

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

Delbert Johnson)	
d/b/a Two Dogs Aviation)	
)	
COMPLAINANT)	
)	Docket No. 16-08-11
v.)	
)	
Goldsboro-Wayne)	
Airport Authority)	
)	
RESPONDENT)	

DIRECTOR’S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on a formal complaint filed in accordance with the *Rules of Practice for Federally-Assisted Airport Enforcement Proceedings*, Title 14 Code of Federal Regulations (CFR) Part 16¹.

Delbert Johnson d/b/a Two Dogs Aviation (Complainant) filed a formal Complaint pursuant to 14 CFR Part 16 against the Goldsboro-Wayne Airport Authority (GWAA, Authority or Respondent), sponsor and operator of the Goldsboro-Wayne Airport (Airport or GWW). The Complainant alleges the Respondent denied its request to establish a self-service fueling facility at the Airport in order to protect the exclusive right of its existing fuel provider. The Complainant also alleges that the Respondent has ceded its control of the Airport and illegally diverted Airport revenue, violating its requirement to operate in a financially self-sufficient manner. These allegations regarding Grant Assurance 5, *Preserving Rights and Powers*, Grant Assurance 22, *Economic Nondiscrimination*, Grant Assurance 23, *Exclusive Rights*, Grant Assurance 24, *Fee and Rental Structure*, and Grant Assurance 25, *Airport Revenues* are construed as the five issues listed in Section IV below and fully discussed herein.

With respect to the allegations presented in this Complaint, under the specific circumstances at the Airport 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. The FAA’s decision in this matter is based on applicable Federal law and FAA policy, review of the pleadings and supporting

¹ Enforcement procedures regarding airport compliance matters may be found at *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* (14 CFR Part 16). These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and became effective on December 16, 1996.

documentation submitted by the parties, reviewed by the FAA, which comprises the Administrative Record reflected in the attached FAA Exhibit 1.

II. PARTIES

The Complainant, Delbert Johnson, is the sole proprietor of Two Dogs Aviation. He proposed to establish a flight school and self-service avgas fueling facility at the Airport. [FAA Exhibit 1, Item 2, exhibit A] Although the Airport Authority approved the Complainant's request to establish a flight school², the disposition of his request to establish the self-service fueling facility remains in dispute. [FAA Exhibit 1, Item 7, exhibit T]

The Goldsboro-Wayne Municipal Airport (Airport) is a public-use airport owned and operated by the Goldsboro-Wayne Airport Authority (GWAA). The Airport, three nautical miles north of Goldsboro, North Carolina, is classified as a general aviation airport with 40 based aircraft and 16,200 annual operations. The Airport has one runway, Runway 5-23, a 5,500 foot long by 100-foot wide asphalt runway. The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.* [FAA Exhibit 1, Item 12]

III. BACKGROUND AND PROCEDURAL HISTORY

Factual Background

Some time prior to July 1, 2002, the Airport's then sole fixed base operator³ (FBO) and airport management contractor, Wayne Aviation, approached SIG Aviation, LLC (SIG) to discuss SIG's assumption of the FBO and airport manager duties at the Airport. [FAA Exhibit 1, Item 7, ¶ 27 and FAA Exhibit 1, Item 7, exhibit A, ¶ 5]

On July 1, 2002, the GWAA and SIG enter into an airport management agreement for a term of five years. Per the contract, the GWAA pays SIG \$20,000 a year to perform certain management services and act as the airport manager. [FAA Exhibit 1, Item 2, exhibit J]

² The Record is unclear as to when the Complainant began offering flight instruction at the Airport. An October 24, 2007 letter from the Respondent's attorney to the Complainant's attorney states:

"Mrs. Johnson [the Director assumes this is the Complainant's wife] was present at the last Airport Authority meeting and she was advised that the Airport Authority had approved their application for a flight school and that it was only necessary for her to provide the Authority with evidence that their airplane(s) for flight instruction have liability insurance and that the Goldsboro Wayne Airport Authority was named as an additional insured. Mrs. Johnson advised me at the Airport Authority meeting and on a subsequent occasion when she came to my office that 'Two Dogs Aviation would not provide the Authority with a copy of its liability policy naming the Authority as the additional insured'." [FAA Exhibit 1, Item 7, exhibit T, p. 1]

The Record is unclear as to when the Complainant provided this documentation and was permitted to begin offering flight instruction. FAA Exhibit 1, Item 10, p. 11 and FAA Exhibit 1, Item 13 demonstrates that the Complainant currently offers flight instruction and aircraft rental at GWW.

³ A fixed-base operator (FBO) is a commercial entity providing aeronautical services such as fueling, maintenance, storage, ground, and flight instruction, etc., to the public. [FAA Order 5190.6A, Appendix 5]

On July 24, 2002, the GWAA and SIG Aviation, LLC execute a five-year Fixed Base Operation Agreement. [FAA Exhibit 1, Item 2, exhibit G]

In conjunction with the FBO Agreement, the GWAA and SIG Aviation, LLC execute a five-year facilities lease agreement on July 24, 2002. The terms of the lease require SIG to pay the GWAA \$1,115 per month for the 20 enclosed hangars and eight sheltered hangars and \$500 per month for space in the terminal building. The total monthly rent is \$1,615. [FAA Exhibit 1, Item 2, exhibit H]

On January 23, 2006, the GWAA and SIG Aviation, LLC execute an amendment to the lease agreement. Under this agreement, SIG pays the GWAA \$4,800 per month for 36 enclosed hangars and eight sheltered hangars and \$500 per month for space in the terminal building. The total monthly rent is now \$5,300. [FAA Exhibit 1, Item 2, exhibit I]

On February 22, 2007, the Complainant attends the GWAA's meeting. The minutes state:

"Tom [Tom Kimbrough, FBO manager] introduced Cindy and Del Johnson who have a proposal for a flight school at the airport with a single airplane. They will need office space, and are looking at the space in the new T-hangar building. Otto Keesling [GWAA Member and Chair of the Board's Buildings and Grounds Committee] will meet with them to work out the details of an office." [FAA Exhibit 1, Item 7, exhibit C, p. 2]

On March 22, 2007, the GWAA amends the Airport's Rules and Regulations to limit self-fueling. The minutes state:

"He [Jim Steele, Airport Manager] requested a change in the current Rules and Regulations to include the following: 'Self-fueling by any method is prohibited without the express written consent of the airport manager. All requests for self-fueling will be reviewed for safety and EPA considerations. Approval for self-fueling shall not unnecessarily be withheld'. Ron Prince [GWAA Member] moved to approve this change to the Rules and Regulations, which motion was seconded by Otto Kessling [GWAA Member] and approved." [FAA Exhibit 1, Item 2, exhibit J-1, p. 1]

At this same meeting, the Complainant proposes and makes application to establish a self-service aviation fuel business at the Airport. [FAA Exhibit 1, Item 2, exhibit A and J-1, p. 2]

On May 9 and 10, 2007, the Complainant exchanges electronic correspondence with the Airport's engineer regarding the location of his proposed self-service aviation fuel business. [FAA Exhibit 1, Item 10, exhibit F] The engineer's last message confirms his understanding of the location and states:

"I need to find out if that is suitable per FAA rules and regulations for the type equipment you are proposing." [FAA Exhibit 1, Item 10, exhibit F, p. 1]

On May 15, 2007, the GWAA holds a special meeting to discuss “fixed base operators, self fueling facility, and flight schools and possibly taking action concerning these issues only.” [FAA Exhibit 1, Item 7, exhibit D] The minutes state:

“Del Johnson gave a presentation concerning his proposal to erect a self-service fueling station at the airport and to do business at the airport as a flight instructor. He shared the particulars of the aircraft he has purchased for flight instruction and the proposed self-service fueling station.

There was discussion that following (sic) concerning self-service fueling and fixed base operators at the airport.

The Chairman reported that the Authority would take these proposals under consideration and adjourned the meeting.” [FAA Exhibit 1, Item 7, exhibit D]

At the May 24, 2007 GWAA meeting, the Authority votes to disapprove the Complainant’s request for a self-service fueling operation at the Airport. The GWAA also votes to extend SIG’s contract to September 30, 2007. [FAA Exhibit 1, Item 2, exhibit C, p. 1]

On May 30, 2007, the GWAA writes a letter to the Complainant, notifying him of the Authority’s action on his proposal. The letter states:

“After careful consideration of the information which you provided the Authority, the current Rules and Regulations of the Airport as set forth in Section 8 thereof and particularly subsection I and the Authority’s belief, based upon current fuel sales that the market for additional fuel sales cannot economically sustain this additional service, the Authority by a 4-0 vote at its regular meeting of May 24th denied your application.” [FAA Exhibit 1, Item 2, exhibit D]

On June 5, 2007, the Complainant’s attorney writes a letter to the GWAA challenging the legality of its decision to deny the Complainant’s self-service fueling application. Although the letter states the Complainant’s request that his attorney initiate a Complaint under Part 16, it proposes a meeting among the parties and their legal counsel to discuss an informal resolution.⁴ [FAA Exhibit 1, Item 2, exhibit E]

On August 23, 2007, the Respondent’s attorney writes to the Complainant’s attorney. The letter states:

“After considering this matter, the Airport Authority is of the opinion that it is acting appropriately in denying Mr. Johnson’s application for an FBO providing self service avgas for the reasons set forth in its letter to Mr. Johnson dated May 30, 2007.” [FAA Exhibit 1, Item 2, exhibit F]

In October of 2007, the GWAA extends SIG’s FBO agreement, airport management agreement, and lease for 20 years. [FAA Exhibit 1, Item 2, exhibits R, S, and T] The GWAA will now

⁴ The Record does not indicate whether or not any such meeting occurred.

compensate SIG at a rate of \$30,000 per year for airport management services. [FAA Exhibit 1, Item 2, exhibit S]

On October 8, 2007, the GWAA and SIG Aviation, LLC, enter into a five-year lease agreement for a corporate hangar. Per the lease, SIG's monthly rental fee for the hangar is \$500. [FAA Exhibit 1, Item 7, exhibit I]

On October 16, 2007, the GWAA holds a special meeting to discuss pending litigation. The minutes state:

“Ken Banks moved to instruct Harrell Everett [GWAA’s attorney] to compose a letter stating our position that has not changed and give Two Dogs Aviation, LLC the opportunity to again comply with the rules and regulations at the airport, which motion was seconded by Jim Maxwell and duly approved. [FAA Exhibit 1, Item 7, exhibit M]

On October 24, 2007, GWAA's attorney sends two letters to the Complainant's attorney. One letter explains that the Complainant's application for a flight school has been approved and that it is necessary for the Complainant to provide the Authority with evidence of liability insurance naming the Authority as an additional insured. [FAA Exhibit 1, Item 7, exhibit T]. The second letter states the Complainant's request to establish a self-service fueling facility will be approved if certain conditions are met. The letter states:

“Finally, if your client can comply with the requirements of Section 8 of its Rules and Regulations, then its application will be approved, subject to the approval of the site at the Airport by the Authority and assurances from the Wayne County Fire Marshall that the self-service facility meets the State and County safety requirements.” [FAA Exhibit 1, Item 2, exhibit K, p. 2]

On November 1, 2007, the Complainant's attorney responds to the two letters dated October 24, 2007. The letter states that the Complainants will provide the insurance documentation shortly and comply with the Minimum Standards requirements that have any rational application with a self-service fueling facility. [FAA Exhibit 1, Item 2, exhibit N]

On November 7, 2007, the Respondent's attorney met with the Complainant's attorney. [FAA Exhibit 1, Item 7, exhibit G]. On November 28, 2007, the Respondent's attorney outlined his notes from the meeting in an electronic message to Wayne County's attorney. The electronic message states the Complainant's demands, as represented by his attorney, as:

- 1. Two Dogs Aviation to become FBO and allowed to sell aviation fuel*
- 2. Payment to TDA for loss profits and attorneys fees and punitive damages since its request last March*
- 3. Ken Banks to resign as either Board member or being paid for preparing financial reports and to pay back to the GWAA all monies he has been paid since he started getting paid. Also, criminal action vs. Ken Banks NOTE: He was paid \$150.00 a month since Sarbane (sic) Oxley was based (sic) by*

Congress in 2002 (I believe) and Pittard Perry and Crone could no longer prepare monthly financials and also be auditor. Ken is still doing financials but will not charge. GWAA will get new person to do financials and Ken will remain on Board (I believe). New person will probably charge \$200.00 a month.

4. *SIG Aviation terminated as Airport Manager and the Airport Manager's selection be bid upon*
5. *Hire outside Company to maintain public records of GWAA. All records must be maintained electronically.*
6. *Wants certain Board members of GWAA to resign*
7. *Wants all contracts with SIG Aviation cancelled-he claims that SIG has a monopoly at the Airport and that the Board only does what SIG Aviation wants.*
8. *Wants the GWAA restructured and contends that it is not operating as proper public agency (sic)*
9. *Intends to bring administrative complaint with the Federal Aviation Agency about SIG Aviation and its denial of allowing it to sell aviation fuel.*
10. *Intends to sue Local Government Commission, BB&T and GWAA in reference to \$495,000 loan in 2005 that was not approved by the LGC since with interest it exceeded \$500,000 when interest was included. Also criminal action vs GWAA Board members and requiring the members personally to repay the loan.*
11. *Intends to bring an anti-trust action against the GWAA and SIG Aviation.*

There may be other claims and demands as well, but these are the ones that I noted.” [FAA Exhibit 1, Item 7, exhibit G]

On November 8, 2007, the Complainant's attorney sends the Respondent's attorney an electronic message outlining the Complainant's five areas of dispute and the legal remedies for each matter. [FAA Exhibit 1, Item 10, exhibit I-1] The next day, the Complainant's attorney sends the same text to the Respondent's attorney in a formal letter. [FAA Exhibit 1, Item 10, exhibit I-2]. The electronic message and letter state:

“There are essentially five areas of dispute, and the Johnson's legal remedies are different for each of those matters.

As to the self-service avgas proposal, on failure to agree to the Johnsons' remedy would be a complaint to the FAA contending the AA has illegally granted and protected an exclusive right for SIG to sell aviation fuels, and separately at some point an action against SIG and the AA contending anti-trust and unfair trade practices, seeking money damages.

As to SIG's conflicts of interest and diversion of revenue, on failure to agree the Johnsons could file a separate FAA complaint, but not likely a legal action, and there would be no damages to recover separate from the avgas monopoly.

As to the Public Records, on failure to agree the Johnsons' could bring a statutory action seeking compliance and legal expenses, but not damages.

As to the non-approved loan, on failure to agree the Johnson's could seek injunctive relief and on behalf of the AA seek recovery of improper payments from BB&T and reimbursement from the individual Board members. They could make a claim for legal expenses, but not damages.

As to Ken's receipt of payments, on failure to agree the Johnson's again could seek injunctive relief and on behalf of the AA seek reimbursement of improper payments from Ken, and could make a claim for legal expenses, but not damages.

Therefore the only matter in which the Johnsons could seek money damages would be ultimate denial of their FBO application; otherwise they could only seek, in money, reimbursement of legal expenses. If we conditioned settlement of any of the other matters on settlement of the avgas proposal, it might be construed as seeking (avgas)money (sic) in exchange for an agreement to refrain from reporting the Board's non-compliance with statutory duties.

This is especially troubling as it relates to the loan and the payments to Ken, because violation of the relevant statutes constitute criminal offenses. The Johnsons have suggested that the Board be re-vamped and procedures implemented to prevent conflicts of interest and to ensure the Board's independence from any private influence, and to bring complete transparency to the AA's financial operations. It seems to me that that is the only legitimate demand they could make as consideration for their forbearance from litigation as to the loan or reimbursement from Ken (which I would hope he would make in a any event).

For these and other reasons, I believe the AA and the Johnsons must work toward resolution of these issues separately, with the Johnson's forbearance in each case being exchanged for AA action in that respective case." [FAA Exhibit 1, Item 10, exhibits I-1 and I-2]

At the December 6, 2007 GWAA meeting, the Respondent reaffirms its decision regarding the Complainant's application to establish a self-service fueling facility. The minutes state:

"The Authority discussed the application of Two Dogs Aviation for a Fixed Base Operation for self-service sales of aviation petroleum products and, as it had done previously, granted it permission, subject to Two Dogs Aviation complying with the requirements of Section 8 of its Rules and Regulations, and subject to the approval of the site at the Airport by the Authority and assurances by the Wayne County Fire Marshall that the self-service facility meets the State and County safety requirements. The Authority directed Mr. Everett to advise the attorney for Two Dogs Aviation its decision." [FAA Exhibit 1, Item 7, exhibit S, p. 2]

On December 6, 2007 the GWAA's attorney writes to the Complainant's attorney reiterating this decision. [FAA Exhibit 1, Item 2, exhibit L]

On February 6, 2008 the Complainant's attorney writes to the FAA's Atlanta Airport District Office to seek the FAA's assistance in an informal resolution.⁵ [FAA Exhibit 1, Item 1, exhibit A]

On June 8, 2009 SIG advises the GWAA of its decision to terminate its FBO and Airport Management responsibilities. [FAA Exhibit 1, Item 21, exhibit B]

On August 5, 2009 the GWAA executes an airport management agreement, a Fixed Base Operation Agreement, and a lease agreement with Wayne County. [FAA Exhibit 1, Item 21, exhibits E, F, and G]

Procedural History

On November 12, 2008, FAA received the Complaint. [FAA Exhibit 1, Item 2]

On December 3, 2008, FAA docketed Delbert Johnson d/b/a Two Dogs Aviation v. Goldsboro-Wayne Airport Authority. [FAA Exhibit 1, Item 3]

On December 3, 2008 the Complainant's attorney provided the FAA's Office of Chief Counsel with certificate of service for the Complaint. [FAA Exhibit 1, Item 4]

On December 16, 2008 Respondent's attorney requested an additional 30 days to answer the Complaint. [FAA Exhibit 1, Item 5]

On December 18, 2008 FAA's Office of Chief Counsel granted the Respondent a 30 day extension. [FAA Exhibit 1, Item 6]

On January 26, 2009, the Respondent filed an Answer and Motion to Dismiss. [FAA Exhibit 1, Item 7].

On February 9, 2009, the Complainant requested an extension through February 28, 2009 to reply to the Answer. [FAA Exhibit 1, Item 8]

On February 10, 2009 the FAA's Office of Chief Counsel granted an extension through February 28, 2009. [FAA Exhibit 1, Item 9]

On March 2, 2009, the Complainant replied. [FAA Exhibit 1, Item 10]

⁵ The FAA's Atlanta Airport District Office referred this request to the North Carolina Department of Transportation. This is because the State of North Carolina participates in the FAA's Block Grant Program and assumes the duties associated with administering grants and enforcing their applicable Federal Grant Assurances. The Complainant states that the North Carolina Department of Transportation made no attempts to resolve this matter informally. [FAA Exhibit 1, Item 1, ¶ 4]

On March 16, 2009, the Respondent filed a rebuttal. [FAA Exhibit 1, Item 11]

Upon the submittal of the Respondent's rebuttal, the FAA's routine practice is to conclude the submission of pleadings and commence with its investigation. As part of the FAA's investigation of this Complaint, the Director requested both parties to respond to specific questions. However, this procedure was not intended to introduce a second round of pleadings or serve as a means for both parties to unilaterally submit additional information not specifically requested by the FAA. The Director's disposition of these additional submittals is noted below.

On March 17, 2009, the Complainant filed a letter containing an affidavit verifying information contained in his Complaint and Reply. [FAA Exhibit 1, Item 22]

On May 18, 2009, the FAA requested additional information from both parties. The FAA also extended the due date of the Director's Determination to on or before July 31, 2009. [FAA Exhibit 1, Item 14]

On June 11, 2009, the Complainant responded to the FAA's request for additional information. [FAA Exhibit 1 Item 15]

On June 16, 2009, the Respondent responded to the FAA's request for additional information. [FAA Exhibit 1 Item 16]

On June 26, 2009, the Respondent provided additional information telephonically requested by the FAA. [FAA Exhibit 1, Item 17]

On July 6, 2009, the Complainant supplemented its response to the FAA's request for additional information. [FAA Exhibit 1, Item 19]⁶

On July 27, 2009, the Complainant supplemented its response to the FAA's request for additional information. [FAA Exhibit 1, Item 20]⁷

On August 3, 2009, the FAA extended the due date of the Director's Determination to on or before September 15, 2009. [FAA Exhibit 1, Item 18]

On August 13, 2009, the Respondent supplemented its response to the FAA's request for additional information. [FAA Exhibit 1, Item 21]⁸

⁶ This item was submitted beyond the period specified by the Director's Request for Additional Information dated May 18, 2009. Said Request set the deadline for submitting additional information as June 17, 2009. Neither party requested an extension of time to submit additional information nor did they argue that good cause existed for the late filings. Notwithstanding, the Director has taken this submission into consideration.

⁷ See Footnote 6.

⁸ FAA Exhibit 1, Item 21 was submitted beyond the period specified by the Director's Request for Additional Information dated May 18, 2009. Said Request set the deadline for submitting additional information as June 17, 2009. Neither party requested an extension of time to submit additional information nor did they argue good cause existed for late filing. Notwithstanding, the Director has taken this submission into consideration. On September 3, 2009, the Complainant submitted a letter raising new allegations and exhibits that go beyond the scope of the extant Complaint. On September 8, 2009, the Respondent submitted a letter commenting on the Complainant's September

On September 16, 2009, the FAA extended the due date of the Director's Determination to on or before October 2, 2009. [FAA Exhibit 1, Item 25]

On October 5, 2009, the FAA extended the due date of the Director's Determination to on or before October 16, 2009. [FAA Exhibit 1, Item 26]

IV. ISSUES

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

- Whether the Respondent's failure to approve the Complainant's request to operate an aeronautical service constitutes an unreasonable denial of access in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, *Economic Nondiscrimination*.
- Whether the Airport's Minimum Standards and conditions for approval of a self-service fueling facility unreasonably deny access to the Complainant or unjustly discriminate against the Complainant in violation of 49 U.S.C. § 47107(a)(1) and Federal Grant Assurance 22, *Economic Nondiscrimination*.
- Whether the Respondent has limited the right to sell fuel and lease hangars at the Airport to a single provider in violation of 49 U.S.C. § 47107(a)(4) and Grant Assurance 23, *Exclusive Rights*.
- Whether the Respondent has ceded control of the Airport in violation of 49 U.S.C. § 47107(a) and Grant Assurance 5, *Preserving Rights and Powers*.
- Whether the Respondent illegally diverted Airport revenue in violation of 49 U.S.C. § 47107(b) and Grant Assurance 25, *Airport Revenues* and failed to maintain a fee and rental structure to make the airport as self-sustaining as possible in violation of 49 U.S.C. § 47107(a)(13) and Grant Assurance 24, *Fee and Rental Structure*.

V. APPLICABLE LAW AND POLICY

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

3, 2009 submittal. 14 CFR Part 21 requires a Complainant to initiate good faith efforts to resolve disputed matters informally before bringing an allegation before the Director. Additionally, Part 16.23(b) requires the Complainant to state its allegations in its initial pleading. As a result, the Director defers this matter to the Atlanta Airport District Office and encourages both parties to work with FAA staff to resolve these new issues outside this Complaint. Accordingly, although the Director will include this correspondence in the Docket, the Director will not consider it in this decision.

airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

The following is a discussion pertaining to the Airport Improvement Program, Airport Sponsor Assurances, the FAA Airport Compliance Program, enforcement of Airport Sponsor Assurances, and the Complaint and Appeal Process.

The Airport Improvement Program

Title 49 U.S.C. § 47101, *et seq.*, provides for Federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. Title 49 U.S.C. § 47107, *et seq.*, sets forth assurances to which an airport sponsor agrees as a condition of receiving federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the Federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the Airport Improvement Program, 49 U.S.C. § 47107, *et seq.*, the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 U.S.C. § 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.⁹ FAA Order 5190.6A, *Airport Compliance Requirements* (FAA Order 5190.6A)¹⁰, issued on October 2, 1989, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to compliance with Federal obligations of airport sponsors. 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.

⁹ *See, e.g.*, the Federal Aviation Act of 1958, as amended and recodified, Title 49 U.S.C. §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and recodified, Title 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122.

¹⁰ On September 30, 2009, the FAA published FAA Order 5190.6B, Airport Compliance Manual and cancelled FAA Order 5290.6A. During the primary portion of the Director's investigation, FAA Order 5190.6A outlined the policies and procedures to be followed in carrying out the FAA's functions related to airport compliance. In an effort to avoid any further delay in issuing this Determination, the Director has chosen to retain the citations attached to FAA Order 5190.6A. This decision has no bearing on the analysis contained herein. However, it should be noted that the format of FAA Order 5190.6B has been updated. As a result, the citations attached to FAA Order 5190.6A, as contained in this Determination, will not accurately direct the reader to the location of the guidance presented in FAA Order 5190.6B.

Five Federal grant assurances apply to the circumstances set forth in this Complaint: (1) Grant Assurance 5, *Preserving Rights and Powers*; (2) Grant Assurance 22, *Economic Nondiscrimination*; (3) Grant Assurance 23, *Exclusive Rights*; (4) Grant Assurance 24, *Fee and Rental Structure*; and (5) Grant Assurance 25, *Airport Revenues*.

Grant Assurance 5, *Preserving Rights and Powers*

Grant Assurance 5, *Preserving Rights and Powers*, implements the provisions of Title 49 U.S.C. 47107, and requires, in pertinent part, that the sponsor of a federally obligated airport

“...will not take or permit any action which would operate to derive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.”

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

Assurance 22, *Economic Nondiscrimination*

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. Federal Grant Assurance 22, *Economic Nondiscrimination* deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Grant Assurance 22 of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part:

“...will make the 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.
[(a)]

b. 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 sponsor will insert and enforce provisions requiring the contractor to-

(1) furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and

(2) 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.

c. Each fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and utilizing the same or similar facilities.

h. The sponsor 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.

i. The sponsor 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.”

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 that would be detrimental to the civil aviation needs of the public.

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [See FAA Order 5190.6A, Sec. 4-8]

FAA Order 5190.6A 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 FAA Order 5190.6A, Sec. 4-14(a) (2) and 3-1]

The owner of an airport developed with Federal assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination. [See FAA Order 5190.6A, Sec. 4-13(a)]

Assurance 23, *Exclusive Rights*

Title 49 U.S.C. § 40103(e), provides, in relevant part, that “there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended.”

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

Grant Assurance 23, *Exclusive Rights*, of the prescribed sponsor assurances implements both statutory provisions requiring, in pertinent part, that the sponsor of a federally obligated airport:

“...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public...and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Improvement Act of 1982.”

An exclusive right is defined as a power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right. An exclusive right can be conferred either by express agreement, by the imposition of unreasonable standards or requirements, or by any other means. Such a right conferred on one or more parties, but excluding others from enjoying or exercising a similar right or rights, would be an exclusive right. [*See* FAA Advisory Circular 5190-6 *Exclusive Rights at Federally Obligated Airports*, January 4, 2007].

Therefore, it is FAA’s policy that the sponsor of a federally obligated airport will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public and will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities. FAA Order 5190.6A clarifies the applicability, extent, and duration of the prohibition against exclusive rights under 49 U.S.C. § 40103(e) with regard to airports developed with FAA-administered grant assistance and Federal property conveyances.

The exclusive rights prohibition remains in effect as long as the airport is operated as an airport. FAA takes the position that the grant of an exclusive right for the conduct of any aeronautical activity on such airports is regarded as contrary to the requirements of the applicable laws, whether such exclusive right results from an express agreement, from the imposition of unreasonable standards or requirements, or by any other means.

Grant Assurance 24, *Fee and Rental Structure*

Grant assurance 24, *Fee and Rental Structure*, addresses fees the owner or sponsor levies on airport users in exchange for the services the airport provides. In pertinent part, the sponsor of a federally obligated airport:

“will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances at the particular airport, taking into account such factors as the volume of traffic and economy of collection.”

Grant assurance 24 satisfies the requirements of 49 U.S.C. § 47107(a)(13). It provides that the owner or sponsor of a federally-obligated airport agrees that it will maintain a fee and rental structure consistent with Assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*. Moreover, FAA Order 5190.6A states that the owner or sponsor’s obligation to make an airport available for public use does not preclude the owner or sponsor from recovering the cost of

providing the facility. The owner or sponsor is expected to recover its costs through the establishment of fair and reasonable fees, rentals, or other user charges that will make the airport as self-sustaining as possible under the circumstances existing at the particular airport. [*See* FAA Order 5190.6A, Sec. 4-14(a)]

FAA's *Policy and Procedures Concerning the Use of Airport Revenues* (Revenue Use Policy)¹¹ provides, among other things, the FAA's policy on the maintenance of a self-sustaining rate structure by federally-assisted airports. It provides, in relevant part, that:

“Airport proprietors must maintain a fee and rental structure that in the circumstances of the airport makes the airport as financially self-sustaining as possible.” [Section VII(B)(1)]

“If market conditions or demand for air service does not permit the airport to be financially self-sustaining, the airport proprietor should establish long term goals and targets to make the airport as financially self-sustaining as possible.” [Section VII(B)(2)]

“...the FAA does not consider the self-sustaining requirement to require airport sponsors to charge fair market rates to aeronautical users. Rather, for charges to aeronautical users, the FAA considers the self-sustaining assurance to be satisfied by airport charges that reflect the cost to sponsors of providing aeronautical services and facilities to users.” [Section VII(B)(5)]

“...the FAA interprets the self-sustaining assurance to require that the airport receive fair market value for the provision of nonaeronautical facilities and services, to the extent practicable considering the circumstances at the airport.” [Section VII(C)]”

Assurance 25, Airport Revenues

Grant Assurance 25, *Airport Revenues*, of the prescribed sponsor assurances implements provisions of 49 U.S.C. § 47107(b), et seq., and requires, in pertinent part, that:

“(1) The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that local taxes on aviation fuel (except taxes in effect on December 30, 1987) and the revenues generated by a public airport will be expended for the capital or operating costs of-

- (A) the airport;*
- (B) the local airport system; or*

¹¹ *See* 64 FR 7696, February 16, 1999.

(C) other facilities owned or operated by the airport owners or operator and directly and substantially related to the air transportation of passengers or property.

This is also stated at 49 U.S.C. § 47133:

(a) PROHIBITION.-Local taxes on aviation fuel (except taxes in effect on December 30, 1987) or the revenues generated by an airport that is the subject of Federal assistance may not be expended for any purpose other than the capital or operating costs of-

- (1) the airport;
- (2) the local airport system; or
- (3) any other local facility that is owned or operated by the person or entity that owns or operates the airport that is directly and substantially related to the air transportation of passengers or property.”

Grant Assurance 25, *Airport Revenues*, reflects this legislative intent and states:

“All revenues generated by the airport and any local taxes on aviation fuel established after December 30, 1987, will be expended by it for the capital or operating costs of the airport; local airport system; or other facilities which are owned or operated by the owner or operator of the airport and which are directly and substantially related to the actual air transportation of passengers or property...”

The FAA Airport Compliance Program

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

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners’ federal obligations and the public’s investment in civil aviation.

The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of federal property to ensure that the public interest is being served. FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. FAA Order 5190.6A is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA’s responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and

administering the various continuing commitments made to the United States by airport owners as a condition of receiving a grant of federal funds or the conveyance of federal property for airport purposes. FAA Order 5190.6A analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

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 (August 30, 2001) (Final Decision and Order)]

FAA Order 5190.6A outlines the standard for compliance, stating, “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.” [*See* FAA Order 5190.6A, Sec. 5-6(a)(2)]

Enforcement of Airport Sponsor Assurances

The Federal Aviation Act of 1958, as amended (FAAct), 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 owner or 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 owners or sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their federal grant assurances.

The Complaint and Appeal Process

Pursuant to 14 CFR § 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant(s) shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint(s)

shall also describe how the complainant(s) directly and substantially has/have been affected by the things done or omitted by the respondent(s). [*See*, 14 CFR § 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. [*See*, 14 CFR § 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 Procedures Act (APA) and Federal case law. The APA provision [*See*, 5 U.S.C. § 556(d)] states, “(e)xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” [*See also*, Director, Office Worker’s Compensation Programs, Department of Labor v. Greenwich Collieries, 512 US 267, 272 (1994) and 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 arguments necessary for the FAA to determine whether the sponsor is in compliance.”

Title 14 CFR § 16.31(b-d), in pertinent parts, provides that “(t)he Director's determination will set forth a concise explanation of the factual and legal basis for the Director's determination on each claim made by the complainant.” In accordance with 14 CFR § 16.33(b) and (e), upon issuance of a Director’s determination, “a party 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;” however, “(i)f no appeal is filed within the time period specified in paragraph (b) of this section, 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.”

Title 14 CFR § 16.247(a) defines procedural recourse for judicial review of the Associate Administrator’s final decision and order, as provided in 49 U.S.C. § 46110 or section 519(b)(4) of the Airport and Airway Improvement Act of 1982, as amended, (AAIA), 49 U.S.C. § 47106(d) and 47111(d).

VI. ANALYSIS AND DISCUSSION

The matter before the Director reflects the natural ebb and flow of negotiations that occurred between two parties over a limited period of time. Based on the Record before the Director, these negotiations took place over the course of approximately ten months. Given the complexity and risk associated with aeronautical fueling, conducted via a new business model for this particular airport sponsor, ten months represents a relatively short period of time for thoughtful negotiations to occur and be ratified by both parties. Moreover, in that relatively

short time period, the Complainant's demands eclipsed his business proposal and now encompass issues which cannot be remedied through the Part 16 process.

The FAA does not mediate or arbitrate negotiation disputes between airport sponsors and potential business proponents concerning issues outside the scope of the Part 16 process and a sponsor's Federal Grant Assurances. Rather, the FAA determines whether or not an airport sponsor is currently in compliance with its Federal obligations. Where applicable, the Director will turn to the Respondent's last offer or final negotiating posture to make such a determination.

The Director will also note that subsequent to the Complainant's filing of this Complaint, circumstances at the Airport changed significantly. In fact, SIG's decision to terminate its FBO and airport management responsibilities renders some of the allegations made by the Complainant moot.¹² However, given the recent disclosure of this matter, this Decision includes the Director's full analysis of the Complainant's allegations in the hope that it will provide a better framework for future negotiations between the two parties. Additionally, the Director believes this analysis can assist the Respondent in its understanding of its Federal grant obligations. Therefore, the analysis of these issues will include SIG in the discussion as if it were still operating at the airport.

Complainant's Request for Relief Through Part 16

The Complaint concludes:

"WHEREFORE, your Complainants pray that the FAA investigate the actions and practices of the GWAA as set forth above, and that the FAA order corrective action to include:

- 1. Requiring the GWAA to negotiate in good faith with Complainants for the lease of facilities for the development and operation of a commercial self-fueling service, and*
- 2. Requiring the GWAA to recover such revenues as have been improperly diverted through overpayments to SIG or otherwise paid out in violation of applicable conflict of interest regulations or policies, and*
- 3. Requiring the GWAA to implement and enforce strict conflict of interest policies, and*
- 4. Requiring the GWAA to open for bid and negotiation its contracts for leasing and airport management services, and to void any contracts not negotiated at arms length."* [FAA Exhibit 1, Item 2, pp 23-24]

The Director believes its role and the relief offered under the Part 16 process must be clarified. The decision before the Director is whether or not the Airport is currently in compliance with its

¹² 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 (August 30, 2001) (Final Decision and Order)] At no time does the Complainant make allegations comparing its treatment to that of the new FBO, Wayne County.

Federal Grant Assurances. The FAA cannot compel an airport sponsor to take actions not required by its Federal Grant Assurances.

Allegations Outside the Part 16 Purview

In an effort to be fully responsive to the Complainant, the Director will review the grant assurance violations alleged by the Complainant throughout the Part 16 process and dispose of those allegations not directly related to the issues identified for FAA analysis and decision.

The Complainant states:

“SIG had an active conflict of interest in advising the GWAA Board of Directors regarding determination of the Complainant’s proposal.” [FAA Exhibit 1, Item 2, ¶ 16]

“The GWAA either does not have or does not abide a strict conflict of interest policy.” [FAA Exhibit 1, Item 2, ¶ 45]

The Federal Grant Assurances do not directly address an airport sponsor’s policies on conflict of interest. Grant Assurance 5, *Preserving Rights and Powers*, prohibits an airport sponsor from taking or permitting “any action which would operate to derive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary.” The Director will discuss the allegations related to SIG’s relationship with the Respondent within the context, as appropriate, of Grant Assurance 5. However, the Director declines to make a determination in regards to whether or not the Respondent maintains a conflict of interest policy. This would be outside the Director’s authority under Part 16.

The Complainant states:

“The loan was not approved by the Local Government Commission as required by N.C.G.S. § 159-153 and N.C.G.S. §160A-20, and is a void contract pursuant to N.C.G.S. § 159-149, but the GWAA has continued to make payments on the contract notwithstanding such payments being unlawful.” [FAA Exhibit 1, Item 2, ¶ 30-1]

“N.C.G.S. § 159-149 provides that any contract required to be approved by the Local Government Commission but which is entered into without such approval is void, and further provides ‘that it shall be unlawful for any officer, employee, or agent of a unit of local government to make any payments of money thereunder.’ (See Exhibit V) Between June 1, 2005 and October 1, 2007, the GWAA made at least \$175,000.00 in illegal payments on the unapproved and void loan. (See Exhibit Appendix B, pp. 39-42)” [FAA Exhibit 1, Item 2, ¶ 34]

The FAA’s administrative complaint process for matters pertaining to federally assisted airports is not the proper forum for review of the Complainant’s claims of violations of state or local

laws. Under 14 CFR Part 16.1, the FAA’s jurisdiction is specifically limited to proceedings involving complaints against federally assisted airports arising under legal authority including portions of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 40101, et seq.; the Airport and Airway Improvement Act (AAIA) of 1982, as amended and recodified at 49 U.S.C. § 47107, et seq.; the Surplus Property Act, as amended, 49 U.S.C. § 47151, et seq.; predecessors to those Acts; and regulations, grant agreements, and documents of conveyance, pursuant to those Acts. The issue of whether this loan is legal or illegal, under the auspices of North Carolina’s General Statutes, is outside the Part 16 purview and the Director’s authority.

The Complainant states:

“In 2003 the GWAA contracted to pay its Treasurer, a board member, to provide the GWAA with accounting services, including the preparation and presentation of monthly financial statements, even though such arrangement violates N.C.G.S. § 14-234, a criminal statute which prohibits a public official from benefiting from a contract he is involved in letting or administering. (See Exhibits Y and Z) This arrangement continued until at least October 2007 when Complainant threatened legal action to enjoin it. However, the GWAA Board has failed and refused to demand reimbursement of the illegal payments.” [FAA Exhibit 1, Item 2, ¶ 44]

Again, any alleged violations of North Carolina’s General Statutes remain outside the purview of Part 16. Although the Director declines to make a finding in regards to the legality of this arrangement, the Director will discuss whether or not a payment for these services constitutes a violation of Grant Assurance 25, *Airport Revenues*, below.

The Complainant states:

“The Complainant has been hindered in inspecting these financial arrangements by the GWAA’s unwillingness or inability to comply with North Carolina’s Public Records Law.” [FAA Exhibit 1, Item 2, ¶ 48]

Requirements stipulated by the North Carolina Public Records Law remain outside the purview of the Part 16 process. As such, the Director declines to make any findings with regard to this allegation.

The Complainant has also alleged violations of FAA Order 5190.6A, *Airport Compliance Requirements*. While FAA Order 5190.6A may help airport sponsors interpret their obligations under the FAA’s Airport Compliance Program, it is not controlling with regard to airport sponsor conduct. FAA Order 5190.6A sets forth policies and procedures for FAA personnel to follow in carrying out the FAA’s responsibilities for ensuring airport compliance. As a result, these allegations will be analyzed only when used in direct support of a grant assurance violation.

Issues Identified for Analysis and Discussion

Issue 1: *Whether the Respondent’s failure to approve the Complainant’s request to operate an aeronautical service constitutes an unreasonable denial of access in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, Economic Nondiscrimination.*

The Complainant states:

“The Complainant applied to the Goldsboro-Wayne Airport Authority (‘GWAA’) to negotiate an FBO contract to operate a commercial self-fueling avgas facility at the Goldsboro-Wayne Airport (‘the Airport’). The GWAA denied the application arbitrarily and in violation of various United States Code provisions and FAA regulations prohibiting the grant of exclusive rights to sell aviation fuel at the Airport.” [FAA Exhibit 1, Item 2, p.1]

The Respondent answers:

“Thus, after initially rejecting his application, the GWAA accepted the Complainant’s proposal, with the condition that he comply with the Airport Rules and Regulations. The GWAA also conditioned its acceptance on the Complainant’s requesting and obtaining approval of a site at the Airport from which he intends to conduct his business, and obtaining a certificate of approval from the local fire marshal for his proposed self-service fueling facility. Thus far, the Complainant has failed to do any of it.” [FAA Exhibit 1, Item 7, p. 2]

As the Respondent admits and the Record documents, the GWAA voted to deny the Complainant’s application to establish a self-service avgas facility at its May 24, 2007 meeting. [FAA Exhibit 1, Item 2, exhibit C, p.1] But then on October 16, 2007, the GWAA voted to conditionally accept the application. [FAA Exhibit 1, Item 7, exhibit M]

While both parties assert their own reasons for this initial denial, the Director does not find these arguments applicable to the issue of an unreasonable denial of access currently at hand. With regard to allegations of past non-compliance, the Director relies on established FAA policy, stating:

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, (August 30, 2001) (Final Decision and Order)] (Wilson)

This FAA policy and citation to *Wilson* are commonly included in Part 16 decisions and speak to the import of current compliance. [See *Clarke v. City of Alamogordo*, FAA Docket No. 16-05-19 (September 20, 2006) (Director's Determination), at 11; and, *Ingram v. Port of Oakland*, FAA Docket No. 16-03-12 (April 7, 2006) (Final Decision and Order), at 21; *Roadhouse Aviation v. City of Tulsa*, FAA Docket No. 16-05-08 (December 14, 2006) (Director's Determination), at 31; and, *Atlantic Helicopters Inc./Chesapeake Bay Helicopters v. Monroe County, Florida*, FAA Docket No. 16-07-12 (September 11, 2008) (Director's Determination), at 26] Not only does the FAA policy stand for 'current compliance,' but it also stands for the concept of voluntary compliance.

By voting to conditionally approve the Complainant's request, the Respondent demonstrated its voluntary compliance with regards to the Complainant's ability to access the airport. However, before the Director addresses the issue of whether or not the conditions imposed on the Complainant were reasonable, the Director must also discuss the obligations assumed by the Complainant as a potential aeronautical service provider.

It is reasonable for the GWAA to require entities proposing to provide new aeronautical services on the Airport to take sufficient steps to demonstrate substantial or realistic intent in support of their proposed endeavors. This precedent is cited in *Flamingo Express, Inc., v. City of Cincinnati, OH* (FAA Docket No. 16-06-04, Final Agency Decision, at 11 as upheld by the Sixth Circuit U.S. Court of Appeals). The Record clearly documents that the Complainant was in the process of taking these steps prior to the GWAA's May 2007 meeting: the Complainant initiated discussions with the Chair of the Airport Buildings and Grounds Committee and Airport Manager [FAA Exhibit 1, Item 10, exhibits D and E]; the Complainant initiated discussions regarding his preferred location with the Airport's engineer [FAA Exhibit 1, Item 10, exhibit F]; the Complainant made a proposal before the GWAA [FAA Exhibit 1, Item 2, exhibit A and FAA Exhibit 1, Item 7, exhibit D]; and the Complainant provided additional financial information as requested by the GWAA [FAA Exhibit 1, Item 2, exhibit B].

However, after the GWAA voted to conditionally approve the Complainant's request in October, the Record offers little documentation regarding the tangible steps taken by the Complainant to demonstrate his substantial or realistic intent with regards to his proposed business. On November 1, 2007, the Complainant's attorney wrote the Respondent's attorney. This letter states:

"I understand that the Authority has withdrawn its denial of my clients' application to operate a commercial self-serve avgas facility at the Airport. Certainly so far as the requirements of Section 8¹³ would have any rational application to such a service, my clients are prepared to comply with those. However it is obvious that many of those requirements have no application whatsoever to the type of facility proposed by my clients. We would certainly expect the Authority to waive the inapplicable requirements, as it has done for the entity with whom my clients' operation would compete. Mr. Johnson has communicated his proposal in that regard to Mr. Steele, in his capacity as Airport

¹³ Section 8 of the GWAA's Rules and Regulations as adopted on September 27, 2007 contains the minimum requirements for all fixed base operations. [FAA Exhibit 1, Item 2, exhibit M, pp 6-10]

Manager. We will expect the Authority to negotiate the details of this arrangement in good faith...” [FAA Exhibit 1, Item 2, exhibit N, p. 1]

“However in light of the fact that the Authority has agreed to negotiate a contract with my client for the installation and operation of the commercial self-service aviation fuel facility, they will forbear at present the filing of a complaint with the FAA, while continuing to obtain and analyze the Authority’s records relating to its financial arrangements with SIG.” [FAA Exhibit 1, Item 2, exhibit N, p. 2]

Additionally, on November 2, 2007, the attorneys for the two parties met. [FAA Exhibit 1, Item 7, exhibit G] On November 8 and 9, 2007, the Complainant’s attorney communicated to the Respondent’s attorney regarding the five areas of dispute and legal remedies for each matter. [FAA Exhibit 1, Item 10, exhibits I-1 and I-2]. On November 25, 2007, the Complainant sent an electronic message¹⁴ stating that “Otto Keesling, as the building and grounds committee, approved the site.” [FAA Exhibit 1, Item 10, exhibit G, p. 3]

Noticeably absent from the Record before the Director is any of the following documentation: communication between the Complainant and the Airport Manager as cited in the November 1, 2007 letter above; any statement conveying a GWAA Board Member’s approval of the proposed site; or any substantive negotiations with regards to the requirements of Section 8 of the Airport’s Rules and Regulations. Because the Record fails to document tangible steps taken by the Complainant to demonstrate his substantial or realistic intent with regards to his business proposal after it was conditionally approved, the Director finds the following allegations, made by the Complainant against the Respondent, to be premature:

“...the Authority refused to engage in good faith negotiations towards a resolution.” [FAA Exhibit 1, Item 1, ¶ 1]

“failing to negotiate with Johnson on reasonable terms for the lease of space on which to operate a self-service avgas fuel facility...” [FAA Exhibit 1, Item 10, p. 1]

The Respondent’s current compliance compelled the Complainant to take the next step, and the Respondent argues this did not occur. The Record contains an affidavit from Otto H. Keesling, a member of the GWAA and chair of the Board’s Buildings and Grounds Committee which states:

“I never heard back from Mr. Johnson about a location for his business after his proposal was approved by the GWAA Board in October 2007.” [FAA Exhibit 1, Item 11, exhibit A, ¶ 4]

An affidavit provided by David E. Gurley, III, an engineer retained to provide services to the

¹⁴ The Record is unclear as to the intended recipient of the Complainant’s November 25, 2007 electronic message. It is contained beneath an electronic message dated November 26, 2007, written by the Respondent’s attorney to the Complainant, courtesy copying the Complainant’s attorney, Complainant’s wife, and two members of the GWAA Board. [FAA Exhibit 1, Item 10, exhibit G]

GWAA states:

“I had no more contacts with Mr. Johnson after the Spring of 2007 regarding the self-service fuel tank and pump.” [FAA Exhibit 1, Item 11, exhibit B, ¶ 6]

Based on the Record before the Director, it appears that the Complainant failed to follow through on negotiations with regard to his proposal for a self-service fueling business. From October 2007 through December 2007, the actions taken by the Complainant and his attorney, as reflected in the Record, focus on requiring the GWAA to address a list of what appears to be numerous demands not related to the Respondent’s grant assurances (see pages 5-6 of this Determination). [FAA Exhibit 1, Item 7, exhibit G and FAA Exhibit 1, Item 10, exhibits I-1 and I-2] This focus, in addition to distracting the Complainant from pursuing his proposed aeronautical business, contributes to a poor environment for substantive negotiations and undermines the abilities of both parties to engage in objective negotiations to resolve their differences. The Director strongly encourages both parties to utilize staff in the FAA’s Atlanta Airport District Office to foster the foundation needed to re-establish productive, good faith negotiations. Failure to create this type of negotiating environment could potentially result in a situation similar to Kent J. Ashton, Jacquelin R. Ashton v. City of Concord, NC [FAA Docket No. 16-02-01 (Director’s Determination) (August 22, 2003)] (*Ashton*). In this case, the City of Concord declined to enter into a lease with the Ashtons based on their past history of lawsuits, FAA complaints, and threats of future litigation. With regards to this defense, the Director found:

“Although it is the Complainants’ right to pursue complaints and lawsuits to protect their interest, it is the Respondent’s right to protect itself from the possibility of future costly and frivolous litigation. In this case, Respondent’s rationale appears to be that less contact with the Complainants should result in less litigation. Here, the Respondent’s position is not unreasonable. Moreover, the Respondent’s Federal obligations limit the City’s proprietary rights, but do not eliminate them.” [See *Ashton*, at 27]

On June 8, 2009, SIG informed the Respondent of its desire to terminate its FBO and airport management responsibilities. [FAA Exhibit 1, Item 21, exhibit B] The Complainant then submitted this information to the Record on July 6, 2009. [FAA Exhibit 1, Item 19] This submission included a copy of the letter SIG sent to its customers, dated June 30, 2009, announcing SIG’s decision to cease its FBO and airport management functions at the Airport. [FAA Exhibit 1, Item 19, exhibit A] Despite the Complainant’s assertion on July 27, 2009 that “the petitioner has been attempting for several years now to negotiate an agreement with the GWAA allowing the petitioner to invest his own funds in the installation of a commercial self-service avgas facility...” the Record provides no evidence or indication of the Complainant fulfilling the requirements outlined in the GWAA’s conditional approval in 2008 or 2009. [FAA Exhibit 1, Item 20]

In conclusion, based on the GWAA’s current compliance, the Director cannot find that the Complainant has been denied access to the Airport. The Director notes the absence of tangible steps taken by the Complainant to demonstrate his substantial or realistic intent with regard to

pursuing his business proposal after it was conditionally approved. Until the Complainant renews his interest by taking tangible steps¹⁵ to address the conditions required for the approval of his self-service fueling facility, the Respondent cannot be expected to engage in further good faith negotiations with the Complainant. Moreover, while the Complainant has a right to utilize legal means to protect its interests, the Respondent also has a right to protect itself from future litigation.

Issue 2: Whether the Airport's Minimum Standards and conditions for approval of a self-service fueling facility unreasonably deny access to the Complainant or unjustly discriminate against the Complainant in violation of 49 U.S.C. § 47107(a)(1) and Federal Grant Assurance 22, Economic Nondiscrimination.

The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at an airport. It is the prerogative of the airport owner or sponsor to impose conditions on users of an airport to ensure its safe and efficient operation. Such conditions must be fair, equal, and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. Once the airport sponsor has established minimum standards, it should apply them objectively and uniformly to all similarly situated on-airport aeronautical activities and services. [FAA AC 150/5190-7, section 1.1.] *See Flightline v. Shreveport*, FAA Docket No. 16-07-05 (March 7, 2008) (Director's Determination).

Moreover, the establishment of minimum standards is the FAA's recommended way for a sponsor to deal with the inherent friction among competing aeronautical service providers and a variety of airport users. But it is through the sponsor's objective and uniform application of its minimum standards that allows it to meet the standard of compliance. However, the standard of compliance does not require that airport sponsors enforce minimum standards so rigidly as to require identical tone and posture toward all airport users that have different records and history with the sponsor. However, the FAA does require airport sponsors to apply their minimum standards consistently through their interactions with aeronautical users and service providers.

The Director will first discuss the reasonableness of the requirements associated with the conditional approval of the Complainant's proposed self-service fueling facility, and then review the Respondent's application of these requirements with regard to the Complainant's request compared to other similarly situated users at the Airport.

Minimum Standards

The Complainant states:

"Section 8, a copy of which is attached as Exhibit M, includes a number of requirements patently incompatible with operation of a self-service avgas facility,

¹⁵ The Respondent initially identified these actions in FAA Exhibit 1, Item 16, p. 2. However, in light of agreements executed between the Respondent and Wayne County on August 5, 2009, the Director encourages both parties to further discuss what steps the Complainant should take to renew negotiations with regards to its business proposal.

and which are both objectively unreasonable and purposefully designed to make compliance by the Complainant impossible.” [FAA Exhibit 1, Item 2, ¶ 26]

The Respondent states:

“The Airport Rules and Regulations speak for themselves. In particular, the GWAA denies that the Airport Rules and Regulations are unreasonable and/or purposefully designed to prevent Complainant’s proposed self-service fueling business. [FAA Exhibit 1, Item 7, ¶ 26]

Section 8 of the Airport Rules and Regulations states, in pertinent part:

“REGULATIONS GOVERNING MINIMUM REQUIREMENTS FOR ALL FIXED BASE OPERATIONS

- A. All fixed base operations at the Airport shall be full-time, progressive business enterprises, with manned office facilities at the Airport during all business hours. The only exception to this rule will be for flight training instruction when approved by the Airport Authority. No fixed base operator shall be allowed to operate on the Airport without a fully executed lease agreement with the Owner.
- B. Fixed base operators providing sale of aviation petroleum products shall also be required to meet the minimum standards and offer services listed in Sections 8.I., 8.J., 8.K., 8.L.¹⁶ Such operators may, at their option, engage in other aeronautical activities by qualifying to meet the associated minimum standards for the aeronautical services involved.
- C. No persons or fixed base operators other than the operators qualifying under Section 8.B. will be permitted to sell aviation petroleum products. All other fixed base operators may engage in such other aeronautical services as they may qualify themselves for in accordance with these regulations and their lease agreements.
- D. The Owner shall determine substantial conformance to the standards for fixed base operators.
- E. Fixed base operators must show financial solvency and business ability to the satisfaction of the Owner.
- F. The minimum liability insurance which a fixed base operator shall carry is \$1,000,000/\$100,000 per occurrence/per person for bodily injury and \$1,000,000 for property damage.
- G. Land available for commercial aeronautical activities is a valuable and limited commodity. It is the policy of the Owner that no land areas or building space in excess of present and foreseeable requirements will be leased to any fixed base operator. Additional areas will be made available to operators on the basis of need and availability.
- H. Any construction on the premises by the Fixed Base Operator or any lessee shall be in accordance with design and construction standards established by the Owner with an appropriate performance bond commensurate with the construction required.

¹⁶ Section 8.I. outlines requirements for fuel and oil sales. Section 8.J. outlines requirements for Aircraft Maintenance and Repair. Section 8.K. outlines requirements for Flight Training. Section 8.L. outlines requirements for Aircraft Charter and Taxi Service. [FAA Exhibit 1, Item 2, exhibit M, pp 8-9]

- I. Fuel and Oil Sales. Persons conducting aviation fuel and oil sales on the Airport shall be required to provide:
1. Hard surface ramp space accessible by taxiway with electric pumps and tank storage having a capacity equal to the minimum tank truck load deliverable for 100 grade aviation fuel and, provide standard jet fuel.
 2. Properly trained line personnel on duty who are readily accessible.
 3. Proper equipment for repairing and inflating aircraft tires, servicing oleo struts, changing engine oil, washing aircraft and aircraft windows and windshields, and for recharging or energizing discharged aircraft batteries.
 4. Adequate towing equipment and parking and tie-down area to safely and efficiently move aircraft and store them in all reasonably expected weather conditions.
 5. Adequate inventory of generally accepted grades of aviation engine oil and lubricants.

In conducting refueling operations, every operator shall install and use adequate grounding facilities at fueling locations to eliminate the hazards of static electricity and shall provide approved types of fire extinguishers or other equipment commensurate with the hazard involved in refueling and servicing aircraft.” [FAA Exhibit 1, Item 2, exhibit M, pp 6-8]

The Complainant does not state how the Airport is preventing Two Dogs Aviation from offering services at the Airport in accordance with these Minimum Standards, nor how the Airport is preventing Two Dogs Aviation from offering services in a manner similar to the existing FBO. The Complainant does not state how these requirements, as outlined above, are specifically unreasonable. Although the Complainant states that these requirements are “*purposefully designed to make compliance by the Complainant impossible,*” the Record contains no documentation to suggest that that Respondent altered its requirements in response to the Complainant’s business proposal. [FAA Exhibit 1, Item 2, ¶ 26] The main issue is compatibility between the business model proposed by the Complainant and the Airport’s Minimum Standards. The Complainant acknowledges this in its response to the Director’s request for additional information, stating:

“In requesting these waivers, the Complainant is guided by certain relevant considerations. First, the very nature of a commercial self-service avgas installation make (sic) a number of the ‘Minimum Standards’ inapplicable and irrelevant to the proposed business.” [FAA Exhibit 1, Item 15, p. 1]

The Director notes that the present case is similar to Self Serve Pumps, Inc., v. Chicago Executive Airport, FAA Docket No. 16-07-02 (March 17, 2008) (Director’s Determination) (*Self Serve Pumps*). In *Self Serve Pumps*, the Complainant argued 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.” [*See Self Serve Pumps* at 21] However, the Director rejected that argument because the Airport’s Minimum Standards clearly tied the retail sale of aviation fuel to other basic aeronautical services to be provided by an FBO. The logic presented by the present Complainant is similar.

The Respondent argues:

“It is well established that bundling other aeronautical services with aircraft fueling is a reasonable requirement and does not, per se, violate Grant Assurance obligations.” [FAA Exhibit 1, Item 7, p. 25]

In support, the Respondent cites several Director’s Determinations which highlight the concept of tying fuel sales to other commercial enterprises in order to provide aeronautical users with services needed to support their activities and/or develop the airport.

An airport sponsor is obligated to maintain the airport and operate the aeronautical facilities and common use areas for the benefit of the public. How an airport opts to carry out this responsibility is a matter of the sponsor’s proprietary discretion. As such, the FAA defers the decision to bundle fuel sales with other aeronautical services to the expertise of the airport’s management. The FAA noted in *Self Serve Pumps*:

“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 requirements 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.” [Self Serve Pumps at 25]

The fact that the extant Respondent has bundled fuel sales with other aeronautical services does not make its Minimum Standards sufficiently unreasonable as to deny access to the Complainant. However, the Director will return to this issue in discussing the Respondent’s application of its Minimum Standards to the Complainant’s request compared to other similarly situated users at the Airport.

Other Requirements

The Respondent’s approval of the Complainant’s self-service fueling proposal was also conditioned upon the Respondent’s site approval and assurances from the Wayne County Fire Marshal. [FAA Exhibit 1, Item 2, exhibit K, p. 2] The Complainant describes these requirements as reasonable, but states that the GWAA has prevented him from meeting them. The Complainant states:

“The GWAA argues that the conditions it would impose on Mr. Johnson’s business are reasonable. First it contends it was reasonable to require site approval and Fire Marshal safety assurances. However as noted above, the GWAA has refused to approve (or disapprove) the site proposed, and now pretends Mr. Johnson never sought approval of a site. Without site approval there can be no Fire Marshal assurances. Thus while these conditions themselves

are certainly reasonable, the GWAA has unreasonably prevented Mr. Johnson from meeting them.” [FAA Exhibit 1, Item 10, p. 10]

The Respondent states:

“...Complainant introduces no evidence showing that he sought approval of a site for the business that was approved by the GWAA, or that the GWAA Board granted such approval.” [FAA Exhibit 1, Item 11, p. 3]

As fully discussed under Issue One above, the Respondent’s current compliance compelled the Complainant to take the next step. In his Reply, the Complainant describes the Respondent’s site approval process as follows:

“Mr. Johnson’s original application, Complaint Exhibit A, included an aerial photograph of the airport on which the proposed site is denoted as ‘SELF-SERVE HERE’. In his presentation to the Board on May 15, 2007, Mr. Johnson noted that ‘Location was talked about with Mr. Keesling prior to proposal’, and that the GWAA’s independent civil engineer, Trey Gurley, was assessing the proposed site. (Complaint Exhibit A, p. 2, Section (c)(ii)). Airport Manager Jim Steele had emailed Mr. Johnson on April 24, 2007 to tell him the site review had been referred to Mr. Gurley. (Reply Exhibit E). Mr. Gurley and Mr. Johnson corresponded by email on May 9-10, 2007 regarding the site, at which time Mr. Johnson described the site and the installation in detail. Mr. Gurley confirmed that he understood the site proposed. (Reply Exhibit F)” [FAA Exhibit 1, Item 10, p. 5]

The Complainant also argues that he has already addressed this issue. The Complainant states¹⁷:

“Otto Keesling, as the building and grounds committee, approved the site. In the original discussions presenting the proposal and any discussions since, the board has never presented any objection to the site. The site has even been approved by Trey Gurley working as the engineer to ensure it meets FAA clear zone requirements. Did the board forget it didn’t have any objection to the site, that the building and grounds committee approved the site, and that the engineer approved the site – or is this a new requirement?” [FAA Exhibit 1, Item 10, exhibit G, p. 3]

While it is clear that the Complainant identified a location for his proposed business, engaged in discussions with the Airport Authority’s chair of the Buildings and Grounds Committee, and communicated his desired location to the Airport’s engineer, there is nothing in the Record to suggest that this site was ever actually approved. Although the Airport’s engineer was aware of the location, his last communication to the Complainant offered no qualitative assessment as to its safety or consistency with the Airport’s plans. It states:

¹⁷ See Footnote 14.

“That is the same location I was told. I need to find out if that is suitable per FAA rules and regulations for the type equipment you are proposing.” [FAA Exhibit 1, Item 10, exhibit F, p. 1]

The Complainant did not have the Airport engineer’s final assessment of his proposed location at the time he presented his original proposal before the GWAA on May 15, 2007. The Complainant’s presentation notes state:

“No objections from Gurley Engineering – he has not completed his work as he is still waiting on information from Dain Riley.” [FAA Exhibit 1, Item 2, exhibit A, p. 2]

Moreover, the Record contains no evidence of the Complainant’s contact with the Airport’s engineer after May 10, 2007. An affidavit signed by the Airport’s engineer states:

“Given the nature of the proposed structures, I told Mr. Johnson that he should contact the GWAA’s airport consultants, The LPA Group of North Carolina, p.a., to clarify the airport safety rules regarding self-service fuel tanks. Thereafter, Mr. Johnson contacted me again asking whether I could provide him with a copy of the airport layout plan, because (he stated) obtaining a copy through The LPA Group would cost \$150. I told him I did not have a copy of those drawings to give away.” [FAA Exhibit 1, Item 11, exhibit B, ¶ 4]

“I had no more contacts with Mr. Johnson after the Spring of 2007 regarding the self-service fuel tank and pump.” [FAA Exhibit 1, Item 11, exhibit B, ¶ 6]

The Airport Sponsor has a fundamental responsibility to ensure that new business activities can be conducted safely and do not diminish the existing and planned use of the Airport. The Complainant does not dispute this. There is nothing in the Record to support the argument that Respondent’s requirement that the Complainant seek site approval is unreasonable.

The Respondent approved the Complainant’s proposal, conditioned upon the site approval, on October 16, 2007. [FAA Exhibit 1, Item 2, exhibit K, p. 1] The requirement to seek site approval was reiterated to the Complainant in a letter dated December 6, 2007. [FAA Exhibit 1, Item 2, exhibit L, p. 1] The Record does not document any attempts by the Complainant to follow up with the Airport’s engineer or the Authority itself during this time. For example, the Record contains the minutes from the Airport Authority’s meeting on December 6, 2007; the Complainant is not listed as a guest, nor is it reported that he made any requests before the Authority at that time. [FAA Exhibit 1, Item 7, exhibit S] Although the Complainant argues that a member of the Airport Authority had approved his proposed site, the Record contains no documentation of any such approval, and this fact is successfully contested by the Respondent. [FAA Exhibit 1, Item 11, exhibit A] Moreover, the Record presents no facts to support the Complainant’s view that the Respondent has thwarted any of the Complainant’s attempts to present his proposed site before the Airport Authority for approval. Given that the Airport Authority does not have any formal request for site approval before it, the Director cannot find that the Respondent has acted unreasonably.

With regard to the Respondent's requirement that the Complainant obtain approval from the Fire Marshal, the Complainant does not contest the reasonableness of this condition. However, the Complainant claims he cannot pursue this requirement until the Respondent approves the proposed site. [FAA Exhibit 1, Item 10, p. 10 and FAA Exhibit 1, Item 10 exhibit G, p. 3] The Complainant offers no documentation as to how the Respondent may have opposed his attempts to seek the Fire Marshal's approval. Instead, he relies upon the fact that his proposed site has not yet been approved by the Airport Authority as the reason he has been unable to meet this condition. While obtaining the site approval is a likely prerequisite to seeking the Fire Marshal's assurances, the burden of action still falls on the Complainant. Therefore, the Director finds that the Respondent has not unreasonably prevented the Complainant from meeting these requirements.

Respondent's Application of its Minimum Standards

The Complainant states:

"Moreover, the GWAA does not require SIG to comply, and SIG has never in fact complied, with Section 8.¹⁸ Thus the GWAA's insistence that the Complainant complies with all of Section 8 is a pretext for the extension and protection of the exclusive monopoly on fuel sales granted to SIG." [FAA Exhibit 1, Item 2, ¶ 27]

The Respondent answers:

"Mr. Keesling, on behalf of the GWAA, negotiated the terms of three separate contracts with SIG (Complaint Exhs. G, H, and J), which were substantially similar to the contracts that the GWAA had with Wayne Aviation. In doing so, the GWAA waived the requirements of Section 8 of the Airport Rules and Regulations as follows: (a) Section 8.I.3. (requiring light line maintenance); (b) Section 8.J. (requiring aircraft maintenance); and (c) Section 8.K. (requiring flight training). These requirements were waived because Wood Aviation, a SASO at the Airport was (and is) providing aircraft maintenance services, and there were (and are) at least two other entities offering flight training. Answer Exh. A, ¶ 5." [FAA Exhibit 1, Item 7, ¶ 27]

As stated in *Self Serve Pumps*:

"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." [*Self Serve Pumps* at 31-32]

¹⁸ See Footnote 13.

Although the Respondent argues, and the Director agrees, that bundling the sale of fuel with aeronautical services is not unreasonable, the Director questions the manner in which the Respondent has applied these requirements. The Airport's Minimum Standards clearly tie the sale of fuel with other responsibilities and services including aircraft maintenance and repair, flight training, and aircraft charter and taxi service. [FAA Exhibit 1, Item 2, exhibit M, p. 6] However, the Respondent admits to waiving these requirements as part of its negotiations with SIG and its predecessor. [FAA Exhibit 1, Item 7, ¶ 27] The result of these waivers effectively voids the Airport Authority's Minimum Standards with regards to bundling.

The Respondent's reason for utilizing waivers is also troubling. The Respondent explains that other businesses were already providing these services. This could imply that SIG's contract was negotiated to protect other businesses already at the Airport or to create a niche market for SIG. Regardless, the overall impact limits the competitive business environment at the Airport, which could shortchange aeronautical users and harm the public interest.

Unfortunately, the Record offers little information regarding what negotiations specific to the requirements of Section 8 might have occurred subsequent to the Respondent's conditional approval of Complainant's proposal. On November 1, 2007, in response to the GWAA's conditional approval of the Complainant's proposed business, the Complainant's attorney writes to the Respondent's attorney. This letter states the Complainant's expectation that the Authority will waive any standards not applicable to the Complainant's proposed business model. [FAA Exhibit 1, Item 2, exhibit N, p. 1] On November 7, 2007, the attorneys for the Complainant and the Respondent meet to discuss the matter. [FAA Exhibit 1, Item 7, exhibit G] An electronic message sent by the Complainant's attorney to the Respondent's attorney on November 8, 2007, the text of which is also contained in a letter sent via U.S. mail the following day states:

“As to the self-service avgas proposal, on failure to agree the Johnsons' remedy would be a complaint to the FAA contending the AA has illegally granted and protected an exclusive right for SIG to sell aviation fuels, and separately at some point an action against SIG and the AA contending anti-trust and unfair trade practices, seeking money damages.” [FAA Exhibit 1, Item 10, p. 8 and FAA Exhibit 1, Item 10, exhibit I-1 and I-2, p. 1]

A November 25, 2007 electronic message written by the Complainant¹⁹ states:

“I have spent a considerable time addressing the first issue [Section 8] and am awaiting your and SIG Aviation LLC's (as airport manager, not FBO) replies to my requests. When are you going to reply? Since the first issue [Section 8] is already adequately discussed from my point of view, although not adequately answered, I would like to address the second and third issues...” [FAA Exhibit 1, Item 10, exhibit G, p. 3]

In an affidavit, the Chair of the Airport Authority states:

¹⁹ See Footnote 14.

“On December 6, 2007, at an executive session, Mr. Everett reported to the GWAA Board that Mr. Johnson, through his attorney, had demanded: (a) a total waiver from the requirements of Section 8 of the Airport Rules and Regulations; (b) to receive damages incurred by his inability to start the self-service fueling business when he first proposed it; (c) that the GWAA fire SIG as the airport manager; (d) that the GWAA rescind all of its agreement with SIG and rebid those contracts; and (e) that the entire GWAA Board resign. It is my belief that the GWAA Board would have been willing to waive for Mr. Johnson any of the requirements in the Airport Rules and Regulations that previously had been waived for SIG. In fact, I believe that the GWAA Board would do so today. However, at that time, we concluded that none of the other terms demanded by Mr. Johnson were acceptable to the GWAA or could be subject to negotiations, so we instructed our attorney, Harrell Everett, to reiterate the GWAA Board’s prior offer.” [FAA Exhibit 1, Item 7, exhibit A, ¶ 18]

While the Complainant describes the above as “third hand hearsay” and states that he “insisted that the negotiation for the approval of his self-service avgas facility be entirely separate from those other matters”, the Record contains no other description of the Complainant’s negotiations with regards to Section 8 of the Airport’s Minimum Standards. [FAA Exhibit 1, Item 10, pp. 7-8]

On December 6, 2007, the Respondent reiterated its conditional approval of the Complainant’s proposed business. [FAA Exhibit 1, Item 2, exhibit L] The Record contains no reference to further negotiations between the two parties. However, the Record does contain a letter from the Complainant’s attorney requesting the FAA participate in an informal resolution²⁰ of the dispute dated February 6, 2008. [FAA Exhibit 1, Item 1, exhibit A]

During its investigation, the FAA requested additional information from both parties. To clarify the Respondent’s offer, the Director asked, “Which sections, if any, of the Airport’s Minimum Standards is the Authority prepared to waive for the Complainant?” [FAA Exhibit 1, Item 14, p. 1] The Respondent answered, “... Respondent is willing to waive for Complainant the same minimum standards that Respondent waived for SIG...” [FAA Exhibit 1, Item 16, p. 3]

This brings us to question before the Director – whether or not the Airport’s Minimum Standards have been applied in a manner to unjustly discriminate against the Complainant. The FAA has long held that in order to establish a claim of unjust economic discrimination, a complainant must establish that it requested similar terms and conditions as other similarly situated airport users and was denied for unjust reasons. [See Aerodynamics of Reading, Inc. v. Reading Regional Airport Authority, FAA Docket No. 16-00-03, (December 22, 2000) (Director’s Determination) at 19] Again, the Director notes the similarity of this case to *Self Serve Pumps*:

“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

²⁰ See Footnote 5.

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'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.”
[Self Serve Pumps at 27]

In the present case, the Complainant seeks a waiver from any requirements not applicable to its specific business model. [FAA Exhibit 1, Item 2, exhibit N, p. 1 and FAA Exhibit 1, Item 15] To clarify the Complainant's position, the Director asked the Complainant, “Which sections of the Airport's Minimum Standards do you believe should be waived for your self-service fueling proposal?” [FAA Exhibit 1, Item 14] In response, the Complainant provided a list specifying 15 paragraphs he believed should be waived.²¹ [FAA Exhibit 1, Item 15, exhibit A] Like with *Self Serve Pumps*, “the Complainant is insisting that he be treated in a wholly different, preferential manner.” [Self Service Pumps at 27 (emphasis added)] Alternatively, the Respondent offered to provide the same waivers as provided to SIG. [FAA Exhibit 1, Item 7, p. 26; FAA Exhibit 1, Item 7, exhibit A, ¶ 18; FAA Exhibit 1, Item 11, p. 5, and FAA Exhibit 1, Item 16, p. 3]

In support of its request for additional waivers, the Complainant argues that he should not be required to provide aircraft charter and taxi service because it is not required of SIG. [FAA Exhibit 1, Item 10, p. 11 and FAA Exhibit 1, Item 15, exhibit A p. 3] To support this claim, he provides an exchange of electronic messages which indicates that SIG was not able to conduct charter operations around the time of February 2009, but that SIG was still able to assist the Complainant with his charter needs. [FAA Exhibit 1, Item 10, exhibit H] SIG is required to provide “adequate charter service” under the terms of its 2007 FBO agreement. [FAA Exhibit 1, Item 2, exhibit R, p. 2] SIG most recently provided charter service, with its Cessna Citation Excel, through an agreement with ACM Aviation LLC. [FAA Exhibit 1, Item 17] Nothing in the Minimum Standards, nor the FBO agreement precluded SIG from providing charter and taxi services through this manner.

²¹ In addition to 12 paragraphs under Section 8, Regulations Governing Minimum Requirements for All Fixed Base Operations, the Complainant lists two paragraphs under Section 6, Rules for Aircraft Fueling Operations, and one paragraph under Section 9, Procedures for Receiving and Processing Applications for Commercial Operations. [FAA Exhibit 1, Item 15, exhibit A and FAA Exhibit 1, Item 2, exhibit M]

Ultimately, the Complainant relies on the following logic for its request for additional waivers:

“...the GWAA has taken a position in its filings in this matter that it has waived various and sundry ‘Standards’ for SIG Aviation, particularly the requirements that an FBO selling aviation petroleum products must provide certain other services, on the ground that those services were already being provided by other vendors at the airport. The same reasoning should be applied to the Complainant’s proposal, and Complainant should not be required to provide any services which are already available from other vendors at the airport, including SIG Aviation.” [FAA Exhibit 1, Item 15, p. 2]

However, this reasoning is inconsistent with the FAA’s interpretation of Grant Assurance 22. While the Director does not condone the Respondent’s practice of routinely deviating from its Minimum Standards, this alone is not a violation of the Federal Grant Assurances. The question before the Director is whether or not these deviations result in the dissimilar treatment of two similarly situated parties. Because the Complainant was offered the same waivers as SIG, an allegation of unjust discrimination cannot stand. Moreover, the Director is not inclined to encourage the Airport Authority to continue this clearly problematic practice.

The FAA encourages airport sponsors to develop minimum standards to address the specific needs of their airport community. Based on the Director’s review of the GWAA’s Rules and Regulations for Fixed Base Operations (Section 8), these requirements do not appear unattainable, overly burdensome, or inconsistent with practices at other general aviation airports. The Record simply indicates that the Respondent has chosen not to fully enforce these requirements in its negotiations with potential and existing aeronautical service providers. This could indicate that the GWAA’s Rules and Regulations were not designed to reflect the local aviation community’s current needs. Regardless, this ‘à la carte approach’ to the Minimum Standards makes it difficult for the Airport Authority to avoid allegations of unjust discrimination as new entrants seek to negotiate access to the Airport. Furthermore, it precludes the Authority from promoting competition and choice at the Airport. This does not serve the interests of the aviation community. The Director strongly recommends the Respondent consider revising its Minimum Standards to better reflect the needs of the airport community and its more immediate masterplans.

The Respondent’s offer to treat the Complainant in the same manner as SIG allows the GWAA to remain compliant with regard to Grant Assurance 22. Conversely, if the Respondent were to agree to additional waivers, it could potentially give rise to future complaints of unjust discriminatory treatment from other tenants.

In conclusion, on July 6, 2009, the Complainant advised the Director of SIG’s intent to terminate its FBO services at the Airport. [FAA Exhibit 1, Item 19] This termination became effective on July 31, 2009. [FAA Exhibit 1, Item 21, exhibit B] As a result, the Director dismisses this allegation.

Issue 3: *Whether the Respondent has limited the right to sell fuel and lease hangars at the Airport to a single provider in violation of 49 U.S.C. § 47107(a)(4) and Grant Assurance 23, Exclusive Rights.*

The Complainant raises concerns associated with a change in the Airport’s Minimum Standards, the presence of a single provider for fuel, and SIG’s ability to sublease the Authority’s hangars. The Director will address these issues separately.

The Complainant states:

“At the time the Complainants made their application to establish a commercial self-fueling avgas facility at the Goldsboro-Wayne Airport, and at present, the GWAA had granted only one entity the right to provide and sell aviation fuel of any kind at the Goldsboro-Wayne Airport. That entity is SIG Aviation, LLC (‘SIG). [FAA Exhibit 1, Item 2, ¶ 11]

“The Complainant’s proposal to the GWAA presented the threat of competition with the fuel sales operation of SIG. In response SIG, through Jim Steele in his capacity as Airport Manager, produced (sic) an amendment to the Airport Rules prohibiting all self-fueling with SIG’s approval. See Exhibit J1” [FAA Exhibit 1, Item 2, ¶ 15]

“The action of the GWAA Board in ‘disapproving’ the Complainants’ proposal, and refusing to enter into negotiations for reasonable terms for the lease of space needed to establish and operate a commercial self-fueling avgas facility resulted in the GWAA Board granting SIG the exclusive right to sell aviation fuel at the Goldsboro-Wayne Airport.” [FAA Exhibit 1, Item 2, ¶ 22]

“GWAA’s grant to SIG of the exclusive right to sell aviation fuel at the Goldsboro-Wayne Airport violates 49 U.S.C. §47107 et seq., 49 U.S.C. §40103(e), various grant assurances, FAA Order 5190.6A Parts 3-8, 3-9, 3-17, 4-13, and 4-14, and is contrary to the guidance set forth in FAA Advisory Circular No. 150/5190-6.” [FAA Exhibit 1, Item 2, ¶ 23]

“In effect the GWAA has financed the expansion of SIG’s profit making hanger (sic) rental business, at no cost to SIG, but at great loss to the GWAA; and allowed SIG an exclusive right to sublease hanger (sic) space to others...” [FAA Exhibit 1, Item 2, ¶30-j]

While the Respondent admits to changing its Minimum Standards to address a safety concern with self-fueling, the Respondent denies granting SIG any exclusive rights. [FAA Exhibit 1, Item 7, ¶ 15, 22, and 23 and p. 35]

Airport's Minimum Standards on Self-Fueling

On February 27, 2007, the Airport Manager writes a memo proposing the GWAA formally update the Airport's Minimum Standards with regards to self-fueling. He recommends adding paragraph 6.e.:

“Self-fueling by any method is prohibited without the express written consent of the airport manager. All requests for self-fueling will be reviewed for safety and EPA considerations. Approval for self-fueling shall not unnecessarily be withheld.” [FAA Exhibit 1, Item 2, exhibit J-1, p. 4]

On March 22, 2007, the GWAA adopted this change. [FAA Exhibit 1, Item 2, exhibit J-1, p.1] The Chair of the GWAA Board explained this change was needed to address a specific safety concern at the Airport. He states:

“In 2007 the GWAA Board voted to amend the Airport Rules and Regulations to regulate self-fueling by aircraft owners. At the time, it was reported that some aircraft operators were fueling their aircraft with automotive fuel brought to the Airport in jerrycans or similar containers. The airport manager deemed such a practice to be a serious safety and liability concern. The GWAA Board concurred. To the best of my knowledge and understanding, self-service fueling – the type of commercial activity being proposed by Mr. Johnson – is not prohibited by the Airport Rules and Regulations.” [FAA Exhibit 1, Item 7, exhibit A, ¶ 20]

Most significantly, the Respondent argues that its “self-fueling amendment, as adopted, did not prohibit the type of self-service fueling business proposed by the Complainant.” [FAA Exhibit 1, Item 7, ¶ 15] In the Reply, the Complainant abandons its allegation and returns to its assertion that the Respondent's denial, unjust and discriminatory conditions for the proposed FBO, and refusal to negotiate in good faith result in the establishment of SIG's exclusive right.

Reasonable restrictions could include the regulation of “practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities by others.” Furthermore, FAA Order 5190.6A states that “reasonable rules and regulations should be adopted to confine aircraft maintenance and fueling operations to appropriate locations with equipment commensurate to the job being done.” [See FAA Order 5190.6A, Sec. 3-9(e)(3)]

The Director notes that while the Airport's Minimum Standards with regard to self-fueling may be restrictive, the Complainant has not alleged harm or challenged their reasonableness as a result of attempting to fuel his own aircraft. The Complainant has proposed to resell fuel to other aircraft owners. This is a wholly different enterprise and it is treated differently as a matter of law and compliance with an Airport's Federal Grant Assurances.²² Simply put, the

²² Title 49 U.S.C. § 47107(a)(6) states “an air carrier using the airport may service itself or use any fixed-base operator allowed by the airport operator to service any carrier at the airport”. The right to self-service one's own aircraft extends to general aviation and is recognized in Federal Grant Assurance 22(f). FAA Advisory Circular

Respondent's amendment did not prohibit the type of activity contemplated in the Complainant's proposal. Based on the Record, the Airport's Minimum Standards for self-fueling do not establish an exclusive right.

Single Provider for Fuel

The Respondent acknowledges that the Airport has never had more than one fuel provider at a time. [FAA Exhibit 1, Item 7, p. 3] However, this does not in and of itself establish the creation of an exclusive right. FAA Advisory Circular 5190-6 states:

“An exclusive rights violation occurs when the airport sponsor excludes others, either intentionally or unintentionally, from participating in an on-airport activity. A prohibited exclusive right can be manifested by an express agreement, unreasonable minimum standards, or by any other means. Significant to understanding the exclusive rights policy, is the recognition that it is the impact of the activity, and not necessarily the airport sponsor's intent, that constitutes an exclusive rights violation.” [FAA Advisory Circular 5190-6, (1.2.)]

“The fact that a single business or enterprise may provide most or all of the on-airport aeronautical services is not, in itself, evidence of an exclusive rights violation. What is an exclusive rights violation is the denial by the airport sponsor to afford other qualified parties an opportunity to be an on-airport aeronautical service provider.” [FAA Advisory Circular 5190-6, (1.3.) (b)(2.)]

The Respondent's conditional approval of the Complainant's proposed self-service fueling facility makes it difficult for the Complainant to successfully argue that he has been *excluded* from establishing a business that would have competed with SIG. Until the Complainant renews his interest by taking tangible steps to renew negotiations, the Complainant does not establish himself as a *qualified* party. Under Issue Two, the Director found that the Respondent's conditions were neither unreasonable nor unjustly discriminatory. The Director also found that SIG's termination of its FBO business at the Airport constituted a curing of the Complainant's allegations. Likewise, the Director dismisses the Complainant's allegations with regards to Grant Assurance 23, *Exclusive Rights*.

Hangar Rentals

The Complainant asserts that the Respondent granted SIG an exclusive right to sublease hangars because this service was not put out to bid and the GWAA did not seek or obtain fair market value for the lease of its hangar space. [FAA Exhibit 1, Item 2, ¶30-i] The Respondent replies that it was not obligated to seek bids for this arrangement. [FAA Exhibit 1, Item 7, p. 35]

In reviewing the Record, the Director found that SIG did not lease all available hangar space at the Airport. The Respondent has directly leased several hangars to other tenants. [FAA Exhibit 1, Item 2, Appendix A, pp 78-79] However, the Complainant fails to establish whether or not

5190-6 states, “The use of a self-service fueling pump is a commercial activity and is not considered self-fueling as defined herein and can be subject to minimum standards.”

these tenants are precluded from subletting their hangars. In order to make a finding of noncompliance with Grant Assurance 23, the Director must find that a qualified party was excluded from an opportunity to erect and sublease hangars. The Complainant's arguments do not meet this burden.

Federally obligated airports have a responsibility to operate their aeronautical facilities to the benefit of the public. In certain circumstances, this precludes an airport sponsor from acting in the same manner as a business structured to maximize its profits. When these decisions do not impact the airport's safety or the sponsor's Federal obligations, the FAA expects an airport owner to utilize its proprietary rights and powers to manage itself generally in the public's interest in aviation and as an ongoing concern. As such, the Director finds that the Respondent's decision to negotiate the hangar rental service with SIG was within the sponsor's proprietary rights (see below for a discussion of the related Rights and Powers issue). [*See Pacific Coast Flyers, Inc.; Donnya Daubney d/b/a Carlsbad Aircraft Pilot Supply; Roger Baker, v. County of San Diego, California*, FAA Docket No. 16-04-08, (July 25, 2005) (Director's Determination), at p. 28; *Jimsair Aviation Services v. San Diego County Regional Airport Authority*, FAA Docket No. 16-06-08, (April 12, 2007) (Director's Determination), at p. 37]

Issue 4: *Whether the Respondent has ceded control of the Airport in violation of 49 U.S.C. § 47107(a) and Grant Assurance 5, Preserving Rights and Powers.*

The Complainant makes numerous allegations regarding the Respondent's relationship with SIG Aviation, LLC. SIG was contracted by the Airport Authority to perform airport management services. [FAA Exhibit 1, Item 2, exhibit S] The Authority also executed a fixed base operations agreement with SIG. [FAA Exhibit 1, Item 2, exhibit R] To provide aeronautical services to the public, SIG leased property and office space in the terminal from the Airport Authority; these terms were outlined in a lease agreement. [FAA Exhibit 1, Item 2, exhibit T] Additionally, SIG leases a corporate hangar from the Authority. [FAA Exhibit 1, Item 7, exhibit I] These relationships were governed by four separate agreements executed between the Respondent and SIG. The Complainant argues that these agreements conferred an inordinate amount of power to SIG, benefiting the company financially, and granting it an exclusive right to provide fueling services. The Director will look at each of these issues individually and under the auspices of four specific grant assurances.

First, the Director will determine whether the relationship between the Respondent and SIG creates a transfer of power which would constitute a violation of Grant Assurance 5, *Preserving Rights and Powers*. Grant Assurance 5 prohibits an airport sponsor from taking actions which would deprive it of any of its rights and powers that are necessary to perform all of the conditions of its grant agreements and other Federal obligations.

The Complainant states:

“On information and belief, and contrary to its publicly stated position, SIG, in its capacity as airport manager, advised the GWAA Board against approval of Complainant's proposal, and against negotiating any terms upon which

Complainant could lease space to operate a commercial self-fueling avgas facility.” [FAA Exhibit 1, Item 2, ¶ 24]

The Respondent denies this allegation. [FAA Exhibit 1, Item 7, ¶ 24] In support of its denial, the Respondent provides affidavits from the Chair of the Airport Authority and SIG’s manager describing SIG’s role with regards to the Authority’s action. The Chair of the Airport Authority states:

“At no time did anyone from SIG advise the GWAA Board on whether Mr. Johnson’s proposal to operate a self-service fueling facility should be approved or denied. In fact, Mr. Steele publicly stated at the GWAA Board meeting on May 15, 2007, that Mr. Johnson’s proposed activity would not significantly impact SIG’s business.” [FAA Exhibit 1, Item 7, exhibit A, ¶ 15]

SIG’s Manager states:

“Because of SIG’s dual role as the FBO manager and the Airport manager I have refrained from offering opinions and/or recommendations to the GWAA Board regarding Mr. Johnson’s self-service fueling proposal. Moreover, at a May 15, 2007 GWAA Board meeting, and again by letter dated October 10, 2007, I stated that Mr. Johnson’s proposal would have little or no impact on SIG, but that whether and under what conditions his proposal should be accepted was strictly a decision of the GWAA Board.” [FAA Exhibit 1, Item 7, exhibit B, ¶ 4]

The Complainant provides no evidence to the contrary. Moreover, the Respondent’s October 16, 2007 decision to conditionally approve the Complainant’s proposal is an action taken by the Respondent, and not SIG, to work with the Complainant. [FAA Exhibit 1, Item 7, exhibit M] This demonstrates that Respondent had not negotiated away its rights and powers. As a result, there is no violation of Grant Assurance 5.

The Complainant states:

“GWAA’s other contracts with SIG allowed SIG to control airport operations and to use such control to provide itself favorable considerations regarding its cost of office and hanger (sic) space, and to divert Airport Revenue to itself and away from the Airport;” [FAA Exhibit 1, Item 2, ¶ 30]

The Respondent acknowledges that it has entered into four separate contracts with SIG. [FAA Exhibit 1, Item 7, ¶ 30] The Complainant fails to document how SIG used any rights granted through these agreements to unreasonably control the airport’s operations. At no time does the Complainant assert that it has been offered less favorable terms regarding the cost of office and/or hangar space. Lacking specific evidence as to how these agreements have been used to usurp the Authority’s proprietary rights and powers, the Director can only review the plain language of each of the four agreements. The Director offers the following analysis of these contracts’ plain language with regard to Airport’s rights and powers.

Airport Management Agreement

The Airport Management Agreement clearly describes the Respondent as the owner of the Airport seeking to enter into an agreement with an independent contractor to perform certain management services. FAA policy permits this action. Although SIG is responsible for enforcing “all laws, ordinances, rules and regulations lawfully adopted for the general operation of the Airport,” SIG has also agreed to “comply with all of the Authority’s reasonable directions in the performance of its duties.” [FAA Exhibit 1, Item 2, exhibit S, p. 2] The agreement outlines other specific duties SIG must perform and provides for compensation. Additionally, consistent with FAA policy, the Respondent included a subordination clause which states, “This Agreement shall be subject and subordinate to the provisions of any existing or future agreement between the Authority and the United States or any agency thereof relative to the operation and management of the Airport.” [FAA Exhibit 1, Item 2, exhibit S, p. 4]

An airport sponsor is permitted to delegate certain responsibilities associated with operating and maintaining the airport to a commercial tenant. This agreement does not relieve the Respondent from its obligations, nor does it transfer any of the Respondent’s proprietary rights. Most importantly, as noted, it includes a subordination clause making clear that the agreement is subordinate to the Respondent’s Federal Grant Assurances. Based on the Director’s review of the plain language, this agreement appears to have been consistent with FAA policy. [*See* FAA Order 5190.6A, Sec. 4-1(c) and 6-5]

Fixed Base Operation Agreement

The Fixed Base Operation Agreement recognizes the Respondent’s desire to make certain services available to its aeronautical users and specifies SIG as the provider. Specifically, this agreement requires SIG to maintain an office and sales offices on the Airport; provides SIG the nonexclusive right to sell aviation gasoline and fuels; provides SIG with a nonexclusive right to provide ramp service; allows SIG to maintain and rent T-hangars, sheltered hangars, and enclosed hangars; allows SIG to provide adequate charter service; and permits SIG a nonexclusive right to conduct any other additional activities requested or approved by the Authority. The agreement contains a clause clearly stating that, “it is expressly understood and agreed that nothing herein contained shall be construed to grant or authorize the granting of exclusive rights within the meaning of Section 308(a) of the Federal Aviation Act of 1958 as amended.” [FAA Exhibit 1, Item 2, exhibit R, p. 2] Another clause in the agreement preserves the Authority’s right to execute agreements with other FBOs and the U.S. government. Furthermore, SIG is prohibited from entering into any transaction which could deprive the Authority of its rights and powers, and SIG must furnish services outlined in the agreement on a fair, equal, and nondiscriminatory basis. [FAA Exhibit 1, Item 2, exhibit R]

FAA Order 5190.6A states:

“The operation of a public airport involve complex relationships that are frequently misunderstood. One can safely land an aircraft on the airport, but unless there are services and conveniences available to attract and encourage flight activity, the investment may be hard to justify. In most instances the public

agency owning the airport must turn to private enterprise to provide those services which will make the use of the airport by the public attractive and convenient.” [FAA Order 5190.6A, Sec. 6-2]

Consistent with FAA Order 5190.6A, the Respondent opted to set forth SIG’s FBO responsibilities in a separate agreement. [*See* FAA Order 5190.6A, Sec. 6-2(c)] Based on the Director’s review, this agreement did not have the effect of granting or denying rights to use the Airport facilities contrary to the requirements of law and applicable obligations. The agreement did not contain any terms or conditions which could have limited realization of the Airport’s full benefits. Moreover, the plain language of the agreement prohibited any exclusive rights and preserved the Authority’s ability to contract with other FBOs. Most importantly, the Authority clearly retained its proprietary rights and powers. Lastly, SIG was prohibited from entering into any transaction which could have deprived the Authority of its rights and powers.

Lease Agreement

In support of the FBO agreement, the Respondent and SIG entered into a lease agreement. This agreement leased Airport property to SIG for the purpose of conducting its FBO business. In addition, the agreement provided SIG with the right to rent and lease aircraft hangars on the Authority’s behalf. However, SIG could not assign or sublet, in whole or in part, without the prior written consent of the Authority. Each month, SIG paid \$500 for a portion of the terminal building and \$4,800 for the use of 44 hangars. In the event of a vacancy in any of the hangars, SIG could prorate its monthly rent by 50 percent of the vacant hangar’s rental fee. SIG was granted a nonexclusive right to use the public portion of the property for aeronautical purposes, and SIG had to obtain the Authority’s written approval before making any major alterations, additions or improvements to the property. SIG was required to adhere to the Airport’s Rules and Regulations. Another clause in the agreement preserved the Authority’s right to execute agreements with other FBOs and the U.S. government, and SIG was prohibited from entering into any transaction which could deprive the Authority of its rights and powers. The agreement also specified insurance coverage requirements. [FAA Exhibit 1, Item 2, exhibit T]

Again, the Director finds nothing in the plain language of the agreement to cede the Authority’s proprietary rights and powers in a manner inconsistent with Grant Assurance 5. SIG was not granted the ability to establish rental fees for the hangars it subleased, and had to obtain the Authority’s consent to sublet any hangars.

Corporate Hangar Lease

The Authority and SIG also entered into a lease agreement for a corporate hangar. Under its terms, SIG pays \$500 a month for a corporate hangar adjacent to the Airport. The lease stipulates insurance requirements and limits use of the hangar for general aviation purposes. SIG must maintain the hangar and cannot assign or sublet the hangar without the Authority’s prior consent. [FAA Exhibit 1, Item 7, exhibit H]

The Director finds nothing in this lease agreement which could abridge the Respondent’s rights and powers.

The Complainant states:

“With very limited exceptions involving a few privately owned hangars, any other party wishing to operate a commercial aeronautical activity on the airport must do so as a subtenant of SIG, while being subject to SIG’s authority as Airport Manager.” [FAA Exhibit 1, Item 10, p. 12]

The Respondent states:

“The GWAA has introduced in the administrative record copies of the most recent Airport Layout Plan clearly depicting comparatively large swaths of Airport land that are designated and reserved for planned and future aeronautical development. Answer Exh. P. None of the areas available for future aeronautical use are ‘controlled,’ contractually or otherwise by SIG. Moreover, it stands to reason that if (as Complainant alleges) all new aeronautical service providers must be subtenants of SIG, there would be some evidence that at some point in the process Complainant had been advised to go speak with SIG about subleasing space at the Airport. Complainant has introduced no such evidence. Section 8 expressly states that all FBOs must have ‘a fully executed lease agreement with the Owner.’ Complaint Exh. M, Section 8.A. (emphasis added). The owner of the Airport is the GWAA (see id. Section 1), not SIG. Complainant’s allegations regarding SIG control of the Airport are simply wrong.” [FAA Exhibit 1, Item 11, p. 6]

The Director believes the Complainant may be confusing SIG’s role. The GWAA contracted SIG to lease and manage hangar rentals. Typically, hangars are rented by individuals for the storage of privately owned aircraft. However, those individuals or entities seeking to conduct business on the airport must seek the approval of the GWAA rather than SIG. The GWAA’s Rules and Regulations recognize this distinction and appropriately preserve the Authority’s ability to regulate commercial operations on the Airport. Section 3 of the Rules and Regulations states:

“The Owner has the right to and does hereby regulate all commercial enterprises using the Airport as a basis of operation, whether such operation is aeronautical or non-aeronautical in nature. No commercial operation of any kind or type shall be conducted on the Airport unless specifically authorized by the Owner.” [FAA Exhibit 1, Item 2, exhibit M, p.1]

Moreover, Section 9 of the Rules and Regulations states:

“Any applicant wishing to establish an aeronautical activity on the Airport shall be furnished a copy of these minimum standards, as amended, and shall make

*application in writing to the Owner, setting forth in detail the following... ”*²³
[FAA Exhibit 1, Item 2, exhibit M, p.11]

With regard to the Complainant, this procedure was followed. As the Complainant established, his application to start a self-service fueling business was presented to the GWAA. [FAA Exhibit 1, Item 2, p. 1] Furthermore, as the Respondent notes above, nothing in the Record indicates the Complainant was advised to discuss leasing arrangements with SIG. The Director finds that the Respondent’s arrangement with SIG does not violate Grant Assurance 5.

The Complainant also argues:

“...SIG as Airport Manager has elected not to enforce against itself any of the Section 8 fuel seller requirements with which the GWAA now insists Complainant must comply (most recently exempting itself from the requirement that it provide charter and air taxi service).” [FAA Exhibit 1, Item 10, pp 12-13]

The Respondent states:

“Had the Complainant bothered to ask instead of engaging in contrived e-mail exchanges with SIG’s manager (see Reply Exh. H), the Complainant would have learned that SIG’s aircraft continues to be available under a Part 135 certificate, and remains available for on-demand charter services (Steele Rebuttal Aff., ¶¶ 4-5, Rebuttal Exh. C).” [FAA Exhibit 1, Item 11, pp 5-6]

The FAA enforces the sponsor’s grant assurances, not the sponsor’s minimum standards. The fact that the GWAA required SIG to enforce the Airport’s Minimum Standards, as part of its airport management agreement, did not absolve the GWAA of its federal obligations. However, the issue of whether or not SIG exempted itself from its contractual requirement to provide charter and air taxi service does not directly relate to the airport sponsor’s obligations under Grant Assurance 5. If this matter had merit, it is an issue that the Respondent should have taken up with SIG to determine if the FBO contract had been breached.

In conclusion, the Respondent had a complex relationship with SIG, most of which has since terminated. Regardless this relationship does not appear to have led to GWAA’s ceding its Airport sponsor’s powers within the meaning of Grant Assurance 5. The Director dismisses this allegation.

Issue 5: *Whether the Respondent illegally diverted Airport revenue in violation of 49 U.S.C. § 47107(b) and Grant Assurance 25, Airport Revenues and failed to maintain a fee and rental structure to make the airport as self-sustaining as possible in violation of 49 U.S.C. § 47107(a)(13) and Grant Assurance 24, Fee and Rental Structure.*

²³ The Complainant believes he should receive a waiver from this requirement. [FAA Exhibit 1, Item 15, exhibit A, p. 3] However, if the Respondent were to exempt the Complainant from this requirement, it could result in a ceding of the sponsor’s rights and powers and possible questions regarding its ability to comply with Grant Assurance 5.

The Complainant alleges that airport revenue has been diverted as a result of the Respondent's contracts with SIG, payments made on a loan, and payments for accounting services. Although the Complainant argues that the airport management agreement and the lease permitting SIG to sublet hangars, in aggregate, contribute to the alleged loss of airport revenue, the Director believes this confuses the matter²⁴ and will review these agreements individually.

The Complaint states:

“In the course of pursuing the application, Complainant also found evidence that the GWAA was violating the statutory and regulatory scheme requiring the GWAA to operate the Airport in as financially self-sustaining a manner as possible, by allowing Airport Revenue to be diverted to the entity to which the GWAA had also granted the exclusive right to sell aviation fuel.” [FAA Exhibit 1, Item 2, pp 1-2]

The Complainant's Response alleges the GWAA is:

“Failing to make the airport as self-sustaining as possible under the circumstances, by excessive payments to SIG for airport management.” [FAA exhibit 1, Item 10, p. 1]

To support this claim, the Complainant argues:

“...The GWAA's 2006/2007 operating budget was approximately \$217,000.00, of which approximately \$70,000.00 was derived from operating income, with the remainder being grants of public funds. During the same budget period, Complainants believe additional operating income was available to the GWAA in the approximate amount of \$50,000.00 or more, but was diverted to SIG through the contractual mechanisms described above. The GWAA 2006 audit showed a loss in net cash used in operating activities of over \$45,000.00. (See Exhibit AA, p. 7) Such arrangements violate the statutory mandate that the GWAA operate the Airport in as financially self-sustaining a manner as practically possible.” [FAA Exhibit 1, Item 2, ¶ 46 and 47]

The Respondent denies this claim:

“The GWAA admits that it has sought and that it has received state and Federal grants-in-aid for public infrastructure development at the Airport, and that the GWAA has received and receives funds from Wayne County to offset operational costs. However, no Airport funds have been diverted – surreptitiously (as implied by Complainant) or otherwise – to SIG. All contracts between the GWAA and SIG were entered into in the course of arms-length transactions...” [FAA Exhibit 1, Item 7, ¶ 46]

²⁴ The Complainant often combines language from Grant Assurance 24, *Fee and Rental Structure*, with language from Grant Assurance 25, *Airport Revenues*.

The Complainant confuses the goal of making an airport as financially “self-sustaining” as possible with revenue diversion. These concepts are inter-related, but they are differentiated into two separate grant assurances. The goal of making an airport as financially self-sustaining as possible is achieved through its rates and charges as specified in Grant Assurance 24, *Fee and Rental Structure*. However, Grant Assurance 25, *Airport Revenues*, deals with how an airport sponsor spends its airport revenue which could in turn result in the diversion of these funds away from airport purposes. Allegations regarding the airport management agreement, loan payments, accounting services, fees paid for management of the hangar rentals, and fuel reimbursement costs²⁵ will be discussed within the context of Grant Assurance 25. Additionally, allegations regarding the hangar rental fees will be discussed within the context of Grant Assurance 24.

Airport Management Agreement

The Respondent’s airport management agreement with SIG commenced on July 1, 2002. [FAA Exhibit 1, Item 2, exhibit J, p. 1] The Director notes that it is not uncommon for general aviation airports to enter into agreements with outside parties for airport management services. This practice is described in FAA Order 5190.6A which states, “More prevalent at small airports are arrangements in which the owner relies upon a commercial tenant or franchised operator to cover a broad range of airport operating, maintenance and management responsibilities.” [FAA Order 5190.6A, Sec. 4-2(c)] The Respondent’s five-year agreement required SIG to:

“...employ and provide sufficient personnel to perform the necessary services as Airport Manager as are required herein. As Airport Manager, SIG shall perform all the usual and customary duties that may be required of the Airport Manager in the administration and management of the Airport. In addition, it shall perform such other reasonable duties as shall be agreed upon by the Authority and SIG from time to time.” [FAA Exhibit 1, Item 2, exhibit J, p. 1]

The agreement also required SIG to perform the following additional duties:

- Check the visual approach slope indicator system and precision approach path indicator on a monthly basis or more if needed;
- Check the runway lights on a weekly basis and replace bulbs (the Authority is responsible for purchasing the bulbs);
- Remove snow with equipment purchased by the Authority;
- Minor repairs and routine maintenance on the Airport’s premises (the Authority pays for any parts necessary to do this and SIG must obtain the Authority’s approval before engaging any outside labor that will cost in excess of \$200);
- Designate a representative to attend the Authority’s meetings and make monthly reports to the Authority; and
- Enforce the rules and regulations of the Airport.

[FAA Exhibit 1, Item 2, exhibit J, pp 1-2]

²⁵ The Complainant, in a supplemental filing dated July 27, 2009, alleges that the GWAA subsidized SIG’s fuel sales around the period of December 2008 as “further indication of the respondent’s favoritism for the current FBO...” however, the Director believes this issue is best addressed under Grant Assurance 25. [FAA Exhibit 1, Item 21, p. 2]

The Respondent agreed to compensate SIG for these services at the rate of \$20,000 per year. [FAA Exhibit 1, Item 2, exhibit J, p. 2]

In 2007, the Respondent and SIG entered into a 20-year airport management agreement.²⁶ This agreement required SIG to perform the same duties as outlined in the 2002 agreement, but increases the rate of compensation to \$30,000 per year. [FAA Exhibit 1, Item 2, exhibit S]

The Revenue Use Policy describes permitted uses of airport revenue, in pertinent part, as:

“The capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property.”
[Revenue Use Policy, Sec. V(A)(1)]

Consistent with the Revenue Use Policy and the revenue use statutes, management companies are permitted to be paid or reimbursed reasonable compensation for providing airport management services. These services are considered part of the operating cost of the airport owner, and the fees can be paid from airport revenue.

SIG’s responsibilities, as outlined above, were inherently related to the operations of the Airport. As such, the Respondent’s use of airport revenue to compensate SIG for these activities is not in violation of Grant Assurance 25.

The Complainant challenges the aggregate value of SIG’s services as negotiated in the separate agreements:

“The GWAA could readily contract with an agent to manage and administer leasing and maintenance of the hangers [sic], and to provide whatever other management services are provided by SIG, for an amount far less than the sum of SIG’s management fee plus its profits from subleasing the GWAA’s hanger [sic] space.” [FAA Exhibit 1, Item 2, ¶ 30-n]

“The total management fee (sublease profits plus airport management fee) paid by the GWAA to SIG was grossly disproportionate to the value of SIG’s services to the GWAA.” [FAA Exhibit 1, Item 2, ¶ 30-o]

The Record did not include sufficient information to compare the aggregate value of SIG’s contracts to those previously negotiated by the Respondent. While the Record contains the Respondent’s 2000 airport management contract with Jeffrey Lynn Jennings, d/b/a Wayne Aviation, there is no documentation regarding how Wayne Aviation was compensated for work associated with the management of the hangars and rental collection. [FAA Exhibit 1, Item 7, exhibit Q] Nor does the Record describe any lease terms negotiated between the Respondent and Wayne Aviation. The Director believes the Complainant has mischaracterized the value of SIG’s airport management contract. The Complainant states:

²⁶ This agreement was subsequently terminated by SIG effective July 31, 2009. [FAA Exhibit 1, Item 21, exhibit B]

“From 2000 to 2003 the GWAA paid the prior Airport Manager \$27,000.00 per year. (Answer p 42, Answer Exh. Q) For that price, the Manager provided all the services SIG now provides, including management of the hangars and collection of rents. In addition however, the prior Manager also provided all labor and equipment for grass cutting and ditch maintenance, a duty omitted from the SIG Airport Management contract. In 2007 that job was budgeted at \$21,500.00.” [FAA Exhibit 1, Item 10, p. 14]

The Respondent’s 2000 airport management contract with Wayne Aviation does not support the valuation described in this comparison. [FAA Exhibit 1, Item 7, exhibit Q] The Record contains no documentation regarding how Wayne Aviation was compensated for work associated with the management of the hangars and rental collection. Although Wayne Aviation was responsible for cutting the grass and the removal of any trees or growth around the Airport’s perimeter fence or in the ditches, a service valued at approximately \$21,500²⁷, it was Wayne Aviation that sought to transfer its airport management responsibilities to SIG prior to the termination of its contract. [FAA Exhibit 1, Item 7, ¶ 27, and FAA Exhibit 1, Item 7, exhibit A, ¶ 5] The Respondent’s contract with Wayne Aviation states the term as September 1, 2000 to December 31, 2003. [FAA Exhibit 1, Item 7, exhibit Q, p. 1] However, SIG’s airport management contract commenced on July 1, 2002. [FAA Exhibit 1, Item 2, exhibit J, p. 1] Consequently, SIG also requested to terminate its contract stating:

“This decision was reached after a detailed financial analysis revealed that losses from this venture have reached unacceptable levels.” [FAA Exhibit 1, Item 21, exhibit B]

The Record supports the fact that Wayne Aviation was not willing to continue providing its negotiated airport management services at the contracted rate of \$27,000 a year. The Record supports that SIG Aviation was willing to negotiate a similar contract at a lower rate for five years, and then renegotiate its terms for a subsequent, 20-year contract, which was cancelled less than two years into its term. [FAA Exhibit 1, Item 2, exhibits J and S and FAA Exhibit 1, Item 21, exhibit B] However, the Complainant has not demonstrated that another party or entity would be willing to negotiate a rate less than that agreed to by SIG.

Ultimately, the Director is not inclined to comment on the reasonableness of the financial arrangement between the Respondent and SIG. The Respondent correctly states the FAA’s position as follows:

“FAA has explained that its policy concerning the use of airport revenue ‘was not intended to provide a vehicle for a party to challenge the reasonableness of fees paid to private entities for airport-related services provided. Rather it was to ensure that airport sponsors do not use airport revenues to create non-airport related benefits for other governmental activities.’ Boca Airport, Inc. v. Boca

²⁷ The GWAA’s Operating Budget for 2005/2006 states that the current budget, “based on actual current operating costs compared to current variances” for grass cutting is \$21,500. The proposed budget for grass cutting in 2005/2006 and 2007/2008 was \$21,500. [FAA Exhibit 1, Item 2, exhibit CC]

Raton Airport Auth., FAA No. 16-00-10 at 42 (2001) (Director's Determination).
[FAA Exhibit 1, Item 7, p. 37]

The FAA's policy is further clarified in Boca Airport, Inc., v. Boca Raton Airport Authority, FAA Docket No. 16-00-10, (March 20, 2003) (Final Agency Decision) (*Boca Airport*). In this decision, the Associate Administrator concurred "that the Revenue Use Policy was not intended to provide a vehicle for a party to challenge the reasonableness of fees paid to private entities for airport-related services." [See *Boca Airport*, at 51] As such, the Respondent's airport management agreement with SIG does not constitute a violation of Grant Assurance 25.

Loan Payments

The Complainant alleges that the Respondent is:

"...Allowing diversion of airport revenues by illegally making payments on an illegally obtained loan..." [FAA Exhibit 1, Item 10, p.1]

The Respondent states:

"The GWAA obtained a loan from BB&T bank on May 17, 2005 in the principal amount of \$495,000 to pay off a previous loan to Wachovia and finance the construction of new hangars at the Airport." [FAA Exhibit 1, Item 7, p. 43]

The Complainant fails to demonstrate that payments for this loan were for any purposes not associated with the Airport's capital or operating costs. Instead, the Complainant argues that the loan was obtained "illegally" and as such, any payments on it are also illegal. [FAA Exhibit 1, Item 2, ¶ 33-34, 42] For reasons discussed under *Allegations Outside the Part 16 Purview* above, any alleged violations of state law are not appropriate for adjudication under Part 16.

Accounting Services

The Complainant states:

"In 2003 the GWAA contracted to pay its Treasurer, a board member, to provide the GWAA with accounting services, including the preparation and presentation of monthly financial statements, even though such arrangement violates N.C.G.S. § 14-234, a criminal statute which prohibits a public official from benefiting from a contract he is involved in letting or administering. (See Exhibits Y and Z) This arrangement continued until at least October 2007 when Complainant threatened legal action to enjoin it. However, the GWAA Board has failed and refused to demand reimbursement of the illegal payments." [FAA Exhibit 1, Item 2, ¶ 44]

The Complainant further construes this arrangement as a violation of the Respondent's Federal Grant Assurances with the following allegation from its Reply to the Respondent's Answer and

Motion to Dismiss:

“Allowing diversion of airport revenues to a board member by illegally paying that member for services to the GWAA...” [FAA Exhibit 1, Item 10, p. 1]

The Respondent admits that the GWAA contracted to pay its Treasurer and Board member for this service. [FAA Exhibit 1, Item 7, ¶ 44] However, the Respondent also correctly notes:

“This claim has no bearing on the GWAA’s compliance with Federal Grant Assurances...” [FAA Exhibit 1, Item 7, p. 43]

The Complainant’s assertion that this arrangement constitutes revenue diversion is based on the service provider, not the nature of the service itself. Paying for accounting services rendered is a valid use of airport revenue. It is not inconsistent with the Revenue Use Policy. For reasons discussed under *Allegations Outside the Part 16 Purview* above, any alleged violations state law are beyond the scope of Part 16.

Management Fees for Hangar Rentals

On October 1, 2007, the Respondent and SIG entered into a 20-year lease agreement.²⁸ [FAA Exhibit 1, Item 2, exhibit T, p. 3] Hangar rental fees and terms are set by the Respondent. [FAA Exhibit 1, Item 7, ¶ 30(d)] SIG was responsible for subletting the following:

8 sunshades @ \$75/month	=	\$600
10 “B” hangers @\$150/month	=	\$1,500
10 “C” hangers @ \$175/month	=	\$1,750
4 “D” hangers @ \$250/month	=	\$1,000
12 “E” hangers @ \$200/month	=	\$2,400
Maximum Amount Collected	=	\$7,250

[FAA Exhibit 1, Item 7, p. 40]

Based on the above, the maximum monthly management fee retained by SIG was \$2,450. In actuality, SIG netted approximately \$2,141.17 per month during the first year of the 2007 agreement. [FAA Exhibit 1, Item 7, p.34 and exhibit J]

The Complainant asserts that SIG’s management fee was excessive by comparing it to the amount of the Respondent’s loan payments. [FAA Exhibit 1, Item 2, exhibit Q] The Director finds this to be an overly simplistic methodology for comparison.

In 2005, the Respondent took out a loan. The minutes of the GWAA’s March 24, 2005 meeting state:

“Ken Banks moved that the Authority accept the proposal from BB&T to borrow \$498,000 at 4.05% interest for ten years, pay off the existing Wachovia loan, and

²⁸ This agreement was subsequently terminated by SIG effective July 31, 2009. [FAA Exhibit 1, Item 21, exhibit B]

proceed to build the new hangars... The motion was seconded by Harold Berk and duly passed.” [FAA Exhibit 1, Item 2, Appendix A, p. 5]

It appears the Complainant assumes the entire principal of the loan was used to finance the additional hangars. [FAA Exhibit 1, Item 2, ¶ 40] This is incorrect; the minutes state that funds from this loan would first be used to pay off an existing loan. The Respondent’s Application for Approval of Installment Purchase or Lease Contracts states “\$305,000 plus \$190,000 to refinance existing debt”. [FAA Exhibit 1, Item 2, Appendix B, p. 2] The Record does not indicate why the Respondent utilized debt financing through Wachovia.

Additionally, as the Respondent notes, “the expected useful life of those hangars is considerably longer than the life of the loan. The GWAA expects to receive rent during the useful life of the hangars, and not just during the life of the loan.” [FAA Exhibit 1, Item 7, ¶ 40]

Ultimately, the Complainant does not argue that the management of hangar rentals is not an appropriate expense for the Airport; he simply argues that the Respondent is paying too much for this service. This does not constitute revenue diversion. For the reasons cited in *Boca Airport*, the Director declines to make a finding with regard to the hangar management fees paid to SIG.

Hangar Rental Fees

Conversely, the Complainant alleges that the Airport is not operating in a self-sustaining manner. Grant Assurance 24 obligates an airport sponsor to “maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances at the particular airport.”

Neither Federal law nor FAA policy specifies a single approach to airport rate-setting. The Respondent explains that its hangar rental fees are set by the GWAA “based on an analysis of comparable rents charged at nearby airports.” [FAA Exhibit 1, Item 7, pp 39 – 40] The Director notes that this is a common practice within the general aviation community. Moreover, the Revenue Use Policy states:

“...the FAA will not ordinarily investigate the reasonableness of a general aviation airport’s fees absent evidence of a progressive accumulation of surplus aeronautical revenues. [See Rates and Charges Policy, C, p. 32018]

The Complainant does not challenge the amount of the rental fees set by the Authority or its methodology for establishing its rates. He simply asserts that the Respondent is not operating the Airport in a self-sustaining manner. This does not meet the threshold needed to establish a violation of Grant Assurance 24.

However, the Director notes that the Respondent recently entered into 20-year lease with Wayne County, which does not appear to require its lessee to pay any rent. [FAA Exhibit 1, Item 21, exhibit G] The Director will address this matter through a separate investigation.

Fuel Reimbursement Costs

On July 27, 2009, the Complainant, in a supplemental filing, alleges that the Respondent subsidized SIG's fuel sales some time around the period of December 2008. [FAA Exhibit 1, Item 20, p. 2] The Complainant references the GWAA's December 2008 minutes which state:

“Jim Steele reported that they purchased fuel when the price was very high, and now they had to reduce the sales price. Otto Keesling moved that the Authority reimburse SIG Aviation \$1.50 per gallon on the sale of 100LL aviation fuel, effective November 28, 2008. This will remain in effect until the next fuel supply is purchased (sic) fuel cost during this period is to be \$3.54 per gallon. This motion was seconded by Ken Banks and duly approved.” [FAA Exhibit 1, Item 20, exhibit A, p. 2]

The Respondent, in a supplemental filing, provides an affidavit from Otto Keesling, now serving as the Chairman of the GWAA, which states:

“At the December 4, 2008 meeting, it was brought to the attention of the Board that Avgas was being sold at the Airport by SIG Aviation at a price higher than the price charged at other airports and that, as a result, a number of pilots were complaining and were buying fuel elsewhere. In order to have competitively-priced fuel at the Airport for the public, the Board agreed to reimburse SIG Aviation \$1.50 per gallon on the sale of Avgas effective November 28, 2008, so that SIG Aviation would, in turn, lower the price it charged the public by the same amount until the next supply of fuel was purchased. This action was not meant to result in any benefit to SIG Aviation, but was for the benefit of the public and customers at the Airport.” [FAA Exhibit 1, Item 21, exhibit A, ¶ 7]

Neither the Complainant nor the Respondent specifies whether or not the GWAA used airport revenues to reimburse SIG. While the Respondent's ultimate goal – to keep services at the Airport competitive – benefited all potential fuel purchasers, the Director cautions the Respondent from using airport revenue in this manner as it may violate the Revenue Use Policy and could result in violations of Grant Assurance 24, *Fee and Rental Structure*. However, at this time, the Complainant fails to meet the burden of proof necessary to substantiate this claim.

VII. CONCLUSION

Upon consideration of the entire Record herein, the applicable law and policy, and for the reasons stated above, the Director finds and concludes:

- (1) In the context of the Respondent's conditional approval of the Complainant's request to operate an aeronautical service, Respondent's actions do not constitute an unreasonable denial of access and is not a violation of Grant Assurance 22, *Economic Nondiscrimination*.
- (2) The Airport's Minimum Standards and conditions for approval of a self-service fueling facility are not sufficiently unreasonable as to deny access or unjustly discriminate

against the Complainant and do not constitute a violation of Grant Assurance 22, *Economic Nondiscrimination*.

- (3) The Respondent has not limited the right to sell fuel or lease hangars to a single provider in violation of Grant Assurance 23, *Exclusive Rights*.
- (4) The Respondent has not ceded control of the Airport in violation of Grant Assurance 5, *Rights and Powers*.
- (5) The Respondent has not illegally diverted Airport revenue in violation of Grant Assurance 25, *Airport Revenues*. The Respondent has not failed to maintain a fee and rental structure to make the Airport as self-sustaining as possible in violation of Grant Assurance 24, *Fee and Rental Structure*.

ORDER

Accordingly, it is ordered that:

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

RIGHT OF APPEAL

This Director's Determination is an initial agency determination and does not constitute final agency action and order subject to judicial review. [14 CFR 16.247(b)(2).] A party to this Complaint 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.



Director
Office of Airport Compliance
and Field Operations

October 9, 2009

Date