome for those using little fuel but such operators can obtain fuel from the FBO.”¹⁷¹

In this case, because the Director has already found that the City’s \$1 million in additional ability to pay requirement is unreasonable, that the City unjustly discriminated by imposing the \$1 million in additional ability to pay requirement and the \$5 million in liability protection on Complainant, but not other self-fuelers, and by imposing the \$1 million additional ability to pay requirement on Complainant, but not on the FBO, the Director need not find whether the City has granted an exclusive right for the use of the Airport in violation of Grant Assurances 23, *Exclusive Rights*, 49 USC § 40103(e) and 49 USC § 47107(a)(4).

¹⁶⁶ FAA Exhibit 1, Item 3, p. 9. This fuel flowage fee is established by the City Council on the recommendation of the Airport Advisory Board and is currently set at \$0.09 per gallon. As discussed above, in February 2005, and following an informal complaint by the Complainant, the Bureau of Aeronautics concluded that that the \$0.09 per gallon fuel flowage fee charged to all users of the airport was not inconsistent with the City’s Federal obligations. FAA Exhibit 1, Item 1, Exhibit 7, p. 1 and FAA Exhibit 1, Item 2, p. 4, footnote 4.

¹⁶⁷ FAA Exhibit 1, Item 1, Exhibit 3, p. 7.

¹⁶⁸ FAA Exhibit 1, Item 13, Exhibit 5.

¹⁶⁹ See Footnote 1.

¹⁷⁰ FAA Exhibit 1, Item 2, p. 12.

¹⁷¹ See FAA Exhibit 1, Item 1, Exhibit 4.

VIII. FINDINGS AND CONCLUSIONS

Upon consideration of the evidence and arguments presented by the parties, the Director concludes that based on a preponderance of reliable, probative, and substantial evidence, some of the City's self-fueling requirements are unreasonable and have been applied in an unjustly discriminatory manner in violation of the Federal grant assurances.

Specifically, the Director finds that:

- The \$1 million additional ability to pay requirement contained in Section 3E of the Fueling Rules and Regulations imposed by the City on Complainant for the right to self-fuel at the Tulip City Airport is unreasonable and contrary to Grant Assurance 22, *Economic Nondiscrimination*, 49 USC 47107(a).
- By imposing the \$1 million in additional ability to pay requirement contained in Section 3E of the Fueling Rules and Regulations and the \$5 million in liability protection contained in Section 3G of the Fueling Rules and Regulations on Complainant but not other self-fuelers, and by imposing the \$1 million additional ability to pay requirement contained in Section 3E of the Fueling Rules and Regulations on Complainant but not on the FBO, the City is unjustly discriminating in violation of Grant Assurance 22, *Economic Nondiscrimination*, 49 USC 47107(a).

ORDER

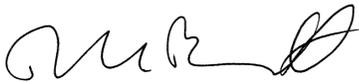
ACCORDINGLY, it is ordered that:

1. The Respondent, City of Holland, is required to submit, within 30 days, a corrective action plan to the Director, Office of Airport Safety and Standards, explaining how it intends to eliminate the current violations outlined in this decision, including the projected timeframe for completion.
2. Failure to provide an acceptable corrective action plan within the designated time may result in the FAA taking appropriate enforcement action, including withholding of approval of any application for grants pursuant to 49 USC §§ 47114(d), 47115 and 47116.
3. The City should reassess the manner in which it classifies fuelers at the Airport in a manner consistent with the FAA's policy on self-fueling, and reassess its insurance requirements to ensure the coverage required reflects the level of risk that is reasonable in terms of type of aircraft, amount of fuel dispensed, and type of fuel facility.
4. All motions not specifically granted herein are denied.

RIGHT TO APPEAL

This Director's Determination is an initial agency determination and does not constitute final agency action subject to judicial review under 49 USC § 46110.¹⁷² A 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.

Date: March 1, 2006



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

¹⁷² See also 14 C.F.R. § 16.247.

INDEX OF THE ADMINISTRATIVE RECORD

The following items constitute the administrative record in this proceeding:

FAA Exhibit 1

Item 1

Complaint No. 16-05-09 dated July 1, 2005, Brown Transport, including appendices containing the following documents:

- ❑ Exhibit 1 Affidavit of Gary Vander Veen, April 28, 2005.
- ❑ Exhibit 1A Jeppesen airport diagram for Tulip City Airport, September 10, 2004.
- ❑ Exhibit 1B Letter from Mr. Greg Robinson, Assistant City Manager, to Mr. Marc Brown, November 8, 2002 (unsigned and includes another draft letter).
- ❑ Exhibit 2 Letter from Mr. Donald G. Heeringa, Chairman & CEO Trendway Corporation to Federal Aviation Administration, Washington DC, March 21, 2005.
- ❑ Exhibit 3 Tulip City Airport Fueling Rules and Regulations, 06/27/2000.
- ❑ Exhibit 4 Letter from Mr. Randall S. Schipper, Attorney, Cunningham Dalman, PC. to Mr. Greg Robinson, Assistant City Manager, October 21, 2002.
- ❑ Exhibit 5 Letter from Mr. Greg Robinson, Assistant City Manager, to Mr. Marc Brown, November 8, 2002 (unsigned).
- ❑ Exhibit 6 Continuing Guaranty Agreement between Mr. Marc Brown and the City of Holland, May 12, 2003.
- ❑ Exhibit 7 Letter from Mr. Rick Hammond, Manager, Airport Safety & Compliance Unit, Bureau of Aeronautics, Michigan Department of Transportation, to Mr. Gary B. Vander Veen, Chief Pilot, Metal Flow Corporation, February 15, 2005 (incorrectly dated 2004), letter from Richard J. Durden to Mr. Rick Hammond, Manager, Airport Safety & Compliance Unit, Bureau of Aeronautics, Michigan Department of Transportation, January 26, 2005.

Item 2

City of Holland's Answer to the Complaint, dated August 15, 2005, including appendices containing the following documents:

- ❑ Exhibit A Land lease between City of Holland and A.D.B. & Associates, December 6, 2002. (This exhibit includes the Tulip City Airport Fueling Rules and Regulations).
- ❑ Exhibit B Property Sublease between A.D.B. & Associates and Brown Transport, April 4, 2003.
- ❑ Exhibit C Airport Advisory Board Meeting Minutes, April 1, 2003 and May 13, 2003, Notice of Referral, April 23, 2003 and Memorandum to Mayor and Members of the City Council, April 23, 2003.
- ❑ Exhibit D Tulip City Airport Fueling Rules and Regulations, Revised July 2003.
- ❑ Exhibit E Letter from Mr. Randall S. Schipper, Attorney, to Mr. Soren Wolff, City Manager, November 13, 2002.
- ❑ Exhibit F Staff Recommendation, Brown Transport Self-Fueling Facility Permit, April 1, 2003.
- ❑ Exhibit G Letter from Mr. Greg Robinson, Assistant City Manager, to Mr. Gary Vander Veen, Chief Pilot, Metal Flow Corporation, September 11, 2002.

- Exhibit H Letter from Mr. Rick Hammond, Manager, Airport Safety & Compliance Unit, Bureau of Aeronautics, Michigan Department of Transportation, to Mr. Gary B. Vander Veen, Chief Pilot, Metal Flow Corporation, February 15, 2005 (incorrectly dated 2004) and letter from Mr. Greg Robinson, Assistant City Manager to Mr. Rick Hammond, Manager, Airport Safety & Compliance Unit, Bureau of Aeronautics, Michigan Department of Transportation, October 26, 2004.
- Exhibit I Excerpt of City Charter, Section 2.1, page 5.
- Exhibit J Minutes of the Meeting of the Board of Canvassers of the City of Holland, November 18, 1998.
- Exhibit K Letter from Mr. Greg Robinson, Assistant City Manager, to Mr. Gary Vander Veen, Chief Pilot, Metal Flow Corporation, May 7, 2003.
- Exhibit L Various documents:
 1. Hand written notes, 01/05/1994.
 2. Hand written notes on retail fuels prices on 1/24/94.
 3. Photocopy of January 1994 issue of Airport Business Magazine.
 4. Memorandum from Chad G. Creevy to Ron Ludema, 05/08/1995 on lease of Lakeshore Air Fuel Farm.
 5. Letter from Mr. Benjamin A. Smith III, Chairperson, Airport Advisory Board, to Mr. Mr. Donald G. Heeringa, President Trendway, October 17, 1995.
 6. Letter from Mr. Jack D. Roemer, Project Manager Federal Aviation Administration, Detroit Airports District Office to Mr. William Gehman, Director, Bureau of Aeronautics, Michigan Department of Transportation, November 21, 1995.
 7. Letter from Mr. Ron J. Engel, Manager, Programming Section, Bureau of Aeronautics, to Mr. Greg Robinson, Assistant City Manager, November 27, 1995.
 8. Letter from Mr. Greg Robinson, Assistant City Manager to Mr. Don Heeringa, President Trendway Corporation, December 18, 1995.

Item 3

Complainant's Reply, August 24, 2005, including appendices containing the following documents:

- Exhibit 7 E-mail from Mr. Gary B. Vander Veen to Mr. Jeff Gilley, (February 2004), letter from Mr. Gary B. Vander Veen to Mr. Jeff Gilley, NBAA, March 1, 2004 (unsigned) and from Mr. Gary B. Vander Veen to Mr. Jeff Gilley, NBAA, March 9, 2004.
- Exhibit 8 E-mail from Mr. Greg Robinson to Mr. Gary Vander Veen, June 25, 2004.
- Exhibit 9 Printout from Avsurance Web Page, 08/24/2005.
- Exhibit 10 Letter from Mr. Bob Knittel, CEO Metal Flow Corporation. Recipient not disclosed, August 23, 2005.
- Exhibit 11 Scottsdale Airport and Airpark Self-Fueling Permit, 03/28/02 and excerpts from the Pierre Regional Airport Minimum Standards for Airport Aeronautical Service Providers, printed 08/24/2005/.
- Exhibit 12 AirNav.com printout for fuel process within 50 miles of KBIV, printed 08/24/2005.

Item 4

FAA Docketing Notice, July 25, 2005.

Item 5

Original Complaint, May 2, 2005, with attachments.

Item 6

FAA Dismissal Letter, June 24, 2005.

Item 7

FAA Form 5010 "Airport Master Record" for BIV, Date: 11/21/2005.

Item 8

FAA Registry Data for Citation N26CB. Date: 11/23/2005.

Item 9

Memo to File, FAA Docket No. 16-05-09, Brown V. Holland, December 5, 2005.

Item 10

Memo to File, FAA Docket No. 16-05-09, Brown V. Holland, December 8, 2005.

Item 11

Fixed Base Operator Agreement, October 23, 1986 (Document provided by Michigan DOT).

Item 12

Letter from Mr. Richard J. Durden [Counsel for Complainant] to Rick Hammond, Manager, Airport Safety & Compliance Unit, Bureau of Aeronautics, Michigan Department of Transportation, November 11, 2004. (Document provided by Michigan DOT).

Item 13

Letter from Mr. Randall S. Schipper to Docket No. 16-05-09. This submission includes the following attachments:

- Exhibit 1 Letter from Greg Robinson, Assistant City Manager to Marc Brown, dated November 8, 2002.
- Exhibit 2 Land Lease between City of Holland and Prince Corp., February 7, 1989.
- Exhibit 3 First Amendment to Fixed Base Operator Agreement, November 15, 1995, FBO Agreement dated October 23, 1986, Memorandum of Amendment Number Two to Land Lease Between City of Holland and Tulip City Air Service, Inc., February 7, 1995, letter from Mr. Andrew Mulder, City

Attorney, to Mr. Gregory Robinson, Assistant City Manager, January 31, 2005, Amendment Number Two to Land Lease Between City of Holland and Tulip City Air Service, Inc., February 7, 1995, Memorandum Number One to Land Lease Between City of Holland and Tulip City Air Service, Inc., November 15, 1994, Amendment Number One to Land Lease Between City of Holland and Tulip City Air Service, Inc., November 15, 1994, and Land Lease between City of Holland and Tulip City Air Service, Inc. February 17, 1992.

- Exhibit 4 Notice of Referral City Council Meeting, November 18, 1998 and Memorandum transmitting attached Fueling Rules.
- Exhibit 5 Fuel Flowage information.

Item 14

Request for Additional Information and Notice of Extension of time, FAA Docket No. 16-05-09, December 5, 2005.

Item 15

Complainant's insurance information, including limits, deductibles and premiums, January 17, 2006. Complainant submitted its insurance information at the request of the FAA investigator.

Item 16

AIP grant history for BIV.

Item 17

Metal Flow Chairman Ran Company With Pride, The Holland Sentinel, August 2003.

Item 18

Excerpts of Cessna Citation II, Operating Manual.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on _____, I caused to be placed in the United States mail (first class mail, postage paid) a true copy of the foregoing document addressed to:

Richard J. Durden, Esq.
Foster, Swift, Collins & Smith, PC
1700 East Beltline, N.E. Suite 200
Grand Rapids, MI 49525

Mr. Greg Robinson
Assistant City Manager
270 South River Avenue
Holland, MI 49423

Andrew J. Mulder and
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Office of the City Attorney
321 Settlers Road
Holland, MI 49423

Suzanne Ball
Office of Airport Safety and Standards