UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Airborne Flying Service, Inc., **COMPLAINANT/Appellant** **V.** **City of Hot Springs, Arkansas** **RESPONDENT/Appellee**	**Docket No. 16-07-06** ***Final May 2, 2008***

FINAL DECISION AND ORDER

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal filed by Airborne Flying Service (Airborne or Complainant) from the Director's Determination of December 18, 2007, issued by the Director of the FAA Office of Airport Safety and Standards, pursuant to the *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* found in Title 14 Code of Federal Regulations (CFR) Part 16 (FAA Rules of Practice).

Complainant argues on appeal to the Associate Administrator for Airports that the Director committed errors in conducting the investigation and interpreting the evidence, causing the FAA to dismiss the Complaint erroneously.

Specifically, Complainant argues the Director incorrectly concluded the Respondent's minimum standards and requirements for self-fueling were not unreasonable and were not overly burdensome. In addition, Complainant argues the Director erroneously relied on two previous FAA decisions: (a) Monaco Coach Corporation v. City of Eugene, FAA Docket No. 16-03-17 (July 27, 2004) (Director's Determination) and (March 4, 2005) (Final Agency Decision), and (b) BMI Salvage Corporation & Blueside Services, Inc. v. Miami-Dade County, Florida, FAA Docket No. 16-05-16, (July 25, 2006) (Director's Determination).

The decision in this matter is based on applicable law and FAA policy regarding the Respondent's federal obligations under 49 United States Code (U.S.C.) § 47107(a)(6) and grant assurance 22, *Economic Nondiscrimination*, a review of the arguments and supporting documentation submitted by the parties, and the administrative record in this proceeding.

II. SUMMARY OF THE DIRECTOR'S DETERMINATION

In its Complaint, Airborne alleged the City of Hot Springs (City or Respondent), as sponsor of Hot Springs Memorial Airport (Airport), refused to accommodate – in a reasonable manner – Airborne's desire to self-fuel its aircraft. The Respondent denied the allegation, stating it did not unreasonably restrict the Complainant's ability to self-fuel. Rather, the Respondent argued, Airborne proposed a method of self-fueling that was unacceptable; the City refused to consent to a method that was unacceptable.

The Director found that the record in this case did not provide sufficient evidence to sustain Airborne's allegations that the City of Hot Springs violated its federal obligations by imposing unreasonable requirements for Airborne to self-fuel. The Director stated the Complainant did not show that the City's method for self-fueling was unreasonable or that declining to accept Airborne's preferred method of self-fueling was an unreasonable denial of access. The Director concluded the City correctly recognized Airborne's right to self-fuel and proposed a reasonable method to do so. As such, the Director found the City was not in violation of its federal obligations under grant assurance 22, *Economic Nondiscrimination*.

III. THE PARTIES

A. Airport

The Hot Springs Memorial Airport (Airport) is a public-use airport located in Hot Springs, Arkansas. The City of Hot Springs owns the Airport and is the sponsor under FAA grants. The development of the Airport has been financed, in part, with funds provided to the City as the Airport sponsor under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.* [FAA Exhibit 1, Item 6.] As a result, the City is obligated to comply with the FAA sponsor assurances and related federal law, 49 U.S.C. § 47107. The City operates the commercial fuel concession from the Airport as a proprietary exclusive retail operation.

B. Complainant

The Complainant, Airborne Flying Service, Inc. (Airborne) is an Air Charter and Air Ambulance Service located on the Hot Springs Memorial Airport (Airport). It operates under Part 135 of the Federal Aviation Regulations (FAR). Airborne has been operating from the Airport for 19 years, employs 15 people, and operates a fleet consisting of eight aircraft, both piston and turbine. Airborne occupies two hangars. [FAA Exhibit 1, Item 1, page 2.]

IV. BACKGROUND

A. Procedural History

Airborne Flying Service served its formal Complaint on the FAA on May 16, 2007.

The FAA served its notice of docketing on June 8, 2007.

The City of Hot Springs served its Answer on June 28, 2007.

No subsequent pleadings were submitted by the parties to this Complaint. Neither party notified the FAA of their intentions not to file a Reply or Rebuttal, as allowed under Part 16 procedures.

The FAA issued its Director's Determination December 18, 2007. The Director found the City of Hot Springs was not in violation of its federal obligations regarding the requirements Airborne Flying Service must meet to self-fuel. The Complaint was dismissed.

Airborne Flying Service appealed the Director's Determination, received by the FAA January 17, 2008.

Respondent replied to the Complainant's appeal on February 12, 2008, received by the FAA March 4, 2008.

B. Factual Background

The factual background reported here is from the Director's Determination. [*See* FAA Exhibit 1, Item 7.]

On January 18, 2006, Airborne wrote to the City in an email, stating:

> *Pleased be advised that Airborne Flying Service, Inc. (Airborne) intends to locate fuel tanks on its premises for refueling Airborne's aircrafts. Airborne does not intend to sell fuel to third parties.*
>
> *Please advise what sort of drawings and/or plats of the property locations that you would like to see, together with any requirements that the City of Hot Springs might have in regard to insurance, permits or flowage….*
>
> *We have elected to install our own fuel farm as a result of the Airport's failure to fuel our airplanes in a timely or accurate manner. I have documented several instances of fueling problems. Since, as you know, we are primarily in the Air Ambulance business, we can not afford any delays in fueling. Our patient's lives depend on immediate service. By installing our own fuel farm, we will no longer be a burden to you or your staff.*

> *It is our intent to install two 10,000 gallon tanks adjacent to Airborne's Hangar A1.* [FAA Exhibit 1, Item 1, exhibit B]

On the same day, the City responded, stating, "We'll need to meet and discuss the requirements." [FAA Exhibit 1, Item 1, exhibit B]

Neither party presents a copy of any self-fueling requirements in the spring of 2006. However, as discussed below, discussions between Airborne and the City concern the type, location, monitoring, liability and economics of fuel tanks as proposed by Airborne.

This discussion is presented in the record in the form of the minutes of the Airport Advisory Committee Meeting in June 2006 submitted by the Complainant. [FAA Exhibit 1, Item 1, exhibit C] These meeting minutes (and the accompanying audio recording) provide evidence of the controversy. The discussion regarding Airborne's proposal on self-fueling and the installation of an underground tank and fuel dispensing system comprises 38 pages of transcript. Generally, the transcript of the meeting reveals that Airborne proposes to install an underground fuel tank/fueling system on its leasehold, near its hangar. This installation would allow Airborne to taxi its aircraft to its own fuel storage/dispensing system and directly fuel the aircraft with its own employees, possibly the pilot. The City responds that it does not wish to allow any more underground tanks around the Airport for environmental and liability reasons, but proposes to allow Airborne to store fuel in above-ground tanks in the City's fuel farm and truck fuel to its aircraft with refueling trucks, in a manner similar to the current practice, except Airborne would conduct the fueling with its own employees and equipment, including two refueling trucks. In part, the transcript (as confirmed by the audio recording) states:

> *Mr. Downie[1]: Mr. Higdon[2] has sent us a proposal asking for approval to install two underground storage fuel tanks at Hangar A-1….* [FAA Exhibit 1, Item 1, exhibit C, page 2.]
>
> *Mr. Chairman[3]: Has there ever been a time where you had to make [an air ambulance] run and you couldn't because of fuel?*
>
> *Mr. Higdon: Well, they've gotten other folk to do it, yes. Other folks that dispatch and I couldn't do it because I couldn't respond quick enough. It's far and few between though, Ed, but yes it has happened to us on occasion.*
>
> *Mr. Harris[4]: Because of fuel?*

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[1] Mr. George Downie is the Airport Manager of Hot Springs Memorial Airport.

[2] Mr. Jolly Higdon is the owner or principal of Airborne Flying Service, Inc., the Complainant.

[3] The Chairman of the Airport Advisory Committee is Mr. Ed Burke.

[4] Mr. Harris is an Advisory Committee member.

Mr. Higdon: Yes. Well, I don't know, maybe not necessarily all together. I mean first of all you have to get up with the pilot and get him here and he's really kind of a key to getting everything in motion, but also our company starts expediting, dispatching fuel, getting it to the airplane and then so on. After hours could be a critical situation, could be. [FAA Exhibit 1, Item 1, exhibit C, pages 3-4.]

Mr. Higdon: I guess its been suggested to me that we transport-- if you was to recognize us on this basis that we would locate a fuel farm next to the existing fuel farm and that would require fuel trucks, it would require liability insurance, moving fuel from the existing fuel farm to our facility, training personnel and then storage of our trucks or the trucks would be a situation. It really puts unrealistic, to me, an unrealistic procedure or policy to make that happen like that. That's why I'm pleading for building A-1 and then I can utilize my current personnel. I'll probably end up hiring another person or two, but I can use my current personnel to fuel their aircraft just like you fuel your car. [FAA Exhibit 1, Item 1, exhibit C, page 7.]

Mr. Downie: They have the right to fuel their own aircraft, no argument there. It's at the city or sponsor's, which is the airport, decision as to where he is to put the tanks or where he can put the tanks. It's our decision, but Mr. Higdon has the right to fuel his own aircraft. [FAA Exhibit 1, Item 1, exhibit C, page 9.]

Mr. Downie: Hot Springs has already removed [ten] underground storage tanks [four of] which were left by former tenants. We've already expensed a lot of money [in] removing underground storage tanks….

I don't think we are [exhibiting or] imposing any unfair restrictions, Mr. Higdon, by asking him to put those tanks[5] *in our fuel farm area.*[6] *Because already we'd have a fuel farms there… [Airborne] would have to purchase two trucks, one for Avgas and one for Jet…. We asked Mr. Higdon consider a proposal… placing them up next to our fuel farm.* [FAA Exhibit 1, Item 1, exhibit C, pages 15-16.]

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[5] In the context of the discussion, these refer to above-ground tanks installed at the consolidated fuel-farm at the Airport. The same fuel farm used by the Airport's retail fuel operation, and from where Airborne's fuel is currently delivered.

[6] Words in brackets represent the recorded version, where the transcribed text differs from the recorded version. Complainant on appeal did submit a copy of the complete transcript of the August 2006 meeting; excerpts from this transcript were originally filed with the audio at FAA Exhibit 1, Item 1, exhibit F.

Mr. Higdon: The expense of purchasing two trucks[7] *and the purchasing of trucks like that are not cheap. So that's a pretty good lick on purchasing fuel for trucks of that caliber. In addition to that, I'm not real comfortable that the personnel that would be transporting that fuel from that fuel farm to my facility; I think it puts me in a liability situation. I think liability is going to be an issue and it's going to be an expense in addition to that.*

In addition, I'm not going to have just anybody, if that was to be in place, to move fuel from there to here…, other aircraft are here, is this person going to be able to keep this truck from getting away from him, has he had a bad night and not paying attention or something? I don't want that exposure.

Mr. Chairman: We do that all day long, though. Our trucks do that all day and all night long, too.

Mr. Higdon: I know your trucks do, but you're in the fuel business or the airport is as an FBO here and that's all you do. [FAA Exhibit 1, Item 1, exhibit C, page 17.]

Mr. Higdon: I'm going to elaborate here that my application here would be no more than as if you were fueling your vehicle as done everyday. My pilots could fuel their own aircraft and my maintenance people could fuel their own airplanes.[8] [FAA Exhibit 1, Item 1, exhibit C, page 18.]

Mr. Higdon: I'm not interested in any above-ground system. [FAA Exhibit 1, Item 1, exhibit C, page 37.]

Mr. Higdon's vendor discussed the technical, environmental, and liability issues regarding above-ground and below-ground fuel storage. [FAA Exhibit 1, Item 1, exhibit C, pages 19-34.]

With regard to Airport policy, Mr. Downie, Airport Manager, expressed concern that if the City allows non-consolidated fuel storage at the Airport, by approving fuel-storage at Airborne's hangar, then the City will have to allow others to do the same. Mr. Downie states, "We cannot deny [other tenants' proposals for] underground tanks, then we'd have underground tanks all over this field. We'd be setting precedence." [FAA Exhibit 1, Item 1, exhibit C, page 32.]

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[7] This refers to refueling trucks to transport fuel from the fuel farm to the aircraft: one for avgas for Airborne's piston aircraft; and one for jet fuel for Airborne's jet aircraft. This is how the City retails fuel to Airborne and other consumers of fuel at the Airport. [FAA Exhibit 1, Item 1, exhibit C, page 17.]

[8] From this reference and other context in the record, the FAA accepts that Airborne's proposal involves underground tanks and an automated fuel dispensing system to dispense fuel directly into aircraft that taxi to the fuel storage. Airborne's technical proposal from its vendor, Southern Company, includes a quote for an underground tank/fueling system, including a fueling nozzle. [FAA Exhibit 1, Item 1, exhibit H.]

The Airport Advisory Committee concluded the discussion by tabling the issue until the Airport Manager could get advice from the FAA. [FAA Exhibit 1, Item 1, exhibit C, page 38.]

On July 24, 2006, the City wrote to the FAA's local Airports Development Office to solicit input regarding proposed Minimum Standards regarding fuel dispensing at the Airport. The letter stated:

> *The proposed Minimum Standards for Non-Public Aircraft Fuels and Oil Dispensing provide: B. Tank Farm.*
>
> *(1) If Lessee elects to utilize fixed storage tanks, such storage tanks for each type of fuel shall have minimum capacities of 5,000 gallons each…. Fuel storage tanks shall be above-ground and such installations shall be in a location approved by the [City].* [FAA Exhibit 1, Item 1, exhibit D, page 1.]
> …
>
> *Some of the stated reasons for prohibiting underground storage of fuel on airport property include provisions of the City's Fire Code, increased environmental liability (storm drainage to nearby Lake Hamilton), and the difficulty in making necessary repairs. An above-ground tank would make it easier to detect any leak.*
>
> *We currently have a tenant who desires to install underground tanks, which would be contrary to our proposed Minimum Standards. Please advise us as to whether such a prohibition would be deemed "unreasonable."* [FAA Exhibit 1, Item 1, exhibit D, page 2.]

On August 4, 2006, the FAA's local Airports Development Office responded, stating, "Upon review of the proposed Hot Springs Memorial Field Minimum Standards, [they do] not appear to conflict with the Airport Grant Assurances.[9] The policy decision regarding installation of above-ground fuel tanks is a local issue and FAA does not have an opinion." [FAA Exhibit 1, Item 1, exhibit E.]

At the August Airport Advisory Committee Meeting, the Committee again discussed the technical merits of Airborne's proposal, including the possibility of requiring double-walled underground tanks. According to Airborne's Complaint, "The Airport Advisory Committee voted four to one to allow Airborne to place single wall fuel tanks at the A1 hangar, provided that Airborne post a performance bond for insurance and name the City of Hot Springs as a named insured." [FAA Exhibit 1, Item 1, page 5.] The Complainant's transcript does not contain this evidence. However, FAA review of the audio tape confirms that the Advisory Committee did submit its recommendation to the

[9] As stated above, the draft minimum standards submitted for FAA review by the City specifically stated the requirement of "above-ground" tank installation. [FAA Exhibit 1, Item 1, exhibit D, page 1.]

Hot Springs Board of Directors (City Council) that Airborne's fuel-tank storage proposal be approved. [FAA Exhibit 1, Item 1, exhibit F, audio.]

On September 18, 2006, the Hot Springs Board of Directors (City Council) took up the question of Airborne's proposal for underground fuel storage tanks, with fuel dispensing, on its leasehold, adjacent to one of its hangars. [FAA Exhibit 1, Item 1, exhibit J.] As stated by the Complainant and confirmed by viewing of the video recording, the Airport Advisory Committee recommended to accept Airborne's proposal for a single-wall, underground tank, with a performance bond. The Complainant states, "Despite the Airport Advisory Committee's action, Downie [Airport Manager] once again instated (sic) that the tanks be located at its fuel farm." [FAA Exhibit 1, Item 1, page 5.] At the Board meeting, Mr. Downie made several points regarding his opinion that allowing underground tanks on Airborne's leasehold was not required by federal obligations and an unwise decision. As stated by the Complainant, Mr. Downie did raise the issue of lost revenue to the City. [FAA Exhibit 1, Item 1, page 5; and Item 1, exhibit J, video.] Finally, as stated by Complainant, the Hot Springs Board of Directors voted four to three to override the recommendation of the Airport Advisory Committee and not allow Airborne to place tanks at its hangar." [FAA Exhibit 1, Item 1, page 6; and Item 1, exhibit J, video.]

On March 15, 2007, the FAA's local Airports Development Office wrote to both Mr. Higdon and Hot Springs City Manager, Kent Myers. In that letter, FAA manager, Ed Agnew stated:

> *FAA reviewed the proposed minimum standards [for self fueling] and concluded they would not conflict with the Airport Grant Assurances. The city of Hot Springs demonstrated the rationale for prohibiting underground storage of fuel on airport property and FAA determined the city's rationale was reasonable. FAA also concluded the city's policy decision regarding installation of above-ground fuel tanks versus underground fuel tanks is a local issue….*
>
> *Based on the above, this office has determined the city of Hot Springs is in compliance with their grant assurances*. [FAA Exhibit 1, Item 1, exhibit K.]

V. APPLICABLE LAW AND POLICY

The following is a discussion pertaining to the (a) FAA's enforcement responsibilities; (b) the FAA compliance program; (c) statutes, sponsor assurances, and relevant policies; and (d) the complaint and appeal process.

A. FAA Enforcement Responsibilities

The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The federal role in

encouraging and developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation, and maintenance, as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure airport owners comply with their federal grant assurances.

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

FAA Order 5190.6A, *Airport Compliance Requirements*, October 2, 1989, (hereinafter 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. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for the grant of federal funds or the conveyance of federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in

compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [*See* e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, (8/30/01).]

C. Statutes, Sponsor Assurances, and Relevant Policies

As a condition precedent to providing airport development assistance under the Airport and Airway Improvement Act of 1982 (AAIA), codified at Title 49 U.S.C. § 47101, et seq., the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 U.S.C. § 47101, et seq., sets forth assurances to which an airport sponsor receiving federal financial assistance must agree as a condition precedent to receiving such assistance. These sponsorship requirements are included in every airport improvement program (AIP) grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the federal government.

One federal grant assurance – Assurance 22, *Economic Nondiscrimination* – applies to the specific circumstances of this complaint and appeal. A second grant assurance – Assurance 23, *Exclusive Rights* – is also included because it is relevant to the Complainant's argument that the City is operating a "monopoly" on its fuel concession.

1. Assurance 22, *Economic Nondiscrimination*

Federal grant assurance 22, *Economic Nondiscrimination*, (Assurance 22) implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part, that the owner or sponsor of a federally-obligated airport:

> "...will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport." [Assurance 22(a)]
>
> "…each air carrier using such airport shall have the right to service itself or to use any fixed-base operator that is authorized or permitted by the airport to serve any air carrier at such airport." [Assurance 22(d)]
>
> " will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees (including, but not limited to maintenance, repair and fueling) that it may choose to perform." [Assurance 22(f)]

> "...may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport." [Assurance 22(h)]
>
> "...may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." [Assurance 22(i)]

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

FAA Order 5190.6A, *Airport Compliance Requirements*, describes the responsibilities under Assurance 22 assumed by the owners or sponsor of public-use airports developed with federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. [*See* Order, Secs. 4-14(a)(2) and 3-1.]

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

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

FAA policy regarding the airport owner or sponsor's responsibility for ensuring the availability of services on reasonable terms and without unjust discrimination provides that third-party leases contain language incorporating these principles. Assurance 22(b) states,

> In any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport, the owner or sponsor will insert and enforce provisions requiring the contractor to:
>
> (a) furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and
>
> (b) charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make

> reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

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 of aeronautical activities. [*See* Order, Sec. 3-8(a).]

2. Assurance 23, *Exclusive Rights*

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

> "…will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public."
>
> "…will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities…"
>
> "…will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49 United States Code."

In FAA Order 5190.6A, *Airport Compliance Requirements*, 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, we have taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [*See* e.g. Pompano Beach v FAA, 774 F2d 1529 (11th Cir, 1985).] An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce onto the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [*See* Order, Sec.3-9 (e)]

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise will be construed as evidence of an intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease. [*See* Order, Sec. 3-9(c)]

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

FAA Advisory Circular 150/5190-6, *Exclusive Rights at Federally Obligated Airports*, January 4, 2007, provides basic information pertaining to FAA's prohibition on granting exclusive rights at federally obligated airports.

D. The Complaint and Appeal Process

1. Right to File the Formal Complaint

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 U.S.C. § 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 the complainant to submit all documents then available to support his or her complaint. Similarly, 14 CFR § 16.29 states that "[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance."

2. Right to Appeal the Director's Determination

A party to this decision adversely affected by the Director's Determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination. If no appeal is filed within the time period specified, the Director's Determination becomes the final decision and order of the FAA without further action. A Director's Determination that becomes final because there is no administrative appeal is not judicially reviewable. [14 CFR, Part 16, § 16.33]

Part 16 requires all relevant facts to be presented in the complaint documents. [14 CFR, Part 16, § 16.23(b)(3).] New allegations or issues should not be presented on appeal. Review by the Associate Administrator is limited to an examination of the Director's Determination and the Administrative Record upon which such determination was based. Under Part 16, Complainants are required to provide with the complaint and reply all supporting documentation upon which it relied to substantiate its claims. Failure to raise all issues and allegations in the original complaint documents may be cause for such issues and allegations to be deemed waived and not reviewable upon appeal. This is consistent with the Supreme Court's recognition that courts may require administrative issue exhaustion as a general rule because it is usually appropriate under an [administrative] agency's practice for contestants in an adversarial proceeding before it to develop fully all issues there. The Court concluded that where parties are expected to develop the issues in an adversarial administrative proceeding, the rationale for requiring issue exhaustion is at its greatest. [*See* Sims v. Apfel, 530 US 103, 108-110 (2000) citing Hormel v. Helvering, 312 US 552 (1941) and US v. LA Tucker Truck Lines, 344 US 33, (1952).]

3. FAA's Responsibility with Regard to an Appeal

Pursuant to 14 CFR, Part 16, § 16.33, the Associate Administrator will issue a final decision on appeal from the Director's Determination, without a hearing, where the complaint is dismissed after investigation.

In such cases, it is the Associate Administrator's responsibility to determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [*See* e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, (December 30, 1999) (Final Decision and Order) page 21 and 14 CFR, Part 16, § 16.227.]

VI. ANALYSIS and DISCUSSION

On appeal from a Director's Determination, the appellant must demonstrate that the Director erred by (1) making findings of fact that were not supported by a preponderance of reliable, probative, and substantial evidence, or (2) by making conclusions of law that were not in accordance with applicable law, precedent, and public policy.

Complainant argues the Director incorrectly concluded the Respondent's minimum standards and requirements for self-fueling were not unreasonable and were not overly burdensome. In addition, Complainant argues the Director erroneously relied on two previous FAA decisions: (a) Monaco Coach Corporation v. City of Eugene[10], FAA Docket No. 16-03-17 (July 27, 2004) (Director's Determination) and (March 4, 2005) (Final Agency Decision), and (b) BMI Salvage Corporation & Blueside Services, Inc. v. Miami-Dade County, Florida, FAA Docket No. 16-05-16, (July 25, 2006) (Director's Determination).[11] [FAA Exhibit 1, Item 8, "Argument" page 4 and page 6.]

Self-fueling Minimum Standards and Requirements

Complainant argues the Director incorrectly concluded the Respondent's minimum standards and requirements for self-fueling were not unreasonable and not overly burdensome. [FAA Exhibit 1, Item 8, "Argument" page 4.]

The controversy between the Complainant and Respondent concerns Airborne's desire to install some type of fuel tank at one of its own hangar locations so it can taxi its aircraft directly to that location for self-fueling.[12] The City, on the other hand, has turned down Complainant's proposal to install a fuel tank at Airborne's own site and instead requires the Complainant to install its fuel tanks in the City's fuel farm, which is approximately a mile from Airborne's primary facility. Locating the fuel tanks in the City's fuel farm would make it necessary for Complainant to purchase two trucks and then transport the fuel from the fuel farm to Airborne's hangar location in order to self-fuel its aircraft. The Complainant wants to avoid this additional cost and inconvenience. [*See* FAA Exhibit 1, Item 8, page 1.]

The Complainant argues the requirement to locate its fuel tanks in the City's fuel farm is burdensome and unreasonable. Complainant further argues the City prepared its minimum standards for self-fueling *after* Airborne submitted its proposal and for the "sole purpose of discouraging Airborne's self-fueling so as to perpetuate the City's monopoly on the sale of fuel to Airborne." [FAA Exhibit 1, Item 8, page 1.] The Complainant argues the City's actions effectively deny Complainant the opportunity to self-fuel.

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[10] Complainant incorrectly identifies this case as "Monaco Coach Corporation v. City of Evergreen…" Actually, it is the City of Eugene.

[11] Complainant does not identify whether it is quoting the July 26, 2006, Director's Determination or the March 5, 2007, Final Decision and Order in this case. The Director's Determination, however, refers to the July 25, 2006 determination only. [*See* FAA Exhibit 1, Item 7, *Director's Determination*, page 14.]

[12] Initially, the Complainant and the City disagreed on the advisability of above-ground fuel tanks versus underground fuel tanks. In this appeal, however, the Complainant states that is no longer the issue. The Complainant states, "This matter has become a dispute about underground tanks, but Airborne was not insistent on underground tanks, merely tanks which would allow its aircraft to taxi to a place to fuel." [FAA Exhibit 1, Item 8, "Argument" page 8.] The issue currently under dispute in this appeal is location of the fuel tanks only.

The Director concluded the record did not provide sufficient evidence to sustain Airborne's allegations that the City is imposing unreasonable requirements upon Airborne to self-fuel. [FAA Exhibit 1, Item 7, *Director's Determination*, page 19.] The Director stated, "Complainant does not explain how the City's actions or requirements are unreasonable or burdensome, other than to mention the added cost over Airborne's preferred method and location." [*See* FAA Exhibit 1, Item 7, *Director's Determination*, page 14.]

Complainant argues again on appeal that the minimum standards were designed to be too burdensome for Airborne to self-fuel by making it necessary for Airborne to purchase two fuel trucks,[13] which would also result in problems of insurance, maintenance, and parking. Once again, the Complainant offers no other detail or explanation. [FAA Exhibit 1, Item 8, "Argument" page 6.]

At the June 2006 Airport Advisory Committee Meeting, the Complainant presented its case to install fuel storage tanks at its hangar site. Regarding the burden of placing the fuel tanks in the City's fuel farm, the Complainant was asked "Is it the cost of the trucks generally that you don't want to purchase the trucks? Are they going to be too costly?" [*See* FAA Exhibit 1, Item 1, exhibit C, page 16, beginning line 26.] Complainant responded, "purchasing of trucks like that are not cheap." Complainant went on to express concern over the liability and expense involved with transporting the fuel from the fuel farm to the hangar location. [*See* FAA Exhibit 1, Item 1, exhibit C, page 17, beginning line 10.]

At that same meeting, the Airport Manager agreed the Complainant has the right to self-fuel, but argued it is the City's decision where Airborne can put the fuel tanks. [*See* FAA Exhibit 1, Item 1, exhibit C, page 9, beginning line 20.] The City also stated that it has in the past had to remove underground storage tanks, at Airport expense, that were left by former tenants. [*See* FAA Exhibit 1, Item 1, exhibit C, page 15, beginning line 14.] In addition, the record shows the Airport Manager pointed out that improvements made by Airport tenants accrue to the Airport. As such, the Airport would want fuel tanks placed in a location where they could be accessed by, or used by, the Airport in the future. [*See* FAA Exhibit 1, Item 1, exhibit C, pages 13-14, beginning line 28.]

Both the City and Complainant argue the merits of safety regarding fuel tanks. The City expressed concern for liability and concerns such as detection and containment of leaking fuel and potential contamination of a public lake and adverse public scrutiny if an incident occurred. [*See* FAA Exhibit 1, Item 1, exhibit C, page 31, beginning line 5.]

The Complainant acknowledged that its facility is located in the fire district, and above-ground tanks at its hangar location "won't work at all." [*See* FAA Exhibit 1, Item 1, exhibit C, page 18, beginning line 20.] The Complainant states, however, "The City never furnishes any evidence at all of the dangers posed by underground tanks. Airborne

[13] Two different fuel trucks would be necessary to transport two different types of fuel – 100 low lead and jet A fuel – in order to self-fuel both piston aircraft and jet aircraft. [*See* FAA Exhibit 1, Item 8, page 1.]

produced a tremendous amount of data showing that underground fuel tanks are safer, and as previously stated are required by the City for service stations." [FAA Exhibit 1, Item 8, "Argument" page 7.]

The Associate Administrator understands that placing the fuel tanks in the City's fuel farm adds to the Complainant's costs and is less convenient for the Complainant than having its fuel tanks located at its own facility. However, that is not sufficient evidence to demonstrate that requiring the fuel tanks to be placed in the City's fuel farm is unreasonable or excessively burdensome.

Complainant argues the City prepared its minimum standards for self-fueling *after* Airborne submitted its proposal. [FAA Exhibit 1, Item 8, page 1.] In addition, the Complainant argues the City's motivation in requiring fuel tanks to be installed only in the City's fuel farm is for the City to retain the financial benefit that comes from selling fuel directly to Airborne.

The record does not indicate that any other tenant at the Airport was self-fueling from a fuel farm at its own site at the time Airborne submitted its initial request. (The Complainant does not argue that another tenant is enjoying this privilege while the Complainant was being denied the same opportunity.) It is reasonable and prudent to review and update standards and regulations for proposed aeronautical activities to ensure those standards and regulations serve to promote safety, protect airport users from unlicensed and unauthorized products and services, maintain and enhance the availability of adequate services for all airport users, promote the orderly development of airport land, and ensure efficiency of operations. In addition, airport sponsors should strive to develop minimum standards that are fair and reasonable to all on-airport aeronautical service providers and relevant to the aeronautical activity to which it is applied. [*See* Advisory Circular 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities*, dated August 28, 2006.] [14]

The record shows Complainant informed the City on January 18, 2006, that it intended to locate fuel tanks on Airborne's premises in order to self-fuel its own aircraft. The City responded the same day, advising that the Airport had a self-fueling policy in place.[15] [FAA Exhibit 1, Item 1, exhibit B.] The record also shows the City presented its proposed minimum standards for self-fueling to the FAA for review in July 2006. The proposed minimum standards specifically state, "Fuel storage tanks shall be above-ground and such installations shall be in a location approved by the Authority…" [FAA Exhibit 1, Item 1, exhibit D, (B)(1).] The FAA Airports Development Office in Southwest Region, Airports Division, responded on August 4, 2006, stating the proposed

[14] *See also* The Aviation Center, Inc. v. City of Ann Arbor, Michigan, FAA Docket No. 16-05-01 (December 16, 2005) (Director's Determination).

[15] The referenced policy was not included in the record.

minimum standards do not appear to conflict with the Airport's federal obligations.[16] [FAA Exhibit 1, Item 1, exhibit E.]

Regarding the City's financial motivation, the Complainant argues the requirement to place fuel tanks only in the City's fuel farm is designed to "perpetuate the City's monopoly on the sale of fuel to Airborne." [FAA Exhibit 1, Item 8, page 1.]

The City enjoys what is called a "proprietary exclusive" on its fuel sales at the Airport. This means the Airport may elect to be the only seller of fuel, provided it operates its fuel concession with its own employees and not through a third party. Complainant refers to this as a "monopoly." Establishing a proprietary exclusive is not a violation of the Airport's federal obligations. (The proprietary exclusive is discussed in greater detail below under the heading *Director's Reliance on Monaco Coach*.)

The Complainant quotes the Airport Manager as stating the overall net loss to the Airport if Airborne elects to self-fuel would be around $46,000. [FAA Exhibit 1, Item 8, "Argument" page 6.] This is not sufficient to demonstrate that the City established standards and regulations for the sole purpose of denying the Complainant the opportunity to self-fuel. In fact, the City has provided an alternative method for Airborne to self-fuel, which includes installing its fuel tanks in the City's fuel farm.

The FAA has previously determined that an airport proprietor has a right to administer self-fueling procedures to promote its proprietary interest, including protecting itself from liability from fuel spills and leaks and enhancing self-sustainability, safety, and efficiency of an airport operation. While some airport standards may be considered burdensome to a self-fueler, the interests of these respective parties are not identical. An airport proprietor must view fuel handling from a broad airport custodial perspective while a self-fueler may have a far narrower perspective of its own private interests. An airport proprietor has the responsibility to permit self-fueling, but under reasonable standards that enhance the safety and efficiency of an airport operation. [*See* Scott Aviation, Inc. v. Dupage Airport Authority, FAA Docket No. 16-00-19 (July 19, 2002) (Director's Determination).]

The Associate Administrator concurs with the Director that the Complainant has not provided sufficient evidence to support an allegation that the City's requirements for self-fueling are unreasonable or burdensome. It is neither unusual nor unreasonable to require fuel tanks to be located in a central or common fuel farm. The airport proprietor retains the right to determine where fuel tanks will be placed on its airport. The City's refusal to approve the Complainant's preferred method and location of self-fueling is not tantamount to denying the Complainant the opportunity to self-fuel. The City has provided an opportunity for Airborne to self-fuel so long as Airborne places its fuel tanks in the City's fuel farm. The Complainant has not demonstrated that the resultant

[16] The FAA Southwest Regional Office further stated the policy decision regarding installation of above-ground fuel tanks versus underground fuel tanks is a local issue and FAA does not have an opinion. [FAA Exhibit 1, Item 1, exhibit E.] Since the issue under appeal is location of the fuel tanks only, the topic of above-ground versus underground fuel tanks is not addressed in this Final Decision and Order.

necessity to purchase two fuel trucks is so burdensome as to constructively deny Complainant the opportunity to self-fuel.

The Associate Administrator concludes the Director did not err in determining the Respondent's minimum standards and requirements for self-fueling are not unreasonable and are not overly burdensome.

Director's Reliance on Monaco Coach

Complainant states the Director's reliance on Monaco Coach[17] is misplaced because in that case the respondent was acting as a neutral third party in establishing procedures for self-fueling while in this case the City actually "enjoys an absolute fueling monopoly, and as such is both the competition and the maker of rules." [FAA Exhibit 1, Item 8, "Argument" page 4.]

First, Complainant fails to recognize that the City of Hot Springs is exercising its proprietary exclusive right to sell fuel, which is not a violation of its federal obligations.

Grant assurance 23, *Exclusive Rights*, does not preclude the airport sponsor from retaining for itself a proprietary exclusive right to conduct any of the aeronautical services on the airport. FAA Order 5190.6A, *Airport Compliance Requirements*, discusses propriety exclusive and states,

> The owner of a public-use airport (public or private owner) may elect to provide any or all of the aeronautical services needed by the public at the airport. In fact, the statutory prohibition against exclusive rights does not apply to these owners and they may exercise, but not grant, the exclusive right to conduct any aeronautical activity. However, these owners must engage in such activities as principals using their own employees and resources. An independent commercial enterprise that has been designated as agent of the owner may not exercise nor be granted an exclusive right. [Order 5190.6A, 3-9d.][18]

Second, Monaco Coach specifically addresses Complainant's argument that it has proposed a method of self-fueling that was not approved by the Respondent, while the Respondent offered a method of self-fueling that was more costly and less convenient to the Complainant than Complainant's preferred method of self-fueling.

In Monaco Coach, the Associate Administrator noted, "The Respondent's federal obligations do not require it to provide a specific level of service, level of convenience or amount of cost savings, simply because a specific proposal might be reasonable. Rather,

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[17] Monaco Coach Corporation v. City of Eugene[17], FAA Docket No. 16-03-17 (July 27, 2004) (Director's Determination) and (March 4, 2005) (Final Agency Decision).

[18] *See also* Jet 1 Center, Inc. v Naples Airport Authority, FAA Docket No. 16-04-03, (July 15, 2005) (Final Agency Decision); and Jet 1 Center v. FAA, (11th Cir, Feb. 13, 2006), dismissed for lack of standing.

the standard is that any sponsor will provide a reasonable opportunity to self-fuel, so that the public taxpayers that finance airport improvements can be assured that the Airport Improvement Program investments are reasonably available to the public, including reasonable access to self-fueling… The FAA expects that operating at an airport according to reasonable sponsor-required standards may cost more money than any specific alternative might cost. …The Record in this case does not establish that the Respondent's proposed alternatives are unreasonably expensive, nor that the Respondent's interest in the safe and prudent management of the airfield is unreasonable." [*See* Monaco Coach Corporation v. City of Eugene, Docket No. 16-03-17, (March 4, 2005) (Final Agency Decision), page 16.]

In the current case, Complainant made two proposals for self-fueling: one for underground tanks at Airborne's Hangar A-1, and another for above-ground tanks at its Hangar A-4. Both proposals were rejected by the City. The City required, instead, that fuel tanks be installed only in the City's fuel farm. [FAA Exhibit 1, Item 8, page 1.] That requirement is neither unusual nor unreasonable. It does not prevent the Complainant from self-fueling.

Complainant argues that locating the fuel tanks in the City's fuel farm will be less convenient for the Complainant and will increase its costs by necessitating the purchase of two fuel trucks. Complainant argues this is an overly burdensome and unreasonable minimum standard prepared after the fact for the sole purpose of discouraging Airborne's self-fueling in order to perpetuate the City's monopoly on the sale of fuel to Airborne. [FAA Exhibit 1, Item 8, page 1.]

Again, the City is entitled to maintain a proprietary exclusive on the sale of fuel. To prevail in this case, the Complainant must demonstrate with evidence that it has been denied the opportunity to self-fuel or that the proposed alternative is unreasonable or unjustly discriminatory. Complainant has not met this burden.

The Associate Administrator concludes the Director did not err in relying on Monaco Coach to support his determination that the City is not in violation of its federal obligations by refusing to accept the Complainant's preferred method of self-fueling and, instead, offering a method of self-fueling that is more costly and less convenient to the Complainant.

Director's Reliance on BMI Salvage

Complainant states the Director quotes BMI Salvage[19] for the proposition that motive alone does not establish unjust economic discrimination, but is a relevant factor to be

[19] BMI Salvage Corporation & Blueside Services, Inc. v. Miami-Dade County, Florida, FAA Docket No. 16-05-16, (July 25, 2006) (Director's Determination). BMI v. FAA, No. 07-12058 (11th Cir, Apr. 8, 2008), reversed and remanded with instructions on other grounds. This does not diminish the fact that attitude and intent do not establish a grant assurance violation. *See* Rick Aviation, Inc. v. Peninsula Airport Commission, FAA Docket No. 16-05-18, (November 6, 2007) (Final Decision and Order).

considered when coupled by a denial of access. [FAA Exhibit 1, Item 8, "Argument" page 6.]

In quoting from BMI Salvage, the Director states, "motive or ill will does not, alone, amount to non-compliance, even if established by the Complainant. Such evidence must be accompanied by an actual unreasonable denial of access for an aeronautical activity or unjust economic discrimination. Motive alone does not establish non-compliance." [*See* BMI Salvage Corp. v Miami-Dade County, FAA Docket No. 16-05-16 (July 25, 2006) (Director's Determination) page 16.] [*See also* FAA Exhibit 1, Item 7, *Director's Determination*, pages 14-15.]

The Director goes on to say, "Evidence of motive is not irrelevant, but must be accompanied by proof from a complainant that a sponsor has unreasonably denied access. The audio and video recordings of the Advisory Committee meetings and the Board of Directors meeting do include mention of financial issues, but are not evidence that the Airport Manager's primary motive was to discourage self-fueling for the financial benefit of the City's proprietary exclusive fuel concession." [FAA Exhibit 1, Item 7, *Director's Determination*, page 15.]

Complainant argues again on appeal that the City's clear motive is to make it too burdensome for Airborne to self-fuel by requiring the purchase of two fuel trucks, which would also result in problems of insurance, maintenance, and parking. [FAA Exhibit 1, Item 8, "Argument" page 6.]

The issue of whether this necessity to purchase two fuel trucks is truly burdensome or unreasonable is discussed above under the heading *Self-fueling Minimum Standards and Requirements*. The Director determined, and the Associate Administrator confirms, that the City's requirement to place fuel tanks only in the City's fuel farm is not unreasonable, and the resultant necessity for the Complainant to purchase two fuel trucks[20] is not sufficiently burdensome so as to constructively deny Airborne the opportunity to self-fuel.

Complainant has not been denied the opportunity to self-fuel; rather, its preferred method of self-fueling was not approved. The fact that the Complainant has declined to proceed with self-fueling under the minimum standards and requirements imposed by the City is not evidence that the Complainant was denied access.

The Associate Administrator concludes the Director did not err in relying on BMI Salvage to support his determination that motive is not sufficient to support a finding of noncompliance when there has been no denial of access. In this case, motive – which was not established – was not coupled with a denial of access.

[20] Two different fuel trucks would be necessary in order to provide fuel both to jets and to piton aircraft. One truck would carry 100 low-lead (for piston aircraft) and one would carry jet A fuel (for jets). [*See* FAA Exhibit 1, Item 8, page 1.]

VII. CONCLUSION

The FAA's role in this appeal is to determine only the narrow issues of whether the Director erred in findings of fact or conclusions of law in issuing the Director's Determination of December 18, 2007.

Upon an appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [*See* e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19 (December 30, 1999) (Final Decision and Order), page 21, and 14 CFR § 16.227.]

In arriving at a final decision on this appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, and the appeal and reply submitted by the parties, in light of applicable law and policy. Based on this reexamination, the Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy. The appeal does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination.

The Associate Administrator affirms the Director's Determination. This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR § 16.33(a).

ORDER

ACCORDINGLY, it is hereby ORDERED that (1) the Director's Determination is affirmed, and (2) the appeal is dismissed, pursuant to 14 CFR § 16.33.

RIGHT OF APPEAL

A party to this decision disclosing a substantial interest in the final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. § 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after a Final Decision and Order has been served on the party. [14 CFR, Part 16, § 16.247(a).]

May 2, 2008

D. Kirk Shaffer
Associate Administrator
for Airports

Date