

**UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC**

<b>Self Serve Pumps, Inc.</b>	)	
	)	
<b>COMPLAINANT</b>	)	
	)	<b>Docket No. 16-07-02</b>
<b>v.</b>	)	<b>March 17, 2008</b>
	)	
<b>Chicago Executive Airport</b>	)	
	)	
<b>RESPONDENT</b>	)	

**DIRECTOR’S DETERMINATION**

**I. INTRODUCTION**

This matter is before the Federal Aviation Administration (FAA) as a complaint filed against the Chicago Executive Airport, Illinois (Respondent) regarding its management of the Chicago Executive Airport (PWK) pursuant to the Rules of Practice for Federally-Assisted Airport Proceedings, Title 14 Code of Federal Regulations (CFR) Part 16 (FAA Rules of Practice).

The Complainant, Self Serve Pumps, Inc., alleges, “the airport sponsor at PWK has violated the grant assurances by supporting an unlawful exclusive right to full service FBO’s.” [FAA Exhibit 1, Item 1, p. 7]

The Respondent, Chicago Executive Airport Board, states “the Airport denies that it unjustly discriminated against the Complainant, or that it granted an exclusive right to the incumbent FBOs when Complainant’s application to establish and operate a commercial self-service fueling operation at the Airport was rejected.” [FAA Exhibit 1, Item 3, p. 2]

The decision in this matter is based on: (a) applicable law and FAA policy regarding the Airport’s Federal obligations as imposed by grant assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*, as well as Title 49 United States Code (USC) §47107(a)(1 and 4) and §40103(e); (b) arguments and supporting documentation submitted by the parties; and (c) the administrative record in this proceeding.

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

## **II. THE PARTIES**

### **Airport**

The Chicago Executive Airport is a public-use, general aviation airport located in Cook County, Illinois. The Chicago Executive Airport Board (Airport) operates PWK on behalf of its sponsors.<sup>1</sup> The development of the Airport has been financed, in part, with funds provided to the Airport as the Airport sponsor under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 USC §47101, *et seq.* As a result, the Airport, the Board and both of its co-sponsors are obligated to comply with the FAA sponsor assurances and related Federal law, 49 USC § 47107. [FAA Exhibit 1, Item 6]

### **Complainant**

The Complainant, Rob Hillerich, President of Self Serve Pumps, Inc. describes himself and his business:

*I have been a tenant at PWK and G.A. aircraft owner for 22 years. My primary business is automotive repair and automotive gasoline marketing for the last 32 years... Over the last 3 years, I have been a Director for PAPA (Palwaukee Airport Pilots Association... ) and am currently an active member of PAPA and CEAA (Chicago Executive Airport Association).*  
[FAA Exhibit 1, Item 1, p. 1]

Not only is the Complainant a tenant of PWK, he is also proposing to initiate a fuel concession commercial business at PWK. The Complainant states, “At the regular meeting of the Palwaukee Airport Board<sup>2</sup> I presented my business plan and asked for their approval to become a new business on the field.” [FAA Exhibit 1, Item 1, p. 2]

## **III. BACKGROUND**

### **Procedural History**

On June 22, 2007, the Complainant served to FAA a formal Complaint from Self Serve Pumps, Inc. against the Chicago Executive Airport. [FAA Exhibit 1, Item 1]<sup>3</sup>

On July 12, 2007, the FAA issued a Notice advising the Airport that the Complaint had been docketed. [FAA Exhibit 1, Item 2]

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<sup>1</sup>As stated by the Respondent, the “Airport co-sponsors are The Village of Wheeling and The City of Prospect Heights, both located in the State of Illinois. Chicago Executive Airport is governed by a Board of Directors.” [FAA Exhibit 1, Item 3, p. 1] The parties refer to the Airport sponsor as the “Airport.” In this document, the Director refers to the owner and sponsor as “the Airport.” “PWK” will refer to the Airport facility.

<sup>2</sup>Palwaukee Airport is the former name of the Chicago Executive Airport. Palwaukee and Chicago Executive is used interchangeably by the Complainant.

<sup>3</sup>On March 27, 2007, the Director dismissed Complainant’s first complaint, dated January 19, 2007, without prejudice as incomplete.

On, July 31, 2007, the Airport submitted its Answer and Motion to Dismiss. [Item 1, Exhibit 3]

On August 10, 2007, the Complainant submitted its Reply. [FAA Exhibit 1, Item 4]

On August 23, 2007, the Airport submitted its Rebuttal. [FAA Exhibit 1, Item 5]

## **Factual Background**

This section describes the facts relevant to the instant Complaint (FAA Docket No. 16-07-02). The Airport states, “for purposes of resolving this Part 16 investigation, the Airport admits the factual allegations made in the Complaint.” [FAA Exhibit 1, Item 3, p. 2] The Complainant does not dispute the Background facts submitted by the Airport in its Reply. Rather, as discussed more fully below, the parties differ on the correct application of Federal law and policy to the facts of this case. The facts of the case concern four general issues raised by the Complainant.

### ***1. Discussions and investigation of the need for self-service fueling at PWK***

The Complainant (Self Serve Pumps) states that the PWK user community, the Airport and the Complainant investigated the user-interest in self-service aviation fuel dispensing at PWK<sup>4</sup>. In 2005 and 2006 the parties discussed options in response to a perceived interest in lowering aviation fuel prices at PWK. [FAA Exhibit 1, Item 1, p. 1] The Complainant presented the following timeline in its Complaint:

- *5/1/05 PAPA reported in the monthly newsletter [See FAA Exhibit 1, Item 1, exh. A] the results of a self-fueling survey that was conducted by PAPA at the request of airport management.<sup>5</sup>*
- *7/1/05 In cooperation with PAPA and the airport authorities, both FBO’s at PWK launch a “test” program of “simulated” self serve fuel. In the introduction letter from PAPA, the president mentions that “PAPA has been working on self-fuel Avgas for the last two years.” [See FAA Exhibit 1, Item 1, exh. I] A discount was offered for pilots that pull up to a specific ramp. The program is later called a failure by both FBO’s and discontinued....*
- *11/22/05 Kevin Dohm [Chairman of the Board of Directors for the Airport] and I met for the first time and he expressed his personal interest in moving forward at PWK with additional T-Hangars and self service fuel. He approved of the direction I was going with the self serve fuel and suggested I continue. I began researching fuel equipment costs and monitoring cost and selling prices of aviation fuel in the market.*
- *4/7/06 1:00 pm Airport management and board conducted a “Strategic Planning Workshop” to determine the issues that were most important for the newly formed board to concentrate their efforts on. Using a professional consulting firm at an undisclosed cost estimated of over \$10,000, one of the problems identified at PWK was the high cost*

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<sup>4</sup> Aviation fuels at issue in this Complaint include 100LL avgas, typically used in small general aviation aircraft, and Jet A, typically used in larger general aviation aircraft.

<sup>5</sup> The newsletter states, “As most of you know by now, Palwaukee Airport is considering installing a 100LL self-fueling pump... Airport management has asked PAPA to help in a feasibility study.” The survey question responses indicated 27 to 44 total respondents, including quoted complaints about high prices at PWK. [FAA Exhibit 1, Item 1, exh. A, p. 4]

of fuel. One of the opportunities identified was a self service fuel facility. [See FAA Exhibit 1, Item 1, exh. E]

- 5/21/06 11:15 am I met with Kevin Dohm to further discuss self serve fuel and develop a plan.
- 7/19/06 6:30pm At the regular meeting of the [Airport Board] several pilots and users... spoke on the issue of a need at PWK for a competitive self service fueler.<sup>6</sup> [See FAA Exhibit 1, Item 1, exh. B] [FAA Exhibit 1, Item 1, p. 2]

The results of PAPA's 2005 self-service fueling survey was reported in the PAPA Newsletter. As reported, the survey found, in part, the following:

Considering 100 LL fuel is at \$3.75 per gallon, what amount of a discount off this price would encourage you to use self-serve fuel at PWK? \_\_\_\_\_ per gallon

Over \$1.00	<u>5</u>	\$1.00	<u>1</u>	\$0.75	<u>4</u>	\$0.60	<u>2</u>
\$.0.50	<u>2</u>	\$0.40	<u>3</u>	No Discount	<u>3</u> <sup>7</sup>		

How many gallons of 100 LL self serve fuel would you purchase in a year? \_\_\_\_\_

3000 gal	<u>1</u>	2200 gal	<u>1</u>	2000 gal	<u>5</u>	1800 gal	<u>2</u>
1500 gal	<u>2</u>	1200 gal	<u>2</u>	1000 gal	<u>5</u>	900 gal	<u>1</u>
800 gal	<u>1</u>	600 gal	<u>1</u>	500 gal	<u>3</u>	400 gal	<u>2</u> <sup>8</sup>

If the airport had a pump price for transients and pay as you go, and offered discounts for pre-purchase of fuel, would you be willing to purchase a fuel debit-card? For instance you could pre-purchase your fuel and have a fuel debit card to use at the pump at a price less than the pump price.

Yes 20 No 7 [FAA Exhibit 1, Item 1, exh. A, p. 4]

In his affidavit, Dennis G. Rouleau, PWK Airport Manager, states:

*The price of fuel has been an issue of concern at the Airport for some time. Over the years, in an effort to explore whether retail self-service fueling should be offered as an alternative to full-service fueling, the Airport conducted a number of tests with the help of the FBOs on the field. In 1993, during a two-month test period, then-Priester Aviation (now Signature) offered simulated self-service fueling from a pump-house, at self-service prices. A similar test was conducted during a four-month period in 1995. More recently, during a one-month test period in 2005, and again during a six-month test period in 2006, the Airport FBOs simulated retail self-service Avgas fueling using fuel trucks manned by FBO attendants. Although during each of the test periods FBOs offered full-service fueling (i.e. using an*

<sup>6</sup> The minutes of the Airport Board meeting reflect that five individuals (including the Complainant) commented on the need for self-fueling and/or the high price of fuel. Also, two Board members, including the Chairman, commented on the self-fueling issue or the high price of fuel at PWK. [FAA Exhibit 1, Item 1, exh. B]

<sup>7</sup> A total of 20 respondents answered this question. The FAA Form 5010 indicated 289 based-aircraft at PWK in October 2005: 192 single engine, 45 multi-engine, 52 jet. PWK had 131,651 operations for the 12 months ending September 30, 2005. [FAA Exhibit 1, Item 6].

<sup>8</sup> A total of 26 respondents answered this question.

*attendant) at self-service prices, most pilots continued to take advantage of the FBOs' other services and declined to use the simulated self-service pump. [FAA Exhibit 1, Item 3, exh. A, p. 2]*

## **2. Fuel Prices at PWK**

The Complainant (Self Serve Pumps) quotes the Chairman of the Airport Board (Kevin J. Dohm) in the Complaint. The Complainant attributes this quote to the January 17, 2007 Airport Board meeting. The excerpt states:

*The prices here at Chicago Executive Airport are always going to be higher than the Waukegans, the Campbells, Shaumbergs, and there are a number of reasons. As you all know, those of you that live in the community, your real estate taxes are much higher than if you were out in the country someplace. That's part of it. The margins on a per gallon basis that the FBO's are making – real questionable if you ask me and we still need to get to the bottom of that and see if we can get their gross margin down a bit to bring it a little bit more competitive. But, at no time will our prices ever be the same as the outside airports. No matter what you say, this airport will always be more expensive and there is a premium to pay for the convenience of having your airplane basically in your backyard. I'm sorry. That's the way it's going to be. [FAA Exhibit 1, Item 1, p. 4]*

The Complainant provides some analysis about fuel prices at PWK in August and September 2006, in the self-service fuel business plan proposal presented to the Airport Board on September 20, 2006. [FAA Exhibit 1, Item 1, p. 2] In his business plan, the Self Serve Pumps principal, Rob Hillerich, presented some figures to the Airport Board regarding retail fuel prices at 11 area airports, including PWK. The Complainant does not explain his tables or cite his data, however, they appear to show that full service 100 LL aviation gas (avgas), of the type typically used in small general aviation aircraft, costs more at PWK than at surrounding airports. The tables also suggest that those airports with self-service retail fuel exhibit lower prices for self-service fuel than full-service fuel, as should be expected for the lower level of service. The survey indicates that two airports offer both self-service and full-service avgas. Of these two airports one has full service avgas prices above average and one has full-service avgas prices below average. The six tables present data for a six-week period. [FAA Exhibit 1, Item 1, exh. C, unpaginated]

As stated above, Dennis G. Rouleau, PWK Airport Manager, admits, “The price of fuel has been an issue of concern at the Airport for some time.” [FAA Exhibit 1, Item 3, exh. A, p. 2] ....

The Airport Manager also states in his affidavit:

*Despite the experiment [simulated retail self-service fueling] results, the Airport continues to explore ways in which it can stimulate lower retail fuel prices. In analyzing the retail price of fuel at the Airport, however, one should consider that the Airport is within the City of Chicago's metropolitan area. In fact, the Airport is the closest general aviation airport to the Chicago downtown. As the Chairman of the Airport's Board of Director's stated, it is unreasonable to expect that prices at the Airport be the same as those at more rural airports where the cost of doing business (including property taxes, labor rates, opportunity costs, etc.) is considerably lower. [FAA Exhibit 1, Item 3, exh. A, p. 2]*

### *3. Discussions regarding Self Serve Pumps' proposal for a fuel concession at PWK*

In part as a result of the perception of high aviation fuel prices at PWK and the Airport's past investigation of the feasibility of self-service fueling, Robert Hillerich, President of Self Serve Pumps, Inc. and the Complainant, sought to enlist the interest of the Airport management in a proposal that his company, Self Serve Pumps, conduct a fuel concession at PWK, only retailing fuel from self-service pumps, without bundling this service with other services nor providing full-service fuel. The Complainant, Robert Hillerich, states:

*I was asked by the membership of PAPA to spearhead an attempt to put a competitive self service fueler on the field because of my expertise in the area. I completed my market analysis, equipment cost study, and developed a business plan which indicated that such a business would be successful. [FAA Exhibit 1, Item 1, p. 2]*

In September 2006, Robert Hillerich previewed a business plan and proposal for Airport officials. This PowerPoint presentation is labeled "Self Serve Fuel at PWK" with the names Robert Hillerich and Self Serve Pumps Inc. on the cover page. (See FAA Exhibit 1, Item 1, exh. C.) Robert Hillerich first presented the business plan at the Airport Board meeting on September 20, 2006. He states that he "asked for approval to become a new business on the field." [FAA Exhibit 1, Item 1, p. 2]

In the PowerPoint business plan [FAA Exhibit 1, Item 1, exh. C], Robert Hillerich summarizes the analysis of his regional fuel price survey discussed above and mentions the self-fueling survey discussed above. He concludes by stating in two slides:

*In my opinion the 100LL alone...*

- *If a self service 100LL pump was at PWK at a competitive price, 10% of today's PWK volume will convert to self service (about 3,400 gal/month)*
- *66% of my projected 100LL volume (10,000 gal/month) is fuel that is currently not bought at PWK (6,600 gals/month)*
- *The 27 respondents<sup>9</sup> alone said they would purchase 2800 gal/month....*

*In conclusion...*

- *A new Self Service Fuel Business at PWK will offer as much needed service currently unavailable and:*
- *Will bring in additional revenue*
- *Will satisfy 100LL pilots long standing requests for this business installation*
- *Will improve the regional stature of Chicago Executive*
- *And will have little or no impact on existing business*

In the business plan, Hillerich also promotes the need for automated self-service Jet A fuel. He predicts benefits to PWK, including increased fuel sales, traffic and based-aircraft due to his

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<sup>9</sup> As mentioned above, it appears from the evidence that as many as 44 respondents answered some of the questions on the survey, but only 27 respondents responded to the question about purchasing a specific fuel debit-card.

proposal. Hillerich discusses location, a land lease for \$472/month, other costs, projected profit to the proposed business, and some technical aspects. Hillerich, dba Self Serve Pumps, did not mention any intent to adhere to the Airport's Minimum Standards with regard to fuel sales, nor did he mention providing a level of service beyond an unattended fixed pump for taxi-up and self-fuel. [FAA Exhibit 1, Item 1, exh. C, unpaginated]

The Complainant summarizes the November 15, 2006 Airport Board meeting, stating:

*At the regular meeting of the Palwaukee Airport Board Chairman Dohm reported that after a discussion and consensus by the Board of Directors, it was recommended not to change the Minimum Standards document regarding a Self Service Fuel Facility on the Airport at this time. He then called for a motion regarding this item..... The motion was approved by a voice vote. [FAA Exhibit 1, Item 1, p. 3 and Item 1, exh. H]*

At the January 17, 2007, Airport Board meeting, the Complainant, Robert Hillerich of Self Serve Pumps, Inc. renewed his request for a self-service fuel facility. As stated in the minutes of that Airport Board meeting, "Chairman Dohm thanked Mr. Hillerich for his comments and presentation on self service fueling. He advised that while the BOD had seriously considered the issue, the Board had determined for a variety of reasons to decline the request at this time." [FAA Exhibit 1, Item 1, exh. D, p. 4] Specifically, the Board passed a motion not to change the Minimum Standards to allow a fuel concession at PWK without providing the other services required of a full-service FBO under the Minimum Standards. [FAA Exhibit 1, Item 1, p. 4]

It appears that the Complainant points directly to a statement of Airport Chairman Dohm on January 17, 2007 as evidence of the granting of an exclusive right. The Complainant includes this quote of Chairman Dohm in his Complaint, citing his transcription from an audio recording. The Respondent does not dispute the evidence presented in the Complaint. The Complainant quotes Chairman Dohm's comments in regard to choosing not to change the Airport's Minimum Standards to allow Self Serve Pumps to operate a stand-alone, automated self-serve retail fuel concession:

*It's a tough choice but, it's a choice we have to make. By staying with our Minimum Standards we keep the playing field level as possible. This hopefully sends a message to future tenants and businesses that if you come to our airport, your investment will not be taken lightly. We hope that by maintaining this position we will attract only the quality investors that we want to see at this airport. So, in conclusion, going back to the meeting where we came out of executive session and did not address your business proposal, this is the end of it. The Board, in their decision to not open up the Minimum Standards has said no to the self fueling facility at this time. That's it for now. I'm sorry. [FAA Exhibit 1, Item 1, p. 4]*

#### ***4. Airport's minimum standards and full-service FBO leases***

The Airport and its owners/sponsors adopted the General Aviation Minimum Standards for PWK on March 29, 2006. These Minimum Standards provide guidance for the conduct of aeronautical services by full-service FBOs at PWK, including the bundling of aviation fuel sales in support of other aeronautical services. The bundling of retail fuel sales to support other aeronautical

services is a typical practice at airports with Minimum Standards and was specifically recommended to the Airport by the FAA's Chicago Airports District Office (ADO) in a letter dated September 16, 2002. In that letter, the ADO stated:

*It is also recommended that the Airport Sponsors develop minimum standards for the airport as soon as possible. Given the complex nature of the airport leases and the potential for airport growth, it is important that the Airport maintain consistent business practices.*  
[FAA Exhibit 1, Item 3, exh. D, p. 5]

This letter was in response to an informal complaint from North American Jet (NAJ), an FBO at PWK. It addressed FBO leases, the need for minimum standards and the Airport's Federal obligations. ADO letter did not make a finding of non-compliance, but did recommend good management practices with regard to managing and monitoring FBOs and their leases.

In part, in response to the FAA guidance, the Airport did issue Minimum Standards addressing aeronautical services provided for in the Airport's FBO agreements. [FAA Exhibit 1, Item 3, exh. A, p. 1] These Minimum Standards list the requirements for all commercial service providers to meet in providing aeronautical and fueling services to the public at PWK. Federally-obligated airports are required to ensure that the public interest is served by providing reasonable and non-discriminatory opportunities for commercial businesses to provide aeronautical services to the public. Specifically, the Minimum Standards state the requirements for fuel sales and other aeronautical services provided at PWK. Under the heading "Fixed Base Operator," the Minimum Standards state that all commercial FBO service providers must provide a specific level and scope of services:

**3. FIXED BASE OPERATOR**

**3.1. Introduction**

- 3.1.1. A Fixed Base Operator (FBO) is a Commercial Operator engaged in the sale of products, services, and facilities to include, at a minimum, the following Activities at the Airport: aviation Fuels and lubricants (Jet Fuel, Avgas, and Aircraft lubricants); passenger, crew, and Aircraft ground services, support, and amenities; Aircraft Maintenance; and Paved Tiedown, hangar, Aircraft Parking, office, and shop.
- 3.1.2. In addition to the General Requirements set forth in Section 2, each Fixed Base Operator at the Airport shall comply with the following minimum standards set forth in this Section 3.

**3.2. Scope of Activity**

- 3.2.1. Unless otherwise stated in these Minimum Standards, all products and services shall be provided by FBO's Employees using FBO's Vehicles and Equipment.
- 3.2.2. FBO's products and services shall include the following:
  - 3.2.2.1. Aviation Fuels and Lubricants (Jet Fuel, Avgas, and Aircraft Lubricants):
    - 3.2.2.1.1. FBO shall deliver and dispense, upon request, Jet Fuel, Avgas, and Aircraft lubricants into all General Aviation Aircraft normally frequenting the Airport.
    - 3.2.2.1.2. FBO shall provide a response time of no more than 15 minutes during required hours of activity (excepting situations beyond the control of the FBO).
  - 3.2.2.2. Passenger, Crew, and Aircraft Ground Services, Support, and Amenities
    - 3.2.2.2.1. FBO shall meet, direct, and park all Aircraft arriving on Operator's Leased Premises.
    - 3.2.2.2.2. FBO shall provide courtesy transportation, utilizing Operator's Vehicles, for passengers, crew, and baggage, as necessary and/or appropriate.
    - 3.2.2.2.3. FBO shall provide parking and Tiedown of Aircraft upon the Operator's Leased Premises.
    - 3.2.2.2.4. FBO shall provide hangar storage of Aircraft, to include in-out service.
    - 3.2.2.2.5. FBO shall provide arrival and departure services for Aircraft using Operator's Leased Premises including crew and passenger baggage handling.
    - 3.2.2.2.6. FBO shall provide oxygen, nitrogen, and compressed air services.
    - 3.2.2.2.7. FBO shall provide lavatory services and Aircraft cleaning services.
    - 3.2.2.2.8. FBO shall make available aircraft ground power units.
    - 3.2.2.2.9. FBO shall make available crew and passenger ground transportation arrangements (Limousine, shuttle, and rental car).
    - 3.2.2.2.10. FBO shall make available Aircraft catering arrangements.
  - 3.2.2.3. Aircraft Maintenance
    - 3.2.2.3.1. FBO shall provide Aircraft Maintenance on the airframe, powerplants, and associated systems of General Aviation Aircraft up to Group II Turbojet Aircraft. In addition, FBO shall provide Aircraft line maintenance for General Aviation Aircraft up to Group III Turbojet Aircraft.
    - 3.2.2.3.2. FBO can meet these Minimum Standards for the provision of Aircraft Maintenance by and through an authorized Sublessee who meets the minimum standards for Aircraft Maintenance Operator and operates from the FBO's Leased Premises.

[FAA Exhibit 1, Item 1, exhs. K, p. 9]

In addition to this scope a level of service, the Airport required commercial fuel concessionaires to provide significant investment in fuel storage facilities:

- 3.4. Fuel Storage**
- 3.4.1. FBO shall construct or install and maintain an on-Airport Fuel storage facility at the Airport, unless otherwise authorized or required, in a location consistent with the Airport Master Plan, Airport Layout Plan, or other Land Use Plan.
  - 3.4.2. Fuel storage facility shall have total capacity for three days peak supply of aviation Fuel for Aircraft being serviced by FBO. In no event shall the total storage capacity be less than:
    - 3.4.2.1. 20,000 gallons for Jet Fuel storage
    - 3.4.2.2. 10,000 gallons for Avgas storage
    - 3.4.2.3. 500 gallons of Autogas storage
    - 3.4.2.4. 500 gallons for waste Fuel or test samples (or the capability to recycle waste Fuel or test samples);
    - 3.4.2.5. FBO shall also demonstrate the capability of expanding its Fuel storage capacity within a reasonable time period.
  - 3.4.3. FBO shall, at its sole expense, maintain the Fuel storage facility, all Improvements thereon, and all appurtenances thereto, in a clean, neat, orderly, and fully functional condition consistent with good business practice and equal or better than in appearance and character to other similar Improvements on the Airport.

[FAA Exhibit 1, Item 1, exh. K, p. 10]

Finally, with regard to fueling, the Minimum Standards listed significant requirements for fuel delivery:

- 3.5. Fueling Equipment**
- 3.5.1. FBO shall have two Jet Fuel Refueling Vehicles with one having a capacity of at least 5,000 gallons and one having a capacity of at least 2,000 gallons.
  - 3.5.2. FBO shall have two Avgas Refueling Vehicles having a capacity of at least 750 gallons. A fixed Avgas refueling (self-fueling) system can be substituted for an Avgas Refueling Vehicle.
    - 3.5.2.1. A fixed Avgas refueling (self-fueling) system constructed or installed and maintained by an FBO for public commercial use shall be located in a location specified by the Airport Layout Plan.
  - 3.5.3. Aircraft Refueling Vehicles shall be equipped with metering devices that meet all applicable Regulatory Measures. One Refueling Vehicle dispensing Jet Fuel shall have over-the-wing and single point Aircraft servicing capability. All Refueling Vehicles shall be bottom loaded.
  - 3.5.4. Each Refueling Vehicle shall be equipped and maintained to comply with all applicable safety and fire prevention requirements, standards, and Regulatory Measure including without limitation, those prescribed by:
    - 3.5.4.1. State of Illinois Fire Code and local Fire District;
    - 3.5.4.2. National Fire Protection Association (NFPA) Codes;
    - 3.5.4.3. Illinois Environmental Protection Agency;
    - 3.5.4.4. 14 CFR Part 139, Airport Certification, Section 139.321 "Handling/Storing of Hazardous Substances and Materials".
    - 3.5.4.5. Applicable FAA Advisory Circulars (AC) including AC 00-34 "Aircraft Ground Handling and Servicing" and AC 150/5210-5 "Painting, Marking and Lighting of Vehicles Used on an Airport".

[FAA Exhibit 1, Item 1, exh. K, p. 11]

The Complainant does not state how the Airport is preventing Self Serve Pumps from offering services at PWK in accordance with these Minimum Standards, nor how the Airport is preventing Self Serve Pumps from offering services in a manner similar to the existing FBOs. The Complainant does not state how these requirements are specifically unreasonable.

PWK currently has two full-service FBOs: Signature Flight Support and Atlantic Aviation Services. As stated by PWK Airport Manager Dennis G. Rouleau in his affidavit, “Both FBO’s offer full-service aviation fueling, as well as a number of other aeronautical service, including flight-line services, aircraft storage, and through third-party sublessees, aircraft maintenance.” [FAA Exhibit 1, Item 3, exh. A, p. 1] In its Answer, the Airport describes the history of these FBOs’ leases, stating:

*On December 23, 1986, the Airport entered into several lease agreements with George J. Priester Aviation Service, Inc. (the “FBO Leases”). On April 30, 1988, Priester assigned its interest in the FBO Leases (as amended) to Palwaukee Aviation, Inc. On October 9, 2001, Palwaukee assigned its interest in the FBO Leases (as further amended) to Signature Flight Support Corporation. [FAA Exhibit 1, Item 3, p. 3, fn. 2]*

*On October 1, 1998, the Airport entered into a Fixed Base Operation Lease Agreement with North American Jet Inc. On April 18, 2006, Macquarie FBO Holdings LLC (Atlantic Aviation Services’ holding company) acquired the capital stock of the successor in interest to North American Jet. [FAA Exhibit 1, Item 3, p. 3, fn. 3]*

Also, the Airport submits excerpts of the FBO Leases. The North American Jet (Atlantic Aviation Services) lease includes a list of required services. It states:

### Standards of Operations

*Required Services. The Lessee shall diligently and continuously conduct its operations consistent with industry standards and at a level to meet the demand of users of the Airport on the Premises consisting of the provision of the following supplies and services:*

- (1) The meeting, directing, and parking of all aircraft arriving upon leased ramp area.*
- (2) Courtesy transportation for passengers, crew, and baggage from said ramp area to points on the flight line, as necessary or appropriate.*
- (3) Parking and tie-down of aircraft upon the leased ramp area.*
- (4) Hangar storage of aircraft, to include in-out service.*
- (5) Arrival and departure services for aircraft using the leased ramp area including direction and passenger baggage handling.*
- (6) Minor aircraft engine, airframe and avionics servicing, maintenance and repair, levels of capability to be commensurate with the demand as it exists from time to time.*
- (7) Sale and delivery of aircraft fuel (limited to 100 low lead and “Jet-A” aviation fuel), oil and lubricants. Sale of any grade of fuel may be discontinued with the prior written consent of the Lessor if there is insufficient demand for that grade.*
- (8) Aircraft ground support services commensurate with the demand as it exists from time to time, including aircraft cleaning.*

*(9) The providing of trained, uniformed operating personnel and management to provide the foregoing supplies and services from at least 0700 to 2300, seven days a week, with qualified personnel available 24 hours a day. Operation hours shall be increased by the Lessee as Airport business requirements expand.*

*(10) Direct telephone service to the Chicago Flight Service Station. [FAA Exhibit 1, Item 3, exh. B]*

The Priester Aviation Service (Signature Flight Support) lease has similar, but not identical, requirements. It states:

*3.1 The Lessee shall occupy and use the Leased Premises for the following purposes and for no other purpose whatsoever:*

*3.1.1 The Lessee shall diligently and continuously conduct its operations consistent with industry standards and at a level to meet the demand of users of the Airport on the Leased Premises consisting of the provision of the following supplies and services:*

- (1) The meeting, directing, and parking of all aircraft arriving upon leased ramp area.*
- (2) Courtesy transportation for passengers, crew, and baggage from said ramp area to points on the flight line, as necessary or appropriate.*
- (3) Parking and tie-down of aircraft upon the leased ramp area.*
- (4) Hangar storage of aircraft, to include in-out service.*
- (5) Arrival and departure services for aircraft using the leased ramp area including direction and passenger baggage handling.*
- (6) Minor aircraft engine, airframe and avionics servicing, maintenance and repair; levels of capability to be commensurate with the demand as it exists from time to time.*
- (7) Sale and delivery of aircraft fuel (limited to 100/130 Octane and "Jet-A" aviation fuel), oil and lubricants. Sale of any grade of fuel may be discontinued with the prior written consent of the Lessor if there is insufficient demand for that grade.*
- (8) Use, in common with the Airport, the automotive fuel farm in the Southeast corner of the Airport adjacent to the leasehold for Buildings P, Q and R.*
- (9) Aircraft ground support services commensurate with the demand as it exists from time to time, including aircraft cleaning.*
- (10) The providing of trained, uniformed operating personnel and management to provide the foregoing supplies and services from at least 0700 to 2300, seven days a week, with qualified personnel available 24 hours a day. Operation hours shall be increased by the Lessee as Airport business requirements expand.*
- (11) Direct telephone service to the Chicago Flight Service Station.*
- (12) Automobile rentals for aviation users of the Airport. [FAA Exhibit 1, Item 3, exh. C]*

While not identical because the leases were negotiated at different times, the Standards of Operations for both FBOs nevertheless show a consistency with the Minimum Standards. These documents are quoted here as background to allegations made by the Complainant.

#### **IV. ISSUES**

The Complainant states:

*My complaint primarily is that Chairman Dohm<sup>10</sup> in his speech made it clear that he is protecting the current businesses on the field.... In addition, they are using the excuse that the “Minimum Standards” (Exhibit K) and the General Provisions and Definitions (Exhibit L) do not allow for a self service fueler. The only business that they will allow to sell fuel on the field is a “complete” FBO that offers all the services that are listed in those standards. That includes a repair station, delivery trucks, and 24 hour operations with attendants. They have also made clear that they will not change the Minimum Standards to allow a business on the field that is not described in those standards. This has resulted in the outrageously high fuel prices at the airport. [FAA Exhibit 1, Item 1, pp. 6-7]*

The Complainant cites Advisory Circular AC 150-5190-6 “Exclusive Rights at Federally-Obligated Airports” and Advisory Circular AC 150-5190-7 “Minimum Standards for Commercial Aeronautical Activities” (Advisory Circulars)<sup>11</sup> to support his allegation that “the airport sponsor at PWK has violated the grant assurances by supporting an unlawful exclusive right to full service FBO’s” [FAA Exhibit 1, Item 1, p. 7]

In its Answer, the Airport states:

*The Airport admits the factual allegations made in the Complaint. The Airport, however, denies each of the legal conclusions stated by the Complainant. Specifically, but without limitation, the Airport denies that it unjustly discriminated against the Complainant, or that it granted an exclusive right to the incumbent FBOs when Complainant’s application to establish and operate a commercial self-service fueling operation at the Airport was rejected. [FAA Exhibit 1, Item 3, p. 2]*

Specifically, the Airport states:

*the Minimum Standard [the Airport] has adopted are reasonable and comply with long-standing FAA interpretation of Federal law.. [FAA Exhibit 1, Item 3, p. 2]*

As a practical matter, the Airport adds, “The Airport Minimum Standards tie retail sale of aviation fuel to other basic aeronautical services to be provided by an FBO. In doing so, the Airport seeks to ensure that a minimum level of aeronautical services are made available to the flying public.” [FAA Exhibit 1, Item 3, p. 10]

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<sup>10</sup> Chairman Dohm is the Chair of the Airport Board. The Complainant is against the Airport Board, which is the administrative arm of two co-sponsors which are collectively, the owners of PWK. .

<sup>11</sup> The Advisory Circulars do not impose Federal obligations. Rather Federal law, grant assurances and quitclaim deeds impose obligations. Advisory circulars provide advice to a sponsor in complying with the Federal obligations. These two advisory circulars provide basic information pertaining to the Federal Aviation Administration’s exclusive rights and minimum standards policies, which, in part, describe the contractual grant obligations assumed by the operators of public airports. Airports that have accepted Federal assistance must comply with the statutory prohibition on exclusive rights. Advice provided with respect to minimum standards is optional but highly recommended. [See AC 150/5190-5 (1)]

In order to provide a complete analysis of the issues raised in this Complaint, the Director will examine the following three issues.

1. *Whether the Airport's failure to grant a retail fuel concession to the Complainant for his proposed automated fuel dispensing retail business constitutes an unreasonable denial of access in violation of grant assurance 22, Economic Nondiscrimination.*
2. *Whether the Airport's failure to grant a retail fuel concession to the Complainant for his proposed automated fuel dispensing retail business constitutes unjust economic discrimination in violation of grant assurance 22, Economic Nondiscrimination.*
3. *Whether the Airport's alleged implementation of unreasonable standards, or unjust discrimination against self-service retail fueling as proposed by the Complainant constitutes the granting of an unlawful exclusive right under grant assurance 23, Exclusive Rights and 49 USC § 40103(e).*

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

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

The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program, authorized by the Airport and Airway Improvement Act of 1982, (AAIA), 49 USC § 47101 *et seq.* This program provides financial assistance to an airport sponsor for airport development in exchange for binding commitments designed to assure that the public interest will be served. These commitments are set forth in the sponsor's applications for Federal assistance and in the grant agreement as sponsor assurances, *i.e.*, a list of applicable Federal laws, regulations, executive orders, statute-based assurances, and other requirements binding the sponsor upon acceptance of the Federal assistance. Pursuant to 49 USC § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

FAA Order 5190.6A, *Airport Compliance Requirements*, (hereinafter Order) provides policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances and restrictive covenants in property deeds and conveyance instruments.

## **The Airport Sponsor Assurances**

The AAIA, 49 USC § 47107, et seq., sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. Pursuant to 49 USC § 47107(g)(1), the Secretary is authorized to prescribe project sponsorship requirements to ensure compliance with 49 USC § 47107. These sponsorship requirements are included in every AIP agreement as explained in the Order, Chapter 2, “Sponsor’s Obligations.” Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal government.

The following assurances are relevant to this current complaint: Federal grant assurance 22, *Economic Nondiscrimination*, and Federal grant assurance 23, *Exclusive Rights*.

### ***Federal Grant Assurance 22, Economic Nondiscrimination***

Federal grant assurance 22, *Economic Nondiscrimination*, deals with the sponsor's obligation to make the airport available for aeronautical use on reasonable and not unjustly discriminatory terms.

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. [grant assurance 22(a)]

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

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

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

The grant assurance specifically addresses the issue of the treatment of fixed-based operators (FBOs), stating that “Each fixed-based operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport and utilizing the same or similar facilities.” Assurance 22(c). Subsection (c) specifies the application of subsection (a) to the treatment of FBOs, providing additional specific guidance as to the sponsor obligations.

The Order describes the responsibilities under grant assurance 22, *Economic Nondiscrimination*, assumed by the owners of public-use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport, and to make all airport facilities and services available on reasonable terms without unjust discrimination. [*See* Order, Secs. 4-14(a)(2) and 3-1.]

The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. [*See* Order, Sec. 3-8(a).]

### ***Federal Grant Assurance 23, Exclusive Rights***

The Prohibition against the grant of an exclusive right is found in grant assurance 23, *Exclusive Rights*. This assurance requires, in pertinent part, that the sponsor of a federally obligated airport:

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

The FAA Act, 49 USC § 40103(e), provides, in relevant 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 §40103(e)] An "air navigation facility" includes an "airport." [*See* 49 USC §§ 40102(a)(4), (9), (28).]

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."

In the Order, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, the FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. However, a sponsor is under no obligation to permit aircraft owners to introduce onto the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [*See* Order, Sec.3-9(e).]

### **The FAA Airport Compliance Program**

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

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

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

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

As an aid to airports, the FAA has issued Advisory Circular AC 150-5190-6 "Exclusive Rights at Federally-Obligated Airports" and Advisory Circular AC 150-5190-7 "Minimum Standards for Commercial Aeronautical Activities" (Advisory Circulars) Advisory Circular AC 150-5190-5, "Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities." (Advisory Circulars). Both these documents state:

This advisory circular (AC) provides basic information pertaining to the Federal Aviation Administration's (FAA's) exclusive rights and minimum standards policies, which, in part, describe the contractual grant obligations assumed by the operators of public airports. Airports that have accepted Federal assistance must comply with the statutory prohibition on exclusive rights. Advice provided with respect to minimum standards is optional but highly recommended. [See AC 150/5190-6 & 7]

### **The Complaint Process**

Pursuant to 14 CFR, Part 16, §16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint shall also describe how the complainant was directly and substantially affected by the things done or omitted by the respondents. [14 CFR, Part 16, §16.23(b)(3,4)]

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents that it considers sufficient to present all relevant facts and arguments

necessary for the FAA to determine whether the sponsor is in compliance. [14 CFR, Part 16, §16.29]

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

## **VI. ANALYSIS AND DISCUSSION**

This case is less a dispute over facts, but rather a dispute over the standards for sponsor compliance and the application of Federal law and policy. In fact, the Respondent (Airport) states, “For the purposes of resolving this Part 16 investigation, the Airport admits the factual allegations made in the Complaint.”<sup>12</sup> [FAA Exhibit 1, Item 3, p. 2]

This Complaint is primarily an allegation that the Airport has protected two full-service FBOs from competition from a proposed specialized, self-service fueling vendor<sup>13</sup> to such an extent as to grant a prohibited exclusive right. The Complainant in this case has made imprecise, open-ended allegations based broadly upon language from FAA Advisory Circulars.<sup>14</sup> These two Advisory Circulars provide advice to sponsors regarding their obligations to avoid granting an exclusive right to provide aeronautical services and to use minimum standards to ensure a level playing field for aeronautical competition. The Complainant does not allege directly that the Airport has violated grant assurance 22 by unreasonably denying access or unjust economic discrimination, despite presenting arguments that imply such violations as a component part of an exclusive rights violation.

As in Lanier v. Gainesville, FAA Docket No. 16-05-03, Director’s Determination (November 25, 2005) (Lanier), the Complainant focuses on the language of the Advisory Circulars in the context of an airport sponsor’s denial of a complainant’s preferred, specific business plan, instead of basing the allegations of violations upon the sponsor’s actual Federal obligation or Federal law.<sup>15</sup> In Lanier, the Director chose to construe the allegations as though they had been raised under the appropriate grant assurances. Grant assurances 22 and 23 are the sponsors’ underlying Federal

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<sup>12</sup> The Complainant raises allegations of fact in his Reply that the Respondent disputes in rebuttal, discussed below.

<sup>13</sup> The Complainant proposes an aviation fuel concession that would offer unattended, taxi-up, self-service fuel without offering associated aeronautical services that the Airport requires of all other fuel vendors that also must provide aviation fuels dispensed from a refueling truck by an attendant.

<sup>14</sup> Advisory Circular AC 150-5190-6 “Exclusive Rights at Federally-Obligated Airports” and Advisory Circular AC 150-5190-7 “Minimum Standards for Commercial Aeronautical Activities” (Advisory Circulars)

<sup>15</sup> See footnote 11.

obligations. Likewise, the Director, here, will examine the allegations of an unreasonable denial of access and unjust economic discrimination under grant assurance 22. Finally, the Director will consider whether any unreasonable denial of access or unjust discrimination amounts to the constructive granting of an exclusive right.<sup>16</sup>

### *Burden of proof*

As stated in BMI Salvage Corporations v. Miami-Dade, FAA Docket No. 16-06-16, Director's Determination (July 25, 2006) (BMI):

*In order for the Director to find a sponsor in violation of its Federal obligations under a Part 16 proceeding, not only must the Complainant include sufficient factual evidence to support its allegations, but also establish by a preponderance of substantial and credible evidence that the sponsor has violated its Federal obligations....*

*Disagreements between an airport operator and a complainant do not necessarily require the FAA to conduct an on-site inspection. ... In a formal Part 16 complaint, the complainant has the burden of proof to establish the complaint's allegations by a preponderance of substantial and reliable evidence. [BMI, DD, pp12- 13]*

This burden of proof applies to the Complainant in the extant case. In his Reply, the Complainant finds fault with the Respondent's Answer. The Complainant states:

*Counsel (to Respondent) claims that "despite lower fuel prices..., most pilots preferred to take advantage of the full services offered by FBO's" (Answer Page 5)*

*What evidence has he shown? On what is he basing his Claim? My complaint includes surveys and fact that he did not dispute to prove all my points and the potential success of my business plan. I personally purchased about 1500 gallons of fuel from one of the FBO's during a simulated self service test during 6 months. That is more fuel than I have bought at PWK over 22 years. I am just one example of many. Throughout Counsels Answer unsubstantiated claims like this are made. [FAA Exhibit 1, Item 4, p. 2]*

The Complainant has the burden to prove that the Respondent's Federal obligations, in light of the circumstance of high fuel prices and the possibility of a market for self-service fueling (discussed below), force it to diverge from its own Minimum Standards and force it to allow the Complainant's specific business plan. It is not enough to state that the Airport has not proven that there is an insufficient market for self-service aviation fuel.<sup>17</sup> Also, the Complainant, in his Reply [FAA Exhibit 1, Item 4, p. 2], finds other faults with evidence presented in the Respondent's Answer. [See FAA Exhibit 1, Item 3, exhs. B & C] These allegations of faults are inconsequential and do not reflect upon a question of compliance with the Airport's grant

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<sup>16</sup> Generally, the Director declines to re-analyze the allegation of a constructive granting of an exclusive right after having analyzed the allegation under its component parts of unreasonable denial of access and/or unjust economic discrimination, since the analysis is identical. In Skydive Paris v. Henry County, TN, FAA Docket No. 16-05-06, the Director found the sponsor in non-compliance of grant assurance 22, but also stated, "In view of the finding ... on unjust discrimination, it is unnecessary to consider the related allegation regarding exclusive rights."

<sup>17</sup> As stated in the Background Section, above, and discussed below, the Complainant's market survey included fewer than 50 respondents. [FAA Exhibit 1, Item 1, exh. A. p. 4] The FAA Form 5010 indicated 289 based-aircraft at PWK in October 2005. [FAA Exhibit 1, Item 6].

assurances. In one case, the Airport explains the differing leaseholder names on the lease excerpts, stating that the current leaseholders are subsequent assignees of original leases entered into earlier and admitting that a particular hangar mentioned in the older lease documents no longer exists at PWK. [FAA Exhibit 1, Item 5, pp.2-3] The Complainant acknowledges that he is not relying on his criticisms of the Respondent's Answer, stating, "Regardless of the outcome of the current FBO compliance (with minimum standards), my case is not built on those possible misrepresentations." [FAA Exhibit 1, Item 4, p. 3]

### *Producing Documents*

Apart from the allegations of fault in the FBO lease documents, the Complainant raises objections to the fact that the Respondent only provided excerpts of the FBO lease documents.<sup>18</sup> This absence of information led the Complainant to speculate that the full service FBO's are not complying with the Airport's Minimum Standards by not offering aircraft maintenance services. He states:

*Counsel's lack of lease evidence has now opened the door to dismissal of his "Answer" because required compliance with the Minimum Standards is his entire argument. I believe that Counsel knows that the current FBO's are not in compliance. The Minimum Standards at PWK... state that "FBO shall provide Aircraft Maintenance...." (3.2.2.3.1 page 9) and that "FBO can meet these Minimum Standards... through an authorized Sublessee who... operates from the FBO's Leased Premises." (3.2.2.3.2 page 9)*

*Signature Aviation, one of the FBO's does not offer any mechanical services. In fact, I went on the web and searched Signature Aviation worldwide. As far as I could tell, I checked about 30 locations around the world, they provide no mechanical services at any of their locations. Since Counsel has not provided evidence to prove that Signature has a Sublease on their leased premises, I thought I should investigate further. I emailed Dennis Rouleau (Reply Exhibit C) to request complete copies of the leases that PWK has with the FBO's and Repair Stations that I know of. He was kind enough to meet me on 8/9/07 at 9:00 am. I gave him a list of what I was requesting.... He explained that the leases were complicated and he would have difficulty copying or showing them to me. I believe he was not withholding information. I truly believe he could not find them... I must assume that I am correct. The two FBO's are not in compliance with Minimum Standards which is the foundation of counsels Answer. If I am correct, the representations made by airport personnel and Counsel should ALL come under grave scrutiny! [FAA Exhibit 1, Item 4, pp. 2-3]*

The Director disagrees with the Complainant that the evidence and lack of evidence in the record provides probable cause for increased scrutiny of the Respondent's lease documents or Minimum Standards. The Director does not investigate matters in a Part 16 process that are not necessary

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<sup>18</sup> The Respondent states in its Rebuttal, "The entire set of lease documents consists of several hundred pages covering a number of hangars and buildings, amendments to the original leases, and assignments. The Airport believes that the contents of these agreements are not relevant to the issues raised by Complainant in this case... If the FAA believes it is necessary that the entire set of agreements be included in the administrative record for the determination of this case, the Airport will be happy to comply and make them available.... At this time, however, the Airport believes it has submitted all the necessary evidence in response to the Complaint." [FAA Exhibit 1, Item 5, pp. 3-4]

components of an allegation of a grant assurance violation. (BMI, DD, p. 11) Even if the Airport were allowing an FBO or both FBOs to depart from the letter of the Minimum Standards, that would not constitute non-compliance. The question of whether or not the Airport is unjustly discriminating by allowing some small divergence from the Minimum Standards for one, while not allowing a large divergence from the Minimum Standards by another will be considered under Issue 3, below.

As stated above, the Complainant carries the burden of proof. The Complainant must present complete allegations and substantial and probative evidence to sustain an allegation of a grant assurance violation. The Director notes that the Complainant does not believe that the Respondent was willfully denying access to documents. Also, the Director does not believe that there is probative value to review complete and historical FBO lease documents, because, even if there were language in past or current documents that does not comport with the Airport's grant assurances, such an divergence, itself, would not be a violation of the grant assurances, unless the Airport takes action to effectuate a violation by actually denying access, unjustly discriminating or granting an exclusive right. (BMI, DD, p. 14) The Director observes that there are two full-service FBOs at PWK. So, even if there were some provision in some prior document that might imply an exclusive right, it would appear that the Airport is not acting to prevent competition between the two full-service FBOs at PWK.

**Issue (1)** *Whether the Airport's failure to grant a retail fuel concession to the Complainant for his proposed automated fuel dispensing retail business constitutes an unreasonable denial of access in violation of grant assurance 22, Economic Nondiscrimination.*

The Complainant does not state, specifically, that any single provision of the Minimum Standards as enforced by the Airport is unreasonable: standards for delivery trucks, for example. Rather, the Complainant re-iterates in his Reply, "My complaint is clear that if a new business that is not defined in the Minimum Standards is rejected only for that reason, the Minimum Standards are not reasonable. That is what happened in my case." [FAA Exhibit 1, Item 4, p. 1]

In fact, the lack of a definition for a self-service fueling concession in the Airport's Minimum Standards was not the only basis for the Airport's denial of a lease for Self Serve Pumps Inc. As a practical matter, the Airport adds, "The Airport Minimum Standards tie retail sale of aviation fuel to other basic aeronautical services to be provided by an FBO. In doing so, the Airport seeks to ensure that a minimum level of aeronautical services are made available to the flying public." [FAA Exhibit 1, Item 3, p. 10] Also, the Respondent states, "If the Airport were to change its Minimum Standards to accommodate the Complainant's business proposal, it would unjustly discriminate against the incumbent full-service FBOs that have made the necessary investments to provide full-service retail fueling, and would question the prudence of future investments in reliance to the Minimum Standards." [FAA Exhibit 1, Item 3, pp. 13-14] Such rationale for adhering to minimum standards is correct, customary and addresses, directly, the spirit of the Advisory Circulars: a level playing field set by minimum standards ensures free market competition. The Advisory Circulars do not stand for the notion that an airport sponsor should tilt the playing field in order to manipulate aviation fuel pricing.

Like the Director, the Respondent cites the precedent in Lanier, as well as other cases and guidance. The Respondent correctly applies this guidance to this case. Bundling aeronautical

services with the retail sale of fuel and setting levels of service for fueling are long-standing and common industry practice. The Complainant is not proposing to conduct business on a level playing field and to compete with the two full-service FBOs on price, with the same costs and commitments. Rather, the Complainant is seeking a cost advantage, explicitly granted by the Airport. This structural cost advantage requires less investment, fewer operating expenses and dramatically lower levels-of-service and scope-of-services to aeronautical users.

Finally, the Complainant is not citing any of the aeronautical services required by the Minimum Standards and provided by the full-service FBOs that he believes should be removed from the required services, in order to lower overhead costs and reduce fuel prices. It would appear that the Airport has appropriately made the judgment as proprietor as to which services should be bundled with fuel and what level of service is appropriate to the aeronautical users at PWK. The question to be discussed below, is whether the market circumstances are so extreme as to force the Airport to alter its proprietary judgment to take the specific action that the Complainant prefers, or whether the circumstances are such that the Airport may chose to take other action or no action, preferring to let the market set prices. In fact, the Complainant plainly describes the actions of the free market when he observes that pilots based at PWK chose to fuel at airports nearby with cheaper fuel. The grant assurances do not require that an airport sponsor insist that its FBOs pursue a high volume/low margin fuel price strategy.

The circumstances in *Lanier v. Gainesville* are strikingly similar to the extant case. We cite it extensively, because it is conclusive precedent and applicable.

In *Lanier*, the Director summarized the allegation:

*The Complaint states that the City has refused “Complainant’s specific request for a permit to sell ‘self-serve’ fuel on the airport.” ... The Complainant focuses on the allegation that the City is obligated to agree to its specific business plan in order to avoid granting an exclusive right to the existing fuel retailer.*

*The Complainant does cite the Advisory Circular.<sup>19</sup> It alleges that the City is “granting and protecting to a single Fixed Base Operator the right to sell fuel, while excluding others, including Complainant, in violation of Advisory Circular number 150/5190-5, §1-2.” The Complainant goes on to state that the City violates the Advisory Circular, “in that they do not allow for the establishment of a Specialized Aviation Service Operation (SASO).”<sup>20</sup> ...*

*Neither grant assurance 22, nor any other Federal obligation of an airport sponsor, requires an airport sponsor to recognize a ‘self-service retail fuel operation’ as proposed by the Complainant as a SASO. The Complaint relies heavily on the notion that the limited nature of the Complainant’s business plan defines it as a SASO and that an airport sponsor*

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<sup>19</sup> This Advisory Circular preceded the publication of the current Advisory Circulars cited by the Complainant in the extant case. The two new Advisory Circulars replace the older one cited in *Lanier* and address the same issues.

<sup>20</sup> In *Lanier*, the Complainant was proposing to establish a self-service fuel concession, like the extant complainant. Lanier aligned itself with the language of the Advisory Circular. A Specialized Aviation Service Operation (SASO) is a specialized subset of aeronautical service, customarily not including fuel retailing. Lanier adopted the term SASO to try to support the notion that the sponsor must not apply the same or similar minimum standards to its business plan that it applies to other fuel concessions at the Airport, but must create new, specialized standards to accommodate Lanier’s preferred business plan. The semantics are not relevant here. Both complainants are proposing the same business and insist that the sponsor is obligated to accommodate the preferred business plan.

*must allow a SASO in conformance with the specific business plan proposed. This is an inadequate and incorrect conclusion drawn by the Complainant. Instead of addressing an alleged violation of the sponsor's actual Federal obligations, the Complainant chooses to use the Advisory Circular's 'SASO' concept as a faulty substitute for the Sponsor's Federal obligations under grant assurance 22 and the congruent surplus property obligations.*

***Furthermore, under grant assurance 22, a sponsor may reasonably classify a 'self-serve' retail fuel operation as part of a classification of a range of aviation services including all retail aviation fueling, as long as the standards are reasonable. The Advisory Circular does not amend the Sponsor's Federal obligations to include a requirement that it recognize a 'self-serve' retail fuel operation as a SASO, or that the Sponsor provide special access to a 'self-serve' retail fuel provider.***

***As stated by the City, neither the City's Federal obligations nor the Advisory Circular prevent a sponsor from issuing minimum standards regarding the required level-of-service associated with retailing aviation fuel at the Airport. In fact, the FAA relies on airport sponsors to create minimum standards for the provision of aviation services at its airport which best serve the civil aviation interests of the public. These standards may address the current needs of the local aeronautical users and/or respond to the needs of itinerant users, as well as induce the provision of services that would otherwise not be available without such standards.***

*The Complainant focuses its argument on the notions that it is a SASO and that the Advisory Circular requires the City to agree to its specific business proposal. Neither of these arguments is accurate. The City is not required to recognize a fuel retailer as a SASO; and the Advisory Circular does not require the City to accept any business proposal that consists of some subset of services offered by other businesses on the Airport. Minimum standards may reasonably require that certain aeronautical services be bundled with fuel retailing or require a specific level of service for all fuel retailers to meet. This is common industry practice by airport management to ensure that a variety of aeronautical services are available at the airport at a reasonable, determined level of service quality, and not just the services that require the least investment or expense, or are most profitable. (Lanier, DD, pp. 11-13)*

The Director concludes, "the Director cannot find that the City's failure, as of the filing of the Complaint, to agree to a lease with the Complainant is a violation the City's Federal obligations." (Lanier, DD, p. 13)

In Lanier, the Complainant did raise objections about specific terms in the minimum standards for fuel retailers, citing them as unreasonable (restrooms, car parking and flight planning areas). The Director did not find these terms and requirements of the minimum standards to be unreasonable. This is different from the extant case. The Complainant (Self Serve Pumps) does not make any specific allegation that any term is unreasonable. However, the Complainant does offer some justification why circumstances at PWK compel the Airport to allow his specific, preferred business plan, without the same terms and conditions required of the full-service FBO. Namely, he cites the high cost of fuel at retail, including the high profit margin, and the claim that the market conditions at PWK support his business proposal.

The Complainant presents some survey data that he collected to support his contention that fuel prices are too high at PWK. In his business plan, the Self Serve Pumps principal, Rob Hillerich,

presented some figures to the Airport Board regarding retail fuel prices at 11 area airports, including PWK. The figures appear to show that full service 100 LL aviation gas (avgas), of the type typically used in small general aviation aircraft, costs more at PWK than at surrounding airports. The tables also suggest that those airports with self-service retail fuel exhibit lower prices for self-service fuel than full-service fuel, as should be expected for the lower level of service. [FAA Exhibit 1, Item 1, exh. C, unpaginated] Dennis G. Rouleau, PWK Airport Manager, admits, “The price of fuel has been an issue of concern at the Airport for some time.” [FAA Exhibit 1, Item 3, exh. A, p. 2]

Also, the Complainant presents a user survey of aircraft owners at PWK and a simulation at PWK, involving actual fuel discounts. These investigations were conducted in 2005 with the cooperation of the Airport. The Complainant summarizes these:

*5/1/05 PAPA reported in the monthly newsletter [See FAA Exhibit 1, Item 1, exh. A] the results of a self-fueling survey that was conducted by PAPA at the request of airport management. [FAA Exhibit 1, Item 1, p. 2]*

The newsletter states, “As most of you know by now, Palwaukee Airport is considering installing a 100LL self-fueling pump... Airport management has asked PAPA to help in a feasibility study.” The survey question responses indicated 27 to 44 total respondents, including quoted complaints about high prices at PWK. [FAA Exhibit 1, Item 1, exh. A, p. 4]

*7/1/05 In cooperation with PAPA and the airport authorities, both FBO’s at PWK launch a “test” program of “simulated” self serve fuel. In the introduction letter from PAPA, the president mentions that “PAPA has been working on self-fuel Avgas for the last two years.” [See FAA Exhibit 1, Item 1, exh. I] A discount was offered for pilots that pull up to a specific ramp. The program is later called a failure by both FBO’s and discontinued.... [FAA Exhibit 1, Item 1, p. 2]*

This evidence of market conditions at PWK does not require the Airport to take any one action to address high fuel prices at PWK. The market survey and simulation data submitted does not require the Airport to take any one action, either. The Complainant has not shown that the bundling of aeronautical services or the level-of-service, as required by the Minimum Standards (See Background Section above) is the cause of high fuel prices. Also, the Complainant has not shown that unbundling the service, specifically to allow the Complainant’s specific, preferred business plan would not result in market conditions that are less desirable than offered today. If the Airport were to unbundle aeronautical services, it is possible that PWK would lose associated aeronautical services that are available today from the full-service FBOs. The Minimum Standards do not prevent a full-service FBO from offering self-service Avgas.

The Respondent applies the Director’s Determination in Lanier to PWK:

*The agency (FAA) went on to observe that bundling the sale of retail aviation fuel with other aeronautical services “is a common industry practice by airport management to ensure that a variety of aeronautical services are available at the airport at a reasonable, determined level of service quality, and not just the services that require the least investment or expense, or are most profitable.”...*

*The Airport Minimum Standards tie retail sale of aviation fuel to other basic aeronautical services to be provided by an FBO. In doing so, the Airport seeks to ensure that a minimum level of aeronautical services are made available to the flying public. In fact, the incumbent full-service FBOs at [PWK] are contractually required to provide a level of services similar to those outlined in the Minimum Standards, including: (1) meeting directing, and parking of aircraft; (2) courtesy transportation within the flight line; (3) aircraft parking and tie-down; (4) hangar storage; (5) arrival and departure services; (6) minor aircraft engine, airframe and avionics service, maintenance and repair; (7) sale and delivery of aviation fuel, including Jet-A and Avgas; (8) aircraft ground support services; (9) fully-manned hours of operation; and (10) direct telephone service to the Chicago FSS. ... Limiting the retail sale of aviation fuel- either self-or full-services- to full-service FBOs is appropriate in this case in order to obtain basic aeronautical services that otherwise may not be available. [FAA Exhibit 1, Item 3, p. 10]*

Clearly, the Airport management believes that its bundling of associated services with the sale of fuel serves the interests of the public in civil aviation. This is its primary mission. The Complainant does not identify any specific requirement as unreasonable, nor does he identify any specific service that he believes that the public does not want. In the end, the evidence presented by the Complainant is insufficient to eclipse the Airport's proprietary discretion to make management decisions in the best aeronautical interests of the public, balanced with the best business interests of the Airport as a going concern.

Considering the above, the Director finds that the Complainant has not presented sufficient evidence to establish that the Airport has unreasonably denied access, in violation of grant assurance 22, to the Complainant for a lease to pursue his preferred, specific business plan for a self-service fuel concession that does not meet the Airport's Minimum Standards. Furthermore, the Complainant has not presented any allegation that any specific condition of a fuel concession is unreasonable. Finally, the Complainant's argument that market conditions at PWK require the Airport to accede to the Complainant's specific business plan is unconvincing. The Airport may continue to review and investigate ways to more nearly serve the public's interest in civil aviation through updates to minimum standards, alteration of its schedule of fees, charges and rents, or seeking price competition at PWK.

**Issue (2)** *Whether the Airport's failure to grant a retail fuel concession to the Complainant for his proposed automated fuel dispensing retail business constitutes unjust economic discrimination in violation of grant assurance 22, Economic Nondiscrimination.*

Apart from the question of reasonable standards, is the question of unjust economic discrimination, which is also prohibited by grant assurance 22. Since the Complainant is explicitly requesting to be treated differently than other fuel concessionaires at PWK, an analysis of discrimination is problematic. At no time does the Complainant mention a willingness to consider meeting, or coming close to meeting, some of the requirements of a full-service FBO at PWK. The very definition of his business, as described in the Background section, is wholly different and dissimilar than that required of a full-service fuel vendor, much less a traditional full-service FBO. The Airport's Minimum Standards are within the typical range of services required of an FBO. Furthermore, the Complainant does not explicitly cite unjust economic

discrimination in the terms of the relevant grant assurance 22. However, in order to provide a complete review of the issues, the Director provides the following analysis.

In Lanier, the Complainant faced a similar conundrum. The Director's Determination summarizes:

*the Complainant argues that the City is discriminating in favor of the incumbent FBO by not agreeing to the Complainant's specific preferred business plan. However, the Complainant states, "Respondent looks to minimum standards that require the Complainant to comply 'with the same minimum standards imposed on the existing FBO.' This is exactly what is not permissible." [FAA Exhibit 1, Item 7, p. 5] This is an inaccurate characterization of the City's Federal obligations. The City may apply consistent, reasonable standards to fuel retailers.<sup>21</sup> (Lanier, DD)*

However, the Complainant does raise an issue closely related to an allegation of unjust economic discrimination. In his Reply, the Complainant states:

*Counsel's lack of lease evidence has now opened the door to dismissal of his "Answer" because required compliance with the Minimum Standards is his entire argument. I believe that Counsel knows that the current FBO's are not in compliance. The Minimum Standards at PWK... state that "FBO shall provide Aircraft Maintenance...." (3.2.2.3.1 page 9) and that "FBO can meet these Minimum Standards... through an authorized Sublessee who... operates from the FBO's Leased Premises." (3.2.2.3.2 page 9)*

*Signature Aviation, one of the FBO's does not offer any mechanical services. In fact, I went on the web and searched Signature Aviation worldwide. As far as I could tell, I checked about 30 locations around the world, they provide no mechanical services at any of their locations. [FAA Exhibit 1, Item 4, p. 2]*

The Complainant implies that the Airport is treating one of the incumbent FBOs preferably by allowing divergence with the Minimum Standards, while insisting that the Complainant adhere to the Minimum Standards. This issue raises two questions: one of fact and one of policy.

In regard to fact, the Airport rebuts the Complainant's allegation by providing evidence that the FBO in question, Signature Aviation, does in fact comply with the Airport's Minimum Standards by offering aircraft maintenance services. The Airport states:

*The Airport searched Signature's website, and notes that Signature does advertise the availability of on-call aircraft maintenance services at the Airport. See Rebuttal Exh. A. As provided for in the Minimum Standards, Signature meets its Aircraft Maintenance requirements via agreements with third parties. The Airport sought and received confirmation of the third-party agreements between Signature and other entities to provide aircraft maintenance. Rebuttal Exh. B. Thus the Airport notes that Signature currently has*

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<sup>21</sup> Modification of minimum standards to prohibit an activity that would be allowed under currently adopted minimum standards, even if the new standard is reasonable, could be evidence of unjust economic discrimination. A sponsor should not alter appropriately adopted minimum standards simply to disallow a prospective tenant that is negotiating a leasehold at the airport (Lanier, DD)

*agreements with Flight Check Aircraft Maintenance, Chicago Executive Service Center, and North American Jet Maintenance...*

*As the Complainant states, the Minimum Standards.... State that an “FBO shall provide Aircraft Maintenance...” and that an “FBO can meet these Minimum Standards for the provision of Aircraft Maintenance by and through an authorized Sublessee.... Because Signature offers aircraft maintenance services at [PWK] via agreements with other qualified entities..., the Airport considers that Signature fulfills the maintenance requirements of its lease agreements as well as those outlined in the Airport Minimum Standards. [FAA Exhibit 1, Item 5, pp. 4-5]*

Certainly, the evidence presented by the Respondent in its Rebuttal exhibits A and B, provides compelling evidence that Signature Aviation does in fact offer aircraft maintenance services. Therefore, the allegation fails as a matter of fact.

However, the allegation also fails as a matter of policy. In order to sustain an allegation of unjust economic discrimination, the discrimination must be unjust. It can only be unjust if the preferred party is similarly-situated to the dis-preferred party. In this case, the Complainant (allegedly the dis-preferred party) is so dis-similar from the full-service FBOs at PWK as to in no way be similarly-situated. It is insufficient to simply state that another party is managing to escape sanction from the airport sponsor by departing from standards in one way, so that the airport sponsor must allow a complaining party to depart from standards in a different way. In fact, to sustain an allegation of unjust discrimination, the Complainant, in the extant case, must comply with Minimum Standards to a degree similar to Signature Aviation and request similar treatment in any preference granted by the Airport. That is clearly not the case here. In fact, the Complainant is insisting that it be treated in a wholly different, preferential manner. Finally, as stated, the FAA’s compliance program does not enforce an airport sponsor’s minimum standards.

Finally, in the one way in which the Complainant, Self Serve Pumps, is similarly-situated to the full-service FBOs at PWK, or in fact any would be business at PWK, is that they are a seeker of a lease and or concession at PWK. In that regard, it is similarly-situated and would be required to be considered for a lease and/or concession as any other proponent. In this matter, the record is clear that the Airport appears to have been accommodating and considerate to the Complainant as a potential business and as a member of the PWK user community. As discussed above, the Airport conducted surveys, simulations and considered the Complainant’s proposals in open session and provided frank and complete explanations, as described in the record. In no way can the Respondent be considered stone-walling.

The FAA encourages the parties in the Complaint to continue to work together in a cooperative and respectful manner.

Considering the above, the Director cannot find by a preponderance of reliable and probative evidence that the Airport has unjustly discriminated against the Complainant in violation of grant assurance 22.

**Issue (3)** *Whether the Airport's alleged implementation of unreasonable standards, or unjust discrimination against self-service retail fueling as proposed by the Complainant constitutes the granting of an unlawful exclusive right under grant assurance 23, Exclusive Rights and 49 USC § 40103(e).*

Generally, the Director declines to further consider a constructive granting of an exclusive right after having analyzed the allegation under its component parts of unreasonable denial of access and/or unjust economic discrimination, as fully discussed above. Such an analysis is redundant.<sup>22</sup> However, the Complainant makes open-ended allegations of circumstance, motive and speculative facts not in evidence to allege an exclusive rights violation by the Airport. Considering this, the Director will provide a summary discussion, herein.

#### *Circumstance*

The Complainant states:

*[The Airport] has made clear that they will not change the Minimum Standards to allow a business on the field that is not described in those standards.<sup>23</sup> This has resulted in the outrageously high fuel prices at the airport. The pilots are a captured audience. [FAA Exhibit 1, Item 1, p. 7]*

The Complainant adds in his Reply:

*I stand by my belief that PWK is a public use airport that should welcome new business, new income, and new types of service. The Airport recognizes the need. They have been experimenting with the concept for 14 years (Rouleau affidavit page 2)! The reason it has not worked is because they have been asking the two FBO's to do it. The two FBOs do not want it to work. I could have predicted the outcome. [FAA Exhibit 1, Item 4, p. 3]*

Primarily, the Complainant's concern is that PWK is being mismanaged because aviation fuel prices are relatively high at PWK. This management concern leads the Complainant to conclude that the Airport must agree to his preferred solution: granting his company, Self Serve Pumps Inc. a lease to retail aviation fuel from an automated, taxi-up, unattended fuel pump, without offering other aeronautical services, commensurate with those required in the Minimum Standards and offered by the two full-service FBOs at PWK. The Complainant presents evidence

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<sup>22</sup>In Skydive Paris v. Henry County, TN, FAA Docket No. 16-05-06, the Director found the sponsor in non-compliance of grant assurance 22, but also stated, "In view of the finding ... on unjust discrimination, it is unnecessary to consider the related allegation regarding exclusive rights."

<sup>23</sup>As discussed below, this is an over-simplified and inaccurate conclusion. As is common practice, the Airport has required bundled services and amenities with aviation fuel sales in the Minimum Standards to ensure a level and scope of services to the aeronautical community that might not otherwise be available if the Airport allowed fuel sales only at PWK. [SEE FAA Exhibit 1, Item 3, p. 10]

that retail fuel prices are higher at PWK than surrounding airports. [FAA Exhibit 1, Item 1, p. 2 and Item 1, exh. C] The Respondent agrees, suggesting that free market mechanisms and overhead costs are, at least in part, at fault. The Airport Manager states in his affidavit:

*Despite the experiment [simulated retail self-service fueling] results, the Airport continues to explore ways in which it can stimulate lower retail fuel prices. In analyzing the retail price of fuel at the Airport, however, one should consider that the Airport is within the City of Chicago's metropolitan area. In fact, the Airport is the closest general aviation airport to the Chicago downtown. As the Chairman of the Airport's Board of Director's stated, it is unreasonable to expect that prices at the Airport be the same as those at more rural airports where the cost of doing business (including property taxes, labor rates, opportunity costs, etc.) is considerably lower. [FAA Exhibit 1, Item 3, exh. A, p. 2]*

The mere existence of high fuel prices does not imply the existence of the granting of an exclusive right, especially in this case where there is no allegation that the Respondent is inhibiting price competition between the two existing full-service FBOs on the field. In fact, one reason for the prohibition on the granting of an exclusive right is to require airports to allow the mechanism of the market to discipline prices. The prohibition of the granting of an exclusive right does not imply the opposite: that an airport must interfere with the market to produce an advantageous price outcome by tilting the playing field to the benefit of certain kinds of operators over others.

The Director's focus under Part 16 proceedings is strictly upon allegations of violations of a sponsor's Federal obligations. (See 14 CFR 16.1) The Director does so by consistently applying a general standard of compliance to the airport specific circumstances in all compliance cases. This standard is found in the Order:

The judgment to be made in all cases is whether the airport owner is reasonably meeting the Federal commitments. It is the FAA's position that the airport owner meets commitments when: (a) the obligations are fully understood, (b) a program (preventive maintenance, leasing policies, operating regulations, etc.) is in place which in the FAA's judgment is adequate to reasonably carry out these commitments, and (c) the owner satisfactorily demonstrates that such a program is being carried out. [Order, Sec 5-6(a)(2)]

As stated in BMI Salvage Corporation v. Miami-Dade, FAA Docket No. 16-06-16, Director's Determination (July 25, 2006) (BMI):

*The FAA only issues findings of fact that directly relate to a question of compliance under the FAA grant assurances and surplus property deeds of conveyance.*

*As stated in the Applicable Law and Policy Section, the FAA does not manage airports. Similarly, the Part 16 process is not a mechanism by which complainant's may petition FAA to establish an alternative management direction for an airport. Consequently, the Director will only consider the record regarding issues related to MDAD's obligations (See BMI, DD, p. 11)*

High fuel prices or high profit margin are not sufficient to make a finding that an airport sponsor is non-compliant. The Airport may, justly, choose to take any of several actions to address fuel prices. As examined in Issue 1, above, the Complainant's argument that market conditions at PWK require the Airport to accede to the Complainant's specific business plan of a stand-alone, automated self-serve fuel concession is unconvincing.

### *Motive*

The Complainant relies on language from the Advisory Circulars as the standard that the Airport is allegedly violating. The Complainant states, "I believe that what has been happening for years and what is happening to me at PWK is wrong and has violated FAA regulations." [FAA Exhibit 1, Item 1, p. 6] Specifically, the Complainant mixes quotes from the Advisory Circulars with comments regarding the Complainant's perception of motive. The Complainant states:

*A.C. NO. 150/5190-6 Section 4, "It is the FAA policy that the sponsor of a federally obligated airport will not grant an exclusive right for the use of the airport to any person providing, or intending to provide, aeronautical services or commodities 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 aeronautical activities." That is exactly what the board has done. "We will protect the investment that the airport businesses have made.' is not a direct quote but is basically what the chairman said at the last meeting. [FAA Exhibit 1, Item 1, p. 7]*

The Complainant concludes his discussion of the Advisory Circulars by stating, "With all this I believe that airport sponsor at PWK has violated the grant assurances by supporting an unlawful exclusive right to full service FBO's." [FAA Exhibit 1, Item 1, p. 7] This appears to be an allegation of an explicit granting of an exclusive right to the two-full service FBOs at PWK.

The Respondent answers:

*The Complainant paraphrases and mischaracterizes a statement made by the Chairman of the Airport Board.... As quoted at length in the Complaint, the day the Airport Board denied the Complainant's request, the Chairman explained that 'if the minimum standards required you to make a substantial investment, you would expect all of the other businesses coming in behind you to have to make the same sacrifice. This levels the playing field... By staying with our Minimum Standards we keep the playing field [as] level as possible. This hopefully sends a message to future tenants and businesses that if you come to our airport, your investment will not be taken lightly. We hope that by maintaining this position we will attract only the quality investors that we want to see at this airport.' [FAA Exhibit 1, Item 3, pp. 11-12]*

The Director agrees that the Complainant has misinterpreted the Chairman's message to suggest the granting of an exclusive right. The sentiment expressed in the quote as provided by both the Complainant and Respondent is consistent with the Airport's Federal grant assurances 22 and 23 with regard to reasonable access, unjust economic discrimination and exclusive rights. Providing a level playing field for all to attempt to compete is the requirement. The grant assurances do not require a specific result, or prescribe a particular path, even if such path might be described in an

advisory circular. But for these purposes, the Director notes that motive alone is insufficient for a finding of an exclusive right or grant assurance violation. (See BMI, DD, p. 16)

This quote does not amount to evidence of the granting of an exclusive right by hidden agreement or understanding, because it simply does not imply the granting of an exclusive right at all. Rather it reveals the intent of the Chairman to appropriately provide a non-discriminatory opportunity for other business to compete on a level playing field. The Complainant does not allege that any business proposal that generally complies with the Airports Minimum Standards has been denied. Also, it is true that if the Airport were to provide significantly more lenient standards to a new entrant, its grant assurances may compel it to provide such unraveling of services and diminishment of level of service for all commercial aeronautical service providers.

### *Speculation*

The Complainant states in his Reply:

*I have a problem with the fact that Counsel has only provided an “Excerpt” of a lease that should have been submitted complete. How do I know that another part of the lease does not exempt the parts shown? [FAA Exhibit 1, Item 4, p. 2]*

As stated in BMI:

*The FAA can only make findings on clear, reliable facts. In the analysis below, the FAA has construed the fact elements of the allegations to the extent it can do so confidently, in order to give the parties as complete an analysis as possible. However, FAA is not able to provide factual findings in regard to all accusations. As stated, the FAA does not make findings of fact that relate to personal, political or legal issues that cannot be directly and clearly connected to noncompliance...*

*With regard to an allegation of an unreasonable denial of access under grant assurance 22, a complaint must clearly and concisely include a description in the initial Complaint of the aeronautical access that was denied, how such access was effectively denied, and why the sponsor’s actions were unreasonable. With regard to an allegation of unjust economic discrimination under grant assurance 22, an allegation should contain a description of the alleged preferential treatment of another party, how the other party is similarly-situated, and that the complainant requested similar treatment and was denied. (BMI, DD, pp.11-12)*

Clearly, the Complainant’s question, “How do I know that another part of the lease does not exempt the parts shown?” is insufficient as an allegation of a granting of an exclusive right by agreement. It is speculative and unsupported. It requires the assumption of concealment that is not supported by the record. Even if there were to be some language in a lease or agreement that does not comport with the prohibition of an exclusive right, that may not, by itself, provide sufficient evidence for a finding of a granting of an exclusive right.

The facts admitted to by the parties in this case do not warrant an ad hoc investigation of old lease agreements, considering that there are two full service FBOs at PWK and there is no evidence that the Airport has inhibited competition between the two FBOs. As stated in the standard of compliance, the FAA does not judge an airport sponsor simply by the plain language of

agreements or minimum standards, since such documents are rarely so perfectly crafted as to avoid all possibilities for inconsistency over time, changing circumstances and interpretations. Rather, the FAA judges compliance by an airport sponsor's actions or inactions with respect to those agreements or minimum standards. These are discussed in the sections above.

The Director finds that the Complainant has not presented a preponderance of substantial evidence that the Airport has explicitly protected the two full-service FBOs from fuel price competition at PWK in a manner to constitute an explicit granting of an exclusive right.

Also, as discussed in Issues 1 and 2, above, the Director is not able to sustain any allegation of an unreasonable denial of access or unjust economic discrimination. Therefore, the FAA cannot determine that the Airport has constructively granted an exclusive right as a result of any action or inaction of the Airport alleged by the Complainant, individually, or in combination with any or all other allegations.

## **VII. CONCLUSION**

The Director finds that the record in this case does not provide sufficient evidence to sustain Self Serve Pump's allegations that the Airport has violated its Federal obligations by imposing unreasonable requirements upon Self Serve Pumps to retail fuel from automated pumps. The Complainant has not shown that the Airport's application of its Minimum Standards to aviation fuel retailers is unreasonable. Nor has the Complainant shown that the Airport's declining to approve Self Serve Pump's preferred method of fuel retailing, without offering the bundled services required in its Minimum Standards, is an unreasonable denial of access. The Director finds that the record in this case does not provide sufficient evidence to sustain an allegation that the Airport has granted an exclusive right by means of unjust economic discrimination, unreasonable denial of access, circumstance, motive or unknown agreements.

Based on the foregoing discussion and analysis, which takes into account the procedural history and background information as well as the applicable law and policy, the Director finds that the Airport is not in violation of 49 USC § 47107(a)(1 and 4) and § 40103(e) or its Federal obligations pursuant to grant assurances 22, *Economic Nondiscrimination* and 23, *Exclusive Rights*.

## **ORDER**

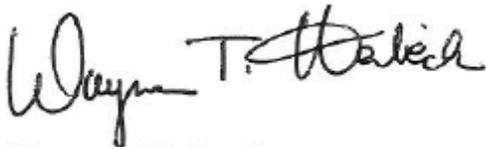
Accordingly, it is ordered that:

1. The Complaint is dismissed.
2. All Motions not expressly granted in this Determination are denied.

**RIGHT OF APPEAL**

This Director's Determination, FAA Docket No. 16-07-02, is an initial agency determination and does not constitute a final agency decision and order subject to judicial review. [14 CFR § 16.247(b)(2)] A party adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR § 16.33(b) within thirty (30) days after service of the Director's Determination.

Signed,



**March 17, 2008**

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Wayne T. Heibeck  
Acting Director, Office of Airport  
Safety and Standards

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Date