

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

**William H. Keyes and  
Dewitt T. (Jack) Ferrell, Jr.  
v.  
McMinn County, Tennessee  
Respondent/Appellee**

**Docket No. 16-08-12**

**FINAL AGENCY DECISION AND ORDER**

**I. INTRODUCTION**

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal filed by William H. Keyes and Dewitt T. (Jack) Ferrell, Jr. from the Director's Determination of December 18, 2009, issued by the Director of the FAA Office of Airport Compliance and Field Operations, pursuant to the Rules of Practice for Federally Assisted Airport Enforcement Proceedings found in Title 14 Code of Federal Regulations (CFR) Part 16.

The Complainants argue on appeal to the Associate Administrator for Airports that the Director erred in not finding the Respondent in noncompliance. The Complainants request that the Associate Administrator "finalize the existing Part 16 process providing the FAA the opportunity to identify and implement the required corrective actions necessary to resolve the Respondents on-going failures cited by the Director and the Complainant(s)." FAA Exhibit 1, Item 32, p. 11. While acknowledging that the Respondent has cured certain past violations, the Complainants further request the Associate Administrator to find that the Director should have made an exception to existing FAA policy that successful action to cure past violations is grounds for dismissal.

The Complainants raise the following three issues on appeal:

1. Whether the Respondent's alleged failure to properly close the Airport in accordance with FAA and State directives due to a runway line of sight discrepancy constitutes a violation of Grant Assurance #19, Operation and Maintenance. [FAA Exhibit 1, Item 32, page 1]
2. Whether the Respondent's alleged failure to properly certify plans and specifications for the runway extension project, allowing errors and omissions in the plans and specifications that were foreseeable at the time of project design, violated Grant Assurance #34, Policies, Standards and Specifications. [FAA Exhibit 1, Item 32, page 2]

3. Whether Respondent violated Grant Assurance #19, Operation and Maintenance, when it allegedly failed to maintain “the airport and all facilities...at all times in a safe and serviceable condition” by allowing the visual approach lighting system and other lighting systems to be in a “state of disrepair” and allegedly failed to promptly notify airmen “of any condition affecting aeronautical user of the airport.” [FAA Exhibit 1, Item 32, page 2]

Complainants identified two additional issues in their joint appeal – issues 4 (regarding alleged threats and vandalism and alleged instances of denial of service) and 5 (regarding alleged discriminatory acts perpetrated by the FBO<sup>1</sup> and alleged abdication of Respondent’s rights and powers to the FBO and others). However, Complainants do not state that the Director erred in his handling of these issues. In fact, with regard to issue 4, Complainants state that “The Complainants are satisfied with the judgment of the Director in these matters.” FAA Exhibit 1, Item 32, p. 9. Concerning issue 5, Complainants state that “Complainant(s) do not challenge this finding.” *Id.* at 9-10. Therefore, issues 4 and 5 are not addressed in the Final Agency Decision.<sup>2</sup>

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

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

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<sup>1</sup> 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 5190.6B, FAA Airport Compliance Manual, page 8-11, footnote 25]

<sup>2</sup>The Respondent understood these issues were not at issue in the Appeal. Respondent stated, “if it interprets Complainants’ pleadings correctly, understands they are satisfied with the Director’s judgment on the matters of allegation of threats and violence and denial of service as not constituting a violation of Grant Assurance #22;” and regarding issue (b), “if it interprets Complainants’ pleadings correctly, understands that while they may not accept, they do not challenge the Director’s findings on performance of the Respondent and its Airport Manager as constituting a violation of Grant Assurance #22 and #5. [sic]. [FAA Exhibit 1, Item 36, page 4]

This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR § 16.33(a).

## II. SUMMARY OF THE DIRECTOR'S DETERMINATION

In the December 18, 2009 Director's Determination, the Director concluded that McMinn County was not currently in violation of its federal obligations as set forth in its airport grant assurances and existing federal statutes.

Each Complainant originally filed an individual complaint (William H. Keyes (16-08-12) and DeWitt (Jack) T. Ferrell (16-08-13) against McMinn County. However, due to the similar nature of the issues occurring in the same time frame raised by both Complainants against the same Respondent, and in the interest of administrative efficiency and economy, the FAA issued an Order to Consolidate FAA Docket Nos. 16-08-12 and 16-08-13 (June 25, 2009) and issued its Director's Determination as FAA Docket No. 16-08-12.

In their initial Complaints, the Complainants allege the Respondent violated Grant Assurance 19, *Operation and Maintenance*, and Grant Assurance 22, *Economic Nondiscrimination*. The Complainants claim the Respondent failed to maintain and operate the airport in a safe and serviceable condition, that it failed to respond to allegations of discrimination perpetrated by the Fixed Base Operator (FBO) and others, and that it transferred its power and authority to others. [FAA Exhibit 1, Item 30, page 1]<sup>3</sup>

The Director found that the Respondent was not in violation of Grant Assurance #19, *Operation and Maintenance*, because the line of sight deviation has been cured as acknowledged by both Complainants and Respondent. [FAA Exhibit 1, Item 30, page 28]

The Director found, based on the undisputed facts entered into the record, that TN DOT<sup>4</sup> approved and recommended the extension project with the known design flaws. The Director accordingly determined that the Respondent's action met the standards of reasonableness and due diligence and therefore did not violate Grant Assurance #34, *Policies, Procedures and Standards*. [FAA Exhibit 1, Item 30, page 32]

The Director found that the (1) Respondent made reasonable attempts and took actions to properly maintain the Airport's new visual glide slope guidance approach lighting systems, which now are operable, (2) Respondent fixed displaced and damaged lighting fixtures, within a reasonable time once the problems were brought to its attention, and (3) Respondent took immediate action to issue Notices to Airmen (NOTAMs) for the inoperative Precision Approach Path Indicators (PAPI) units and other unspecified and unsupported occurrences upon initial notification and has provided its airport management appropriate guidance for complying with the issuance of NOTAMs in the future, in compliance with Grant Assurance #19, *Operation and Maintenance*. [FAA Exhibit 1, Item 30, page 38]

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<sup>3</sup> As noted above, Complainants do not appeal the FAA's findings concerning these allegations.

<sup>4</sup> Tennessee Department of Transportation.

The Director found that Complainants (1) did not provide any evidence supporting their claims that rise to the standard of preponderance of proof, (2) Complainant's allegations involve private citizens, not Airport or county personnel, and (3) allegations of criminal behavior are not within the jurisdiction of the Part 16 process. [FAA Exhibit 1, Item 30, page 46]

The Director found that Respondent is not in violation of Grant Assurance #22, Economic Nondiscrimination because (1) Complainants did not provide any evidence supporting their claim that Mr. Keyes was not awarded a hangar in proper order, and (2) Complainants' allegations regarding the email and invitation list do not amount to discriminatory practices as a specific level of service by an FBO is not a grant obligation. [FAA Exhibit 1, Item 30, page 49]

The Director also found that Complainants failed to submit any evidence to the Record demonstrating by a preponderance of evidence that the Respondent violated Complainants' rights or was currently in violation of any of its grant assurances based on its own or its FBO/Management company's actions; and Complainants failed to establish Respondent has ceded its rights and powers to Ms. Gentry-Cox or anyone else. [FAA Exhibit 1, Item 30, page 51]

### **III. PARTIES**

#### **A. Airport**

McMinn County, Tennessee ("County" or "Respondent") is a rural community located in the southeastern part of the state, between Knoxville and Nashville. The County is the owner/sponsor of the McMinn County Airport (MMI) [FAA Exhibit 1, Item 23], which has a single 6,450 foot long by 100 foot wide asphalt runway. The planning and development of the Airport, including the 2005 runway expansion project, 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.*

#### **B. Complainant/Appellants**

The first Complainant, William H. Keyes, is referred to as "Complainant Keyes" or "Keyes." Complainant Keyes describes himself as a user of McMinn County Airport who has been "directly and substantially affected" by the Respondent's alleged compliance violations. [FAA Exhibit I, Item 30]

The other Complainant, Dewitt T. (Jack) Ferrell, is referred to as "Complainant Ferrell" or "Ferrell." Complainant Ferrell describes himself as a user and tenant of McMinn County Airport since 1971, against whom the Respondent allegedly has discriminated. [FAA Exhibit I, Item 30]

## **IV. PROCEDURAL HISTORY and FACTUAL BACKGROUND**

### **A. Procedural History**

On December 17, 2008, Complainant Keyes filed his Complaint and on December 22, 2008, Complainant Ferrell filed his Complaint. [FAA Exhibit 1, Items 1 -2]

On January 16, 2009, the FAA provided a Notice of Docketing to Complainant Keyes for 16-08-12, and to Complainant Ferrell for 16-08-13. [FAA Exhibit 1, Item 3]

On February 4 and 6, 2009, Respondent McMinn County filed a request for an extension of time to answer. [FAA Exhibit 1, Items 5 and 7]

On February 5, 2009, Complainants submitted a response to Respondent's request for an extension of time. [FAA Exhibit 1, Item 6]

On February 6, 2009, FAA granted the Respondent's request for an extension of time. [FAA Exhibit 1, Item 8]

The Respondent McMinn County filed its Answer to Keyes' Complaint and Motion to Dismiss, dated February 9, 2009. [FAA Exhibit 1, Item 9]

On February 12, 2009, Answer to Ferrell's Complaint and Motion to Dismiss. [FAA Exhibit 1, Item 10]

On February 24 and 25, 2009, Complainant Ferrell submitted letters regarding the Respondent's Answer. [FAA Exhibit 1, Item 11]

On February 18, 2009, Complainant Keyes filed his Reply. [FAA Exhibit 1, Item 12]

On March 2, 2009, Complainant Ferrell filed his Reply. [FAA Exhibit 1, Item 13]

On February 26, 2009, Respondent McMinn County filed its Rebuttal to Complainant Keyes and on March 10, 2009 filed its Rebuttal to Complainant Ferrell. [FAA Exhibit 1, Item 14-15]

On June 25, 2009, FAA issued an Amended Notice of Docketing and Order to Consolidate both complaints. [FAA Exhibit 1, Item 25]

On December 18, 2009, the Director issued a Director's Determination finding that McMinn County was in current compliance with its Airport Grant Assurances. [FAA Exhibit 1, Item 30]

On January 11, 2010, the Complainants jointly filed an appeal of the Director's Determination. [FAA Exhibit 1, Item 32]

On March 11, 2010, McMinn County filed a request for an extension of time to answer the appeal. [FAA Exhibit 1, Item 33]

On March 23, 2010, the FAA's Office of the Chief Counsel granted an extension of time to answer the appeal until April 22, 2010. [FAA Exhibit 1, Item 34]

On April 19, 2010, Respondent McMinn County filed its Reply to Complainant's Appeal of Director's Determination. [FAA Exhibit 1, Item 36]

## **B. Factual Background**

The evidence submitted for docketing on this consolidated complaint includes numerous letters and media reports, meeting minutes, several photographs, an advertisement, and a draft of proposed local airport rules and regulations in addition to two complete sets of Complaints, Answers, Replies, and Responses. [FAA Exhibit 1, Item 25]

Complainants omitted from the Record a significant number of letters referenced in their Complaints that were authored by Tennessee Department of Transportation Aeronautics Division (TN DOT) and FAA personnel. In accordance with 14 C.F.R. § 16.29, the agency requested "additional oral and documentary evidence" and supplemented the record to include pertinent referenced documents. [See, FAA Exhibit 1, Items 16 – 21]

### **1. Runway Line of Sight (LOS) Issue**

In 2005, McMinn County began construction on a project to extend its only runway from 5,000 feet to 6,450 feet and an associated parallel taxiway. McMinn County also installed and activated a new runway approach lighting system-Precision Approach Path Indicators (PAPIs)-for runways 2 and 20; and edge lighting for the extended runway and parallel taxiway. These projects were funded with more than \$2.6 million from the FAA's Airport Improvement Program (AIP) and the State of Tennessee.<sup>5</sup> [FAA Exhibit 1, Item 24] The runway extension project was completed in November 2005. However, a large hump in the runway caused an obstructed view on the northern end of the extended runway; thus, one could not see the ends of the runways from either side. As noted by TN DOT [FAA Exhibit 1, Item 12, Exhibit 7], this obstruction did not comply with FAA Advisory Circular 150/5300-13, "Airport Design," Section 503 (a), which states:

*An acceptable runway profile permits any two points five feet (1.5 m) above the runway centerline to be mutually visible for the entire runway length. However, if the runway has a full length parallel taxiway, the runway profile may be such that an unobstructed line of sight will exist from any point five feet (1.5 m) above the runway centerline to any other point five feet (1.5 m) above the runway centerline for one-half the runway length.*

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<sup>5</sup> In 1996, the State of Tennessee began participating in the FAA's State Block Grant Program. In accordance with Title 49 U.S.C. § 47128 and 14 CFR Part 156, a state participating in the FAA's State Block Grant program "shall use monies distributed pursuant to a State block grant agreement for airport development and airport planning, for airport noise compatibility planning, or to carry out airport noise compatibility programs, in accordance with the Airport and Airway Improvement Act of 1982, as amended." (14 CFR § 156.4(a))

Both Complainants describe how Mr. Kenny Witt<sup>6</sup> brought the line of sight issue to the attention of the McMinn County Mayor's office, TN DOT, and the local media. Mr. Witt also notified the FAA in a letter to the Nashville Flight Standards District Office (FSDO), dated November 26, 2005. On November 28, 2005, Complainant Keyes telephoned the FAA's Office of Airports, Safety and Standards Branch (AAS-100) in Washington, DC, to advise the agency that the recent runway extension project resulted in a "line of sight problem," and that there recently had been "an undocumented near miss since the completion of the runway extension." [FAA Exhibit 1, Item 16] That same day, the FAA responded to the allegations by writing a letter to TN DOT, advising "the recent extended portion of the runway should remain closed until the (Section 503 (a)) standard can be met." [FAA Exhibit 1, Item 16]

On December 1, 2005, TN DOT wrote a letter to the McMinn County Mayor, conveying the FAA's recommendation to "mark off" the runway until the situation could be reviewed. TN DOT advised the Mayor a consultant had devised a temporary solution to the matter, stating the County could "locate the new runway threshold 650' from the North end of the runway... (which) meets the five foot line of sight criteria for the entire runway. The marking of this threshold needs to be performed immediately in order to eliminate the potential of a line of sight related incident." [FAA Exhibit 1, Item 17]

According to Complainant Keyes, the County complied with TN DOT's directive, marking 650 feet on the north end of the runway for taxi operations within a week of the date on TN DOT's letter.<sup>7</sup> [FAA Exhibit 1, Items 1 and 12] Keyes contends the County only took this action after the media began reporting on the allegations. [FAA Exhibit 1, Item 1]

On December 14, 2005, the FAA Memphis Airports District Office (ADO) responded to Mr. Witt's letter to the Nashville FSDO dated November 26, 2005. The letter outlines TN DOT's plan to mitigate the line of sight deviation, including displacing the threshold on the northern end of the runway by 640<sup>8</sup> feet. [FAA Exhibit 1, Item 18]

On December 16, 2005, TN DOT responded to Mr. Witt's letter dated December 9, 2005. TN DOT advised Mr. Witt that the threshold markings for a taxiway were in progress or recently completed; however, TN DOT stated that, "upon further discussions with the FAA, we have decided simply to recommend the temporary closure of the new portion of the taxiway until we determine the ultimate solution to the line of sight problem." [FAA Exhibit 1, Item 19]

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<sup>6</sup> Mr. Kenny Witt is referenced numerous times by both Complainants in their pleadings. Mr. Witt is not a party to this or any other Part 16 Complaint against the Respondent at this time. Complainants state he is a certified flight instructor (CFI) who was employed as a contractor by the former FBO until January 2006.

<sup>7</sup> In his Complaint, Keyes alleges the markings were implemented on December 8, 2005; however, in his Reply, Keyes states the markings were implemented on December 7, 2005.

<sup>8</sup> In TN DOT's letter to the County dated December 1, 2005, TN DOT stated the displacement would be 650 feet. In the FAA's letter to Mr. Witt, the FAA Memphis ADO stated the displacement would be 640 feet. The 640 foot displacement was also reiterated by TN DOT in its December 16, 2005 letter to Mr. Witt. While the 10 foot differential is negligible for the purposes of this Determination, the Director notes that, based on the letters from TN DOT and FAA, it appears even the consulting engineers had not agreed upon the displacement amount, thereby indicating that when Respondent initially complied with the displacement order, it did so based on variables not confirmed until approximately three weeks after the initial order was issued.

In his Complaint, Keyes alleges that on December 20, 2005, TN DOT contacted the McMinn County Airport Manager at that time, Mr. Bill Johnson,<sup>9</sup> via telephone to advise him that “a revision to the marking plan would be developed.” [FAA Exhibit 1, Item 1] Keyes further alleges TN DOT told the airport manager that it was the TNDOT’s recommendation “that the parallel taxiway north of the connector A-5 be closed in addition to the north 640’ of runway....” FAA Exhibit 1, Item 1] According to Keyes, the County did not change the markings to properly close the designated portion of the runway and parallel taxiway in accordance with TN DOT’s alleged telephone call until January 11, 2006, after Mr. Witt took the matter to the media again. [FAA Exhibit 1, Item 12]

To clarify the timeline, the Director notes that in Keyes’ Reply, the Complainant incorrectly calculated the timeframe from notification to closure as “approximately six weeks ... after Mr. Witt received written notification” from TN DOT of the new plan. [FAA Exhibit 1, Item 12] As stated by Keyes and noted above, Mr. Witt received written notification of the new plan via a letter dated December 16, 2005; this equates to an elapsed time of 27 days, which is less than four weeks at best. However, Keyes then contends in his Reply that TN DOT did not notify the Respondent of the new plan until December 20, 2005, and it was via telephone. [FAA Exhibit 1, Item 12] This equates to an elapsed time of 23 days or just over three weeks.

The Director surmises Keyes’ alleged six week timeframe is referring to the initial corrective action plan TN DOT issued in its December 1, 2005 letter to the Respondent; however, Keyes himself admitted the original markings were completed within a week of notification. [FAA Exhibit 1, Item 1 and FAA Exhibit 1, Item 12]

Regarding the second corrective action plan timeframe, neither Complainant Keyes nor Complainant Ferrell submitted documentary evidence to the Record supporting the claim about when or how the Respondent was notified officially in writing of the new plan. Complainant Keyes only noted the “marking began” in compliance with the second corrective action plan on January 11, 2006. [FAA Exhibit 1, Item 12]

Despite these conflicting and undocumented statements, for the purpose of this Determination, the Director will accept the Complainants’ suggestion that on or about December 20, 2005, Respondent received telephone notification of the new corrective action plan for the revised markings, thereby setting the elapsed time between this notification and the Respondent’s compliance at about three weeks or 23 days.

In the Background section of Keyes’ Complaint, on which he further elaborates in his Reply, Keyes alleges the Respondent violated “the Terms and Conditions of Accepting Airport Improvement Program Grants, Sponsor Certification for Project Plans and Specifications, specifically Paragraphs 1 and 9,” by allowing the runway expansion project to proceed with known deviations from airport design standards contained in FAA Advisory Circular 150/5300-13. [FAA

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<sup>9</sup> Mr. Bill Johnson was the owner of Athens Air, Inc. until October 2006 at which time he sold his interests to Ms. Kristy Gentry-Cox and Mr. Taylor Newman of Athens Air, LLC. Mr. Johnson’s FBO interests also included a contract with McMinn County to manage the airport. This contract was transferred by County Resolution in November 2006 to Athens Air, LLC. [FAA Exhibit 1, Item 9, Exhibit 5]

Exhibit 1, Item 12] However, Keyes' reference in his Complaint erroneously points to guidance provided by the FAA's Southern Region on its Airports website. The Part 16 process addresses violations of grant assurances; therefore, the Director addressed this allegation within his purview and applied Grant Assurance 34,<sup>10</sup> *Policies, Standards, and Specifications*, as the intended basis for the alleged violation.

In his Complaint, Keyes contends that since the engineers contracted by the Respondent alerted the Respondent and TN DOT "of the line of site [sic] problem during a project review meeting," the Respondent is in violation of Paragraphs 1 and 9 of the Sponsor Certification Form<sup>11</sup>. [FAA Exhibit 1, Item 12]

The Respondent acknowledges that the engineers did notify TN DOT and the County of the potential line of sight issue; however, Respondent clarifies, and Complainant Keyes concurs, that TN DOT still decided to go forward with the project. [FAA Exhibit 1, Item 1; FAA Exhibit 1, Item 9; and FAA Exhibit 1, Item 12]

In early 2006, TN DOT, the County, and an engineering firm agreed upon a solution to the line of sight deviation issue and in March 2006, a rehabilitation construction project commenced with one hundred percent of the funding provided by the State of Tennessee. [FAA Exhibit 1, Item 12 and FAA Exhibit 1, Item 14] Both Complainants acknowledge and the Respondent concurs that the reconstruction project was completed by the end of 2006 and the line of sight deviation issue was resolved to everyone's satisfaction. [FAA Exhibit 1, Item 2, Exhibit 1; FAA Exhibit 1, Item 9; FAA Exhibit 1, Item 12, Exhibit 24; and FAA Exhibit 1, Item 13]

## **2. Inoperative NavAids and Lighting; Failure to Issue NOTAMs**

The runway expansion project that commenced in 2005 also included federal funding for the installation and activation of new runway approach lighting systems, called Precision Approach Path Indicators (PAPIs), for both runway ends (02 and 20). Prior to the runway expansion project, MMI had a Visual Approach Slope Indicator (VASI) system. While both systems provide pilots with feedback on their vertical approach to the runway (glide slope), the primary difference between the two systems is that a VASI only tells pilots if they are too high or too low; the PAPI has additional lights that provide more precise feedback on how high or low the aircraft is in relation to the glide slope. Due to the PAPI's additional guidance, it is considered to be an upgrade over the standard VASI system.

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<sup>10</sup> Grant Assurance 34 states that a sponsor will "carry out the project in accordance with policies, standards, and specifications approved by the Secretary including but not limited to advisory circulars listed in the Current FAA Advisory Circulars for AIP Projects." The citation provided by Keyes should reference FAA Order 5100.38C, commonly referred to as the AIP Handbook, specifically Appendix 25, Standard Sponsor Certification Forms, Paragraphs 1 and 9. While this Appendix is not a required document under the State Block Program to execute grants, the Director will consider the intent of Grant Assurance 34 overall in reviewing the Complainants' allegations.

<sup>11</sup> See also, Footnote 8. The Sponsor Certification Form is found in FAA Order 5100.38C, Appendix 25, which the Director added to the Record. [See, FAA Exhibit 1, Item 22]

In or about January 2007, the Airport began using the newly installed PAPI for Runway 02 and Runway 20. Complainant Keyes alleges and Respondent acknowledges, “McMinn County has encountered numerous problems with the new PAPI systems” for both runway ends. [FAA Exhibit 1, Item 9]

In October 2007, Complainant Keyes contends he appeared before the McMinn County Commission during a regularly scheduled meeting and “publicly asked that someone repair the equipment.” [FAA Exhibit 1, Item 1] Keyes also alleges “neither the airport owner nor the airport manager had ever issued Notams [sic] for equipment, which had been out of service for months.” [FAA Exhibit 1, Item 1] According to Keyes, a NOTAM was issued the next day. [FAA Exhibit 1, Item 1]

The Respondent does not dispute Keyes’ contention that there were extended periods of time when the PAPIs were out of service. However, there are conflicting accounts regarding when the NOTAMs were issued. Contrary to Complainant Keyes’ allegations, Respondent alleges, “NOTAMs have been issued during all repairs since the initial malfunction.” [FAA Exhibit 1, Item 9] Complainant Ferrell did not reference the PAPIs in his Complaint.

Keyes and Respondent agree that the PAPIs for Runways 02 and 20 were in operation at the time of the respective filings in this matter.

In mid to late 2008, Complainant Keyes alleges “the runway threshold lights on the northeast end of the runway were damaged and displaced. No attempt has been made to repair these units.” [FAA Exhibit 1, Item 1]

Respondent states it contacted the FBO upon receipt of Keyes’ Part 16 Complaint; according to the Respondent, the FBO stated, “end lights are reported to be neither damaged nor displaced.” [FAA Exhibit 1, Item 9]

In its Answer to Complainant Keyes, Respondent requested more information regarding this allegation as it was not specific and was never mentioned previously.

In his Reply, Keyes alleges edge lights “located on the north end of the runway... had been displaced throughout the summer.” [FAA Exhibit 1, Item 12] Keyes includes in his Reply a digital photograph showing a single lighting fixture in a horizontal position, which he alleges was taken on November 6, 2008. Keyes contends “additional displaced lighting fixtures were located to the right of the light noted above” in his photograph caption. [FAA Exhibit 1, Item 12] Keyes confirms the displaced lighting was “repaired some time between (November 6, 2008) and January 1, 2009.” [FAA Exhibit 1, Item 12]

### **3. Allegations of Discrimination and Airport Mismanagement**

Complainants Keyes and Ferrell both alleged intentional acts of discrimination perpetrated against Keyes and Ferrell, precipitated by the FBO’s inadequate management of the Airport, resulted in the Respondent violating Grant Assurance 22, *Economic Nondiscrimination*. Additionally, Complainants allege the Respondent’s lack of oversight regarding the FBO’s management of the

Airport's administrative functions resulted in violations of Grant Assurance 22 and Grant Assurance 19, *Operation and Maintenance*.

### *Hangar Waiting List*

In the first alleged act of discrimination, Complainants state Keyes was not awarded rental of a hangar in accordance with his place on the hangar waiting list.

In 1998, the Airport erected two sets of ten (10) new t-hangars. With the addition of these twenty (20) new hangars, the Airport had a total of thirty (30) t-hangars; the oldest ten (10) of which were leased out by the FBO as a source of base level revenue, while the twenty new hangars were leased directly by the County. [FAA Exhibit 1, Item 9]

Complainant Keyes contends he was placed on a t-hangar waiting list at the Airport on May 30, 2004, by the former FBO owner and airport manager, Bill Johnson. [FAA Exhibit 1, Item 12, Exhibit 25]

The Respondent does not object to the claim that Keyes was on a waiting list for a t-hangar at the Airport. In its Answer to Keyes' Complaint, Respondent states the waiting list for the County operated t-hangars had been maintained by the Mayor's Assistant but at some point prior to October 2006, the Mayor's Assistant allegedly transferred the list to the former FBO owner, Mr. Johnson, for maintenance. [FAA Exhibit 1, Item 9] There is no statement of clarity regarding precisely when this occurred or if the FBO was given instructions on how to assign available hangars from the County's waiting list in combination with Mr. Johnson's waiting list.

When Mr. Johnson sold his FBO and airport management interests to Athens Air, LLC in October 2006, Respondent asserts Mr. Johnson and the new FBO owners met to confer on the status of the FBO's list. Respondent alleges the FBO's hangar waiting list was not organized at that time, contending Mr. Johnson kept most of it by memory. [FAA Exhibit 1, Item 9] Mr. Johnson since passed away. Respondent states that the new FBO management placed Complainant Keyes in the top ten on its waiting list based on the conversations held with Mr. Johnson in late 2006. [FAA Exhibit 1, Item 9]

Sometime in or around 2006 and 2007, Keyes states a new set of ten (10) t-hangars was constructed on the Airport.

On July 5, 2007, Complainant Keyes alleges he "was intentionally passed over for a hangar [sic] which had become available," having been on the hangar waiting list since May 30, 2004. [FAA Exhibit 1, Item 1] Complainant Ferrell restates Keyes' allegation, noting that "the next available hangar [was given] to a pilot (Mr. Steve Dodd) that was below Mr. Keyes on the list." [FAA Exhibit I, Item 2] Keyes contends Mr. Dodd notified the airport manager that Keyes was ahead of him. [FAA Exhibit 1, Item 1]

Keyes also alleges he had a conversation with McMinn County Mayor John Gentry and FBO Owner, Kristy Gentry-Cox on July 11, 2007, regarding his place on the hangar waiting list. Keyes includes in his Reply excerpts from notes he claims he took during this meeting. According to

Keyes' account, this meeting concluded with the Mayor and Ms. Gentry-Cox telling Complainant Keyes that he will get the next available hangar. [FAA Exhibit 1, Item 12]

Keyes states he formally complained about the issue before the McMinn County Airport Committee on July 16, 2007. [FAA Exhibit 1, Item 1]

Both Complainant Keyes and Complainant Ferrell allege the new FBO owner intentionally passed over Keyes on the waiting list due to his involvement in the line of sight issue. [FAA Exhibit 1, Item 1 and FAA Exhibit 1, Item 2, Exhibit 4]

Respondent denies that Keyes was intentionally passed over or left off the hangar waiting list. [FAA Exhibit 1, Item 9 and FAA Exhibit 1, Item 10] In its Answer to Keyes' Complaint, Respondent admits "some administrative confusion in maintaining the hangar waiting list;" however, Respondent contends the new waiting list "is publicly displayed in the terminal as additions and deletions occur." [FAA Exhibit 1, Item 9]

Respondent asserts Keyes was offered and accepted a County t-hangar in 2008 before his Part 16 Complaint was filed. [FAA Exhibit 1, Item 9]

In his Reply, Keyes acknowledges he was offered a hangar on or about February 29, 2008, by Mayor Gentry on behalf of the County; however, Complainant maintains the Respondent is in violation of Grant Assurance 22(a.) because:

*When the airport manager was confronted with the fact that the individual to whom she was offering the hangar (prior to Keyes, Steve Dodd) indicated that he was not the next individual on the list, she should have stopped and corrected her mistake... and the Airport Committee and County Mayor... should have intervened and remained engaged until a satisfactory resolution was reached. They did not.* [FAA Exhibit 1, Item 12]

#### *Email and Event Invitation Lists*

The second instance of alleged discrimination appears to have occurred sometime around the summer of 2007 when Complainant Ferrell alleges he was "taken off [Athens Air's] E-mail list, not invited to any airport public functions, including monthly safety meetings, along with Mr. Witt and Mr. Keyes." [FAA Exhibit 1, Item 2] Ferrell also alleges that because this is Ms. Gentry-Cox's "first management job," the Respondent "should have given her strict guidelines of how to operate a public facility when she assumed the contract to manage the MMI airport... in accordance with State and Federal Guidelines." [FAA Exhibit 1, Item 2, Exhibit 2]

Respondent denies "there have been any willful acts of discrimination" and requests "clarification how these (accusations regarding Ferrell's alleged removal from the FBO's email list and invitations to airport functions) would violate federal grant assurances." [FAA Exhibit 1, Item 10] Furthermore, Respondent states the FBO does not sponsor monthly safety meetings. [FAA Exhibit 1, Item 10]

In his Reply, Ferrell only reiterates his contention that the FBO stopped sending him emails after the rental event concerning Mr. Witt. He also states “he has not been inside the terminal building at the airport, or received any hint of an apology from Mrs. Gentry-Cox.” [FAA Exhibit 1, Item 13]

### *Airport Mismanagement*

In October 2006, when the runway line of sight deviation project was concluding, Bill Johnson, owner of Athens Air, Inc., the FBO on the Airport prior to October 2006, sold his interests in the business to Kristy Gentry-Cox and Taylor Newman, who formed Athens Air, LLC. [FAA Exhibit 1, Item 9, Exhibit 3] In November 2006, the county approved transfer of the airport management contract to the new FBO. [FAA Exhibit 1, Item 9, Exhibit 5] By April 2007, Ms. Gentry-Cox purchased Mr. Newman’s interests in Athens Air, LLC. These events are uncontested in the record. [FAA Exhibit 1, Item 12]

There are unsubstantiated allegations by Complainants that Ms. Gentry-Cox and Mr. Newman had prearranged the April 2007 buyout.<sup>12</sup>

After the buyout, Complainants contend Ms. Gentry-Cox was given “complete control of the airport” [FAA Exhibit 1, Item 1 and FAA Exhibit 1, Item 12] and runs the facility “as if it were (her) private Airport.” [FAA Exhibit 1, Item 2, Exhibit 2] Complainant Ferrell also states that the Respondent “should have given [Ms. Gentry-Cox] strict guidelines on how to operate a public facility when she assumed the contract to manage the MMI airport.” [FAA Exhibit 1, Item 2, Exhibit 2] Complainant Ferrell states the:

*Airport should be managed by a firm that realizes that this is a public facility and that all pilots who are in good standing with the FAA should be welcome to come and fly in the capacity they are qualified to do so in accordance the FAA Regulations and not discriminate against any one pilot.* [FAA Exhibit 1, Item 2, Exhibit 1]

Regarding the allegations that the Airport should be managed by a firm that abides by FAA regulations and be open to the public, Respondent reiterates its assertion that Complainants Keyes and Ferrell and Mr. Witt “are welcome to use and enjoy the airport without fear of intimidation or retaliation.” [FAA Exhibit 1, Item 14] Respondent also references its progress drafting new airport rules and regulations and minimum standards [FAA Exhibit 1, Item 14] as suggested by Complainant Ferrell during the Part 13.1 process. [FAA Exhibit 1, Item 2, Exhibit 2]

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

The Federal role in civil aviation is provided 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

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<sup>12</sup> The Director will not investigate allegations based on third party conversations that amount to hearsay or conjecture “being publicly discussed at the airport” and, more importantly, that have no relevance to this case. [FAA Exhibit 1, Item 12]

operate its airport 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 airport design, construction, operation, and maintenance, as well as ensuring the public fair and reasonable access to the airport. In addition to managing the airport in accordance with the grant assurances, ensuring the airport operates for the use and benefit of the public is the prime obligation set forth in the Federal grant assurances. [See, FAA Order 5190.6B, *Airport Compliance Manual* (FAA Order 5190.6B) issued on September 30, 2009, Section 14-2]

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. The AIP provides grants to eligible airport sponsors (recipients of grants are referred to as "sponsors") for the planning and development of public-use airports. Airport sponsors who accept a grant offer also accept conditions and obligations associated with the grant assurances. These include 39 specifically delineated obligations such as operating and maintaining the Airport in a safe and serviceable condition, not granting exclusive rights, mitigating hazards to airspace, using airport revenue properly, etc.

### **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.<sup>13</sup> FAA Order 5190.6B provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances. The FAA considers it inappropriate to provide Federal assistance for improvement to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. The grant assurances relevant to the issues raised in the Appeal are the following:

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<sup>13</sup> See, e.g. the Federal Aviation Act of 1958, as amended and recodified, Title 49 U.S.C. §§ 40101, 40113, 40114, 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.

## **Grant Assurance 19, *Operation and Maintenance***

Grant Assurance 19, *Operation and Maintenance*, implements the provisions of the AAIA, 49 U.S.C. § 47107(a) (7),<sup>14</sup> and requires, in pertinent part, that the sponsor of a federally obligated airport assure:

*“a. The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state, and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith, with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for non-aeronautical purposes must first be approved by the Secretary. In furtherance of this assurance, the sponsor will have in effect arrangements for:*

- (1) Operating the airport’s aeronautical facilities whenever required;*
- (2) Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and,*
- (3) Promptly notifying airmen of any condition affecting aeronautical use of the airport.*

*Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood, or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.*

Additionally, FAA Order 5190.6B provides that the owner should adopt and enforce adequate rules, regulations, or ordinances as necessary to ensure safety and efficiency of flight operations and to protect the public using the airport. In fact, the prime requirement for local regulations is to control the use of the airport in a manner that will eliminate hazards to aircraft and to people on the ground. As in the operation of any public service facility, FAA advises airport sponsors to establish adequate rules covering, *inter alia*, vehicular traffic, sanitation, security, crowd control, access to certain areas, and fire protection. [See, FAA Order 5190.6B, Section 7.8c]

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

The owner of an airport developed with Federal assistance is required to operate the airport for the use and benefit of the public. 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

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<sup>14</sup> AAIA is the Airport and Airway Improvement Act of 1982.

assurances implements the provisions of 49 U.S.C. § 47107(a) (1) through (6), and requires, in pertinent parts:

- a. *[The airport owner/sponsor] 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.*
- 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 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 –*
  - i. *Furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and*
  - ii. *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 purchases.*
- h. *[The airport owner/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 as 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 5190.6B, 8.8a]

### **Grant Assurance 34, Policies, Standards, and Specifications**

Grant Assurance 34 ascribes general Airport Improvement Program (AIP) standards, including the incorporation of certain advisory circulars, to the Grant Assurance Program. Specifically, it states a sponsor:

*...will carry out the project in accordance with policies, standards, and specifications approved by the Secretary including but not limited to the advisory circulars listed in the Current FAA Advisory Circulars for AIP projects, dated \_\_\_\_\_ and included in this grant,*

*and in accordance with applicable state policies, standards, and specifications approved by the Secretary.*

## **The FAA Airport Compliance Program**

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

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

FAA Order 5190.6B, *Airport Compliance Manual*, sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures to be followed by FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for receiving Federal funds or Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports, and facilitates the interpretation of grant assurances by FAA personnel.

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 of whether an airport sponsor currently is 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 an applicable Federal obligation to be grounds for dismissal of such allegation. [See, Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket 16-99-10 (Director's Determination Issued August 2, 2000) (Final Agency Decision Issued August 30, 2001); upheld in Wilson Air Center, LLC v. FAA, 372 F.3d 807 (C.A. 6, June 23, 2004)]

## **Enforcement of Airport Sponsor Assurances**

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 procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and became effective December 16, 1996.

## **The Complaint 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. A party adversely affected by the Director's determination may appeal the initial determination to the Associate Administrator as provided in § 16.33.” 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.”

## **The Appeal Process**

A party to the Complaint adversely affected by the Director’s Determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination. If no appeal is filed within the time period specified, the Director’s Determination becomes the final decision and order of the FAA without further action. A Director’s

Determination that becomes final because there is no administrative appeal is not judicially reviewable. [14 CFR, Part 16, § 16.33]

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

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).

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

Pursuant to 14 CFR, Part 16, § 16.33, the Associate Administrator will issue a final decision on appeal from the Director's Determination, without a hearing, where the complaint is dismissed after investigation. In such cases, it is the Associate Administrator's responsibility to determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [See e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, (December 30, 1999) (Final Decision and Order) page 21 and 14 CFR, Part 16, § 16.227.]

It is well established that in an agency's appeal process new evidence need not be admitted unless the new evidence was not available and could not have been discovered or presented at the prior proceeding. Charles H. Koch, Jr. Administrative Law and Practice, Vol. 1, § 6.76. A party may not correct a mistake in its original selection of evidence by then compelling the agency to consider it on appeal. Koch, *supra*, § 6.76.

## ISSUES ON APPEAL

On Appeal, the Complainants allege the Director erred in concluding the Respondent is not currently in violation of its grant assurances obligations. Specifically, the Complainants raise the following three issues on appeal:

1. Whether the Respondent's alleged failure to close the Airport properly in accordance with FAA and State directives due to a runway line of sight discrepancy constitutes a violation of Grant Assurance #19, Operation and Maintenance. [FAA Exhibit 1, Item 32, page 1]
2. Whether the Respondent's alleged failure to properly certify plans and specifications for the runway extension project, allowing errors and omissions in the plans and specifications that were foreseeable at the time of project design, violated Grant Assurance #34, Policies, Standards and Specifications. [FAA Exhibit 1, Item 32, page 2]
3. Whether Respondent violated Grant Assurance #19, Operation and Maintenance, when it allegedly failed to maintain "the airport and all facilities...at all times in a safe and serviceable condition" by allowing the visual approach lighting system and other lighting systems to be in a "state of disrepair" and allegedly failed to promptly notify airman "of any condition affecting aeronautical use of the airport." [FAA Exhibit 1, Item 32, page 2]

Complainants identified two additional issues in their appeal – issues 4 (regarding alleged threats and vandalism and alleged instances of denial of service) and 5 (regarding alleged discriminatory acts perpetrated by the FBO and alleged abdication of Respondent's rights and powers to the FBO and others). However, Complainants do not state that the Director erred in his handling of these issues. In fact, with regard to issue 4, Complainants state that "The Complainants are satisfied with the judgment of the Director in these matters." FAA Exhibit 1, Item 32, p. 9. Concerning issue 5, Complainants state that "Complainant(s) do not challenge this finding." *Id.* Therefore, issues 4 and 5 are not addressed in the Final Agency Decision.

## VI. ANALYSIS AND DISCUSSION

The Director's Determination found that the County did not violate Grant Assurance 19, *Operation and Maintenance*; Grant Assurance 22, *Economic Nondiscrimination*; and Grant Assurance 34, *Policies, Standards and Specifications*.<sup>15</sup> The specifics of these findings are detailed in the above Section II. Summary of the Director's Determination.

Based on the evidence submitted to the record, the Director found that the Respondent was not in violation of:

- Grant Assurance 19, *Operation and Maintenance*, regarding allegations of threats and vandalism;

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<sup>15</sup> The Director also found that the County did not violate Grant Assurance 5, *Preserving Rights and Powers*; this finding is not at issue in this appeal.

- Grant Assurance 22, *Economic Nondiscrimination*, regarding allegations of denial of access and service;
- Grant Assurance 22, *Economic Nondiscrimination*, regarding allegations of hangar, email list, and other suggestions of discrimination; or
- Grant Assurance 34, *Policies, Procedures, and Standards*, because the Respondent’s action met the standards of reasonableness and due diligence.

In their Appeal, the Complainants state that they understand, “*the Director has previously held that ‘the Part 16 process is not intended to be punitive for past violations; instead it is intended to allow the FAA to correct noncompliance.’*” However, the Complainants argue, “*given the egregious nature of the events established in the record we believe the Director would be justified in making an exception, holding the Respondent and others, at the discretion of the Director, accountable for actions in this matter.*” [FAA Exhibit 1, Item 32, page 2]

In their Reply to the Appeal, the Respondent

*“reiterate[s] that Tennessee’s rural general aviation airports must rely on the expertise of the Tennessee’s Division of Aeronautics for technical advice, capital funding and policy recommendations. Aviation is a technical field in which most counties do not possess the ‘in-house’ expertise to self-govern. We must reply on consultants and state assistance. This is not an excuse for apathy, it is reality. In fact, Respondent would claim its airport and FBO are more credentialed and in compliance with FAA guidelines than most American airport communities comparable in size. The Tennessee Division of Aeronautics is the Respondent’s licensing body, inspector, capital funding source and technical advisor. McMinn County did not believe, nor did it have reason to believe TDOT<sup>16</sup> had erred when it stated the line of sight deviation would not be a FAA violation due to the planned construction of a full parallel taxiway...It was because the Respondent desired a safer airport that the project was solicited and agreed upon by TDOT.”* [FAA Exhibit 1, Item 36, page 2]

Respondent closes its Reply by stating, “[it] would like to work with the Complainants in a much more constructive manner in the future.” [FAA Exhibit 1, Item 36, page 4]

There are two preliminary issues the Associate Administrator would like to address before opining on the three main issues of the Appeal.

The first involves submittal of new evidence on Appeal. The Complainants submitted nine new exhibits including six NOTAMs, four of which postdate the Director’s Determination, and two photographs which postdate the Director’s Determination. [FAA Exhibit 1, Item 32, exhibits 1-9] Complainant Keyes admits that upon receipt of the Director’ Determination, he was able to find a few examples of NOTAMs and advises the exhibits were submitted to corroborate “their”

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<sup>16</sup> "TNDOT" and "TDOT" are used interchangeably in the pleadings. TDOT also means the Tennessee Department of Transportation.

statements. [FAA Exhibit 1 Item 32, page 8] The Respondent did not object to the Complainants' submission of the new exhibits. It is well established that in an agency's appeal process, new evidence need not be admitted unless the new evidence was not available and could not have been discovered or presented at the prior proceeding. Charles H. Koch, Jr. *Administrative Law and Practice*, Vol. 1, § 6.76. (1997). Typically, new evidence will not be considered if the party could reasonably have known of its availability. Koch, *supra*, § 6.76. A party may not correct a mistake in its original selection of evidence by then compelling the agency to consider it on appeal. Koch, *supra*, § 6.76.

Part 16 requires all relevant facts to be presented in the complaint documents. [See Sims v. Apfel, 530 U.S. 103, 108-110 (2000)] The FAA may, under 14 CFR § 16.29(b)(1), rely entirely on the complaint and responsive pleadings provided by the parties in reaching its initial determination. If the parties could supplement the Director's Determination after it is issued, the administrative process would be endless and contrary to the expedited procedures provided under Part 16. [See Preamble, Rules of Practice for Federally Assisted Airport Enforcement Proceedings, Summary, 61 Fed. Reg. 53998 (Oct. 16, 1996)]

Pursuant to 14 CFR § 16.23(b)(2), the Complainant was required to submit all of its pleadings and other documentation in support of its case so that in rendering the Director's Determination, the FAA would have the entire record before it. Review by the Associate Administrator is limited to an examination of the Director's Determination and the Record upon which such determination was based. Complainant made no showing that its new evidence met any of the standards necessary to permit the Associate Administrator to consider them on appeal. Specifically, Complainant has not explained, nor does the Record show, why the nine appeal exhibits were not available or could not have been discovered for the investigation before the Director's Determination was issued.

Additionally, most of the appeal exhibits appear to have been created after the Director's Determination was issued. For these reasons, the nine appeal exhibits from Complainants consisting of new evidence will not be considered in this appeal. The nine appeal exhibits attached to FAA Exhibit 1 Item 32 will remain in the Record, but will not be considered on appeal.

The second issue pertains to the substance of the Complainant's Appeal. Upon an appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [See e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, (December 30, 1999) (Final Decision and Order), page 21, and 14 CFR, Part 16, §16.227.] Here, the Complainants state as the basis of their Appeal disagreements with the Director's discretion with interpreting the application of federal law and policy. The Complainants do not allege that the Director erred in the three issues under Appeal or how such error resulted in an incorrect finding. Specifically, under Issue 1, the Complainants acknowledge the Director's reasoning, but "*believe the Director would be justified in making an exception, holding the Respondent...accountable for actions in this matter.*" [FAA Exhibit 1, Item 32, page 2] Under Issue 2, the Complainants concede that the Respondent received bad advice, but believes the definition applied to the issue was too "narrow" and asks for reconsideration. [FAA Exhibit 1,

Item 32, page 2] As to Issue 3, the Complainants acknowledge that the “*Respondent may technically be in compliance today,[but] the Federal Aviation Administration should be very concerned about a clear lack of urgency as it relates to its systems provided to improve flight safety.*” [FAA Exhibit 1, Item 32, page 4]

These claims go directly to the Director’s discretionary authority. The Complainants fail to clearly allege error by the Director. The bulk of the Appeal consists of Complainants’ statements of disagreement with the Director’s finding, but do not claim that the Determination is not supported by reliable, probative, and substantial evidence, or that it is inconsistent with applicable law, precedent, and FAA policy. [Ricks, FAA Docket No. 16-98-19 (Dec. 30, 1999), p. 21, and 14 CFR, Part 16, §16.227.]

The Complainants falls short of its initial burden to establish that the Director erred and therefore the Associate Administrator would be within her authority to dismiss the Appeal *sua sponte* for this Appeal defect. However, the Associate Administrator will assume for the sake of argument that the Complainants met its initial burden to establish error by the Director in the Director’s Determination, and provide a complete review by analyzing the three issues on Appeal.

### **Issues on Appeal.**

Issue No. 1. Whether the Respondent’s alleged failure to properly close the Airport in accordance with FAA and State directives due to a runway line of sight discrepancy constitutes a violation of Grant Assurance #19, Operation and Maintenance. [FAA Exhibit 1, Item 32, page 1]

In their Appeal, the Complainants state their belief that “*the delay of six weeks to address a safety issue in January 2006, which was known in January 2003 (prior to construction)...is excessive by any reasonable standard, even accounting for the holiday season, and should represent a violation of Grant Assurances.*” Additionally, the Complainants allege,

*“The record establishes that the Respondent and others knew a deviation to AC 150/5300-13<sup>17</sup>, which compromised public and pilot safety, two years before, the Respondent was notified by TN DOT to take corrective action on December 1, 2005 closing a portion of the newly completed runway. [sic] The record further establishes that it took the Respondent an additional six weeks to address a temporary fix for the line of sight safety issue, until a final repair was implemented a month’s [sic] later costing Tennessee taxpayers more than one and one-half million dollars. The Complainant[s] can find no justification for the actions of the Respondent or the other parties involved; however, it is clear the Respondent was the only party involved, which had the legal authority to continue the process.”* [FAA Exhibit 1, Item 32, page 1]

The Complainants state in conclusion, “*...given the egregious nature of the events established, in the record, we believe the Director would be justified in making an exception, holding the Respondent and others, at the discretion of the Director, accountable for actions in this matter.*” [sic] [FAA Exhibit 1, Item 32, page 2]

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<sup>17</sup> FAA’s Advisory Circular on Airport Design.

In its Reply to the Appeal, McMinn County states,

*“The Respondent denies it was in violation of Grant Assurance #19...The line of sight issue has been well documented and stipulated. The Respondent could not have known in 2003 what corrective action per the runway markings would be required in December of 2005. Alleging the Respondent’s runway and taxiway closure markings completed in January 2006 were excessively delayed to the point of being a federal grant assurance violation because Respondent’s consultants were aware of a potential line of sight deviation in 2003 is at best preposterous. All parties regret poor advice was given by the TDOT personnel and followed by Respondent’s consultants and staff. Human error, while costly to correct, was not malicious or conspired. The time it took for the airport to be properly marked from the time of notification in December 2005 to completion of the markings in January 2006 had everything to do with acquiring the proper drawings and securing a contractor during the holidays.”* [FAA Exhibit 1, Item 36, page 1]

In the Director’s Determination, the Director found that McMinn County had acted reasonably due to the fact that consultants needed to be engaged in two corrective action plans over the holiday season. Furthermore, the Director noted that as late as December 16, 2005, TN DOT, the FAA, and engineering consultants still had not reached consensus with regard to the final plan’s markings. Moreover, the Director noted that all parties acknowledged in their pleadings that in early 2006, TN DOT, McMinn County, and an engineering firm agreed upon a solution to the line of sight deviation issue. The evidence submitted to the record, including statements by both Complainants and the Respondent, clearly show that the line of sight deviation was fixed in 2006 and the remediated runway now is compliant with FAA Airport Design Line of Sight Standards per Advisory Circular 150/5300-13. [FAA Exhibit 1, Item 30, pages 27-28]

In this Appeal, the Associate Administrator notes that the Complainants do not allege that the Director erred in the analysis of this issue, leading to findings of fact that were not supported by evidence, nor do they allege that the conclusions the Director came to were not in accordance with applicable law, precedent, and public policy. Rather, the Complainants ask that an exception be made in this case to compliance policy to reach back to 2006 and apply a finding of noncompliance to McMinn County.

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).]

The Associate Administrator wants to highlight that timely correction by airport sponsors of compliance concerns is imperative and that the Director’s finding should not be read to diminish this obligation. The Associate Administrator appreciates the Complainants frustration, but can

find no evidence in the record that McMinn County acted so unreasonably as to warrant a present finding of noncompliance for events that occurred more than four (4) years in the past and are now corrected. Correcting a past state of noncompliance renders the issue moot. The reconstruction project was completed by the end of 2006, which remedied the line of sight issue; the remediated runway is now compliant with the FAA Airport Design Line of Sight Standards per Advisory Circular 150/5300-13. [FAA Exhibit 1, Item 30, page 28]

Accordingly, the Associate Administrator finds that the Director did not err, and did not make incorrect assumptions from the record. There are no facts warranting making an exception in this case as requested by the Complainants.

Issue No. 2. Whether the Respondent's alleged failure to properly certify plans and specifications for the runway extension project, allowing errors and omissions in the plans and specifications that were foreseeable at the time of project design, violated Grant Assurance #34, Policies, Standards and Specifications. [FAA Exhibit 1, Item 32, page 2]

In the Appeal, the Complainant states,

*“Upon reviewing the explanation provided, we can appreciate that the Director believes he ‘cannot equate the Respondent’s decision to take expert advice it was given by its approving authority, TN DOT, by virtue of its Block Grant status, to a violation of Grant Assurance 34 or any other assurance’ given its finding in [Platinum Aviation and Platinum Jet Center BMI v. Bloomington-Normal Airport Authority, Illinois, FAA Docket No. 16-06-09 (Director’s Determination issued June 4, 2007) (Final Decision and Order issued November 28, 2007)]. However, as noted in Issue 1, the Respondent was clearly aware of the deficiency well before construction. The Complainant(s) respectfully disagree that the Respondent should be materially relieved of responsibility when they knowingly pursued funding and intentionally constructed a runway with known design flaws, which compromised public safety.”* [FAA Exhibit 1, Item 32, page 2]

The Complainants went on to state, *“We all concede that the Respondent received bad advice from TN DOT, who was acting on behalf of the Federal Aviation Administration; however, the evidence suggests that the respondent [sic] did not attempt to challenge this safety issue which ultimately compromised public safety and cost the taxpayers of Tennessee between one and one-half and two million dollars to correct. We believe the definition applied to this issue is too narrow in its scope, because while TN DOT failed in their responsibility to ensure public safety by approving the project on behalf of the Federal Aviation Administration, the Respondent failed as well.”* [FAA Exhibit 1, Item 32, page 2]

The Complainants conclude by asking the Associate Administrator to *“reconsider the finding”* that the Director made on this issue. [FAA Exhibit 1, Item 32, page 2]

In its Reply, the Respondent combined a response to Issue 1 and 2, noting, *“Respondent believes both allegations have at their core the Complainants dissatisfaction with the Respondent’s reliance and subjugation to the Tennessee Department of Transportation’s Division of Aeronautics, the Respondent’s approving authority.”* [FAA Exhibit 1, Item 36, page 1] The

Respondent also contends as to the Grant Assurance 34 allegation that it is “somewhat perplexed since this new allegation is new and not part of the original Part 13 and 16 processes,” and denies violating Grant Assurance 34. [FAA Exhibit 1, Item 36, pages 1-2]

The Associate Administrator would like to address this matter before getting into an analysis of the substance of the Grant Assurance 34 appeal issue. The Director made it very clear in his Director’s Determination that Complainant Keyes’ reference in his Complaint erroneously points to guidance provided by the FAA’s Southern Region on its Airports website. The Part 16 process addresses violations of grant assurances; therefore, the Director elected to address the allegation within his purview and apply Grant Assurance 34, *Policies, Standards, and Specifications*, as the intended context of the alleged violation even though not specifically raised in the Complaint. [FAA Exhibit 1, Item 30, page 6]

The Associate Administrator notes that the Director’s Determination recognized that the Respondent had previously stated, “*While (Respondent) is technically the owner of the airport, we rely heavily on (TN DOT’s) funding, advice and expertise. We went forward with this project on the expert advice of (TN DOT).*” [FAA Exhibit 1, Item 30, page 30]

The Associate Administrator reiterates language from the Director’s Determination which she believes appropriately sets forth FAA’s expectations of its airport sponsors:

While the FAA expects its airport sponsors to abide by its grant obligations as well as be knowledgeable of the agency’s standards regarding airport operations, the Director previously has held that, “the issue of whether the (Respondent) acted unreasonably lies with the justification for its actions and what the record establishes.” [See Platinum Aviation and Platinum Jet Center BMI v. Bloomington-Normal Airport Authority, Illinois, FAA Docket No. 16-06-09 (Director’s Determination issued June 4, 2007) (Final Decision and Order issued November 28, 2007)] The Director would be remiss to assert that sponsors are reasonably expected to know more than airport consultants and state engineers on airport design matters. Therefore, the Director cannot equate the Respondent’s decision to take the expert advice it was given by its approving authority, TN DOT, by virtue of its Block Grant State status, to a violation of Grant Assurance 34, *Policies, Standards and Specifications*, or any other assurance. The Respondent was reasonable to rely upon the expertise and guidance of TN DOT; it should not be penalized for such reliance.” [FAA Exhibit 1, Item 30, page 31]

However, the Associate Administrator is concerned that the parties may be reading this language too narrowly. The Airport sponsor, McMinn County, is not excused from its grant assurance obligations because it operates a rural general aviation airport in the State of Tennessee, but rather, as the Director observed, airport sponsors are required to exercise due diligence in assessing its compliance status and posture.

The Associate Administrator takes note that the Director in his review examined Grant Assurance 34, *Policies, Standards and Specifications*, the State Block Grant Program Agreement between Tennessee and the FAA, the state aeronautical division’s guiding documents, FAA Order

5100.38C<sup>18</sup> and TN DOT's Aeronautics Division Sponsors Manual. As noted in Issue 1 above, the Complainants do not allege that the Director erred in the analysis of this issue leading to findings of fact that were not supported by evidence, nor do they allege that the conclusions the Director reached were not in accordance with applicable law, precedent, and public policy. The Complainants again ask that the Associate Administrator "reconsider" the Director's finding while at the same time acknowledging that the Respondent received "bad advice" from their approving authority.

The Associate Administrator reiterates that the FAA Airport Compliance Program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with federal financial assistance. The Compliance Program is not punitive in nature. [See Guy Heide v. FAA, Docket Nos. 16-04-11, 16-05-02, 16-05-05, 16-05-15, July 7, 2006, "The FAA's Airport Compliance Program is focused on bringing noncompliant sponsors into compliance. The program is neither designed nor administered to punish sponsors for past violations that have been cured."]

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. The Associate Administrator in reconsidering this issue finds that it was appropriate for the Director to consider actions taken by the Respondent to cure potential past violations of applicable federal obligation and then determine this to be grounds for dismissal of the allegations. [Consistent with Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, (8/30/01).]

Accordingly, the Associate Administrator finds that the Director did not err, and did not make incorrect assumptions in his review of the Record. Rather, the Director closely examined the roles and responsibilities of the parties involved in the runway extension and made the determination that yes, errors were made, but the errors were ultimately corrected by McMinn County.

Issue No. 3. Whether Respondent violated Grant Assurance 19, *Operations and Maintenance*, when it allegedly failed to maintain "the airport and all facilities...at all times in a safe and serviceable condition" by allowing the visual approach lighting system and other lighting systems to be in a "state of disrepair" and allegedly failed to promptly notify airmen "of any condition affecting aeronautical use of the airport." [FAA Exhibit 1, Item 32, page 2]

In their arguments on Appeal, the Complainants raise three (3) points with regard to this issue: (A) Failure to properly maintain the airport's new visual approach system (NAVAIDS), (B) Failure to properly maintain the airport's other lighting systems, and (C) Failure to properly notify airmen 'of any condition affecting aeronautical use of the airport'. [FAA Exhibit 1, Item 32, pages, 2, 4 and 6]

3A. Failure to properly maintain the airport's new visual approach system (NAVAIDS).

It appears the crux of the Complainants' appeal regarding this issue pertains to the timeliness of the Respondent's action.

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<sup>18</sup> Airport Improvement Program Handbook

In its Appeal, the Complainants argue,

*“While we appreciate the Director’s statement that, ‘Clearly the Respondent’s actions resulted in a compliant outcome; therefore the Director finds the Respondent is not currently in violation,’ it took the Respondent two years and four months...to bring the newly purchased and installed equipment used for visual descent guidance on-line. This outcome could be deemed excessive and unacceptable by any measure. We respectfully submit the fact that this equipment was allowed to remain inoperable for such a long period of time, that it casts doubt on the professional judgment of the Respondent, the Respondent’s understanding that airport facilities must be kept in a safe and serviceable condition and whether the Respondent had/has adopted and implemented a sufficiently detailed program of cyclical preventative maintenance as required by FAA Order [5]190.6[A]<sup>19</sup> and cited by the Director.”* [FAA Exhibit 1, Item 32, pages 3 and 4]

The Complainants go on to argue, *“While the Respondent may technically be in compliance today, the Federal Aviation Administration should be very concerned about a clear lack of urgency as it relates to its systems to improve flight safety.”* The Complainants also state, *“The Complainant(s) respectfully submit that the Federal Aviation Administration should find the Respondent’s failure to act in a timely manner as unacceptable and hold the Respondent accountable for there [sic] lack of urgency. If the Director can not find the Respondent in violation of the Grant Assurances because the Respondent finally made the units operational after more than two years, then we believe it is appropriate that the FAA provide the necessary oversight and follow-up as necessary to ensure future compliance.”* [FAA Exhibit 1, Item 32, page 4]

In their Reply to the Appeal, the Respondent states it,

*“believes it adequately addressed both the issue of the faulty PAPI lights and the issuance of the NOTAMs in its original Answer and Motion to Dismiss. Respondent would like to add that McMinn County has taken additional corrective actions to enhance any maintenance concerns at the airport, whether it be terminal or airfield related. Maintenance staff has had duties reassigned resulting in a staff member devoted primarily to airport upkeep...The FBO has been given authority to directly request maintenance assistance without going thru [sic] the County Mayor’s office for approval, unless major expenditure are required. Official County maintenance personnel are on the airport grounds to a varying degree every work day. The FBO has reported no issues with a lack of response or lack of competence on behalf of Respondent’s maintenance department. In fact, Respondent’s maintenance staff helped ... trouble shoot some of the problems with the lighting system on a recent malfunction... affirms the PAPI system has been difficult to maintain...Respondent emphatically denies it has a noncompliant posture towards maintaining the system and overall airport facility.”* [FAA Exhibit 1, Item 36, pages 2 and 3]

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<sup>19</sup> Complainants incorrectly cited FAA Order 5190.6A as “6190.6a.” This Order was in effect when Complainants submitted their initial Complaints. However, FAA Order 5190.6A has since been superseded by FAA Order 5190.6B, which incorporated the policies found in 5190.6A.

As referenced in the Director's Determination, the Respondent did not dispute Complainant Keyes' allegations that the PAPIs were inoperative during certain periods of time, but did dispute Keyes' contention that Respondent failed to act. The evidence entered into the Record did not support Keyes' allegations that the Respondent "failed to act regarding the PAPI's (sic) malfunction." [FAA Exhibit 1, Item 30, page 35] The Director's Determination stated,

While an inoperative system is not, in itself, grounds for a grant assurance violation, the Director could find, under certain circumstances, that a violation exists if a sponsor fails to repair an inoperative system in accordance with established guidance. FAA Order 5190.6A<sup>20</sup> offers the following guidance regarding satisfactory compliance with a sponsor's maintenance obligations:

*The degree of maintenance effort required of an airport owner is a matter of professional judgment. Compliance with this maintenance obligation is considered satisfactory when the airport owner:*

- a) *Fully understands that airport facilities must be kept in a safe and serviceable condition;*
- b) *Has adopted and implemented a sufficiently detailed program of cyclical preventive maintenance that in the judgment of FAA is adequate to carry out this commitment; and*
- c) *Has available the equipment, personnel, funds and other resources including contract arrangements to effectively implement such a program.*

[FAA Exhibit 1, Item 30, page 35]

The Associate Administrator believes the Director correctly assessed the facts at issue. The Director concluded that the Complainant failed to enter evidence into the Record contradicting Respondent's statements that it has met the three elements of compliance defined in FAA Order 5190.6a. The Associate Administrator also believes it was reasonable for the Director to conclude that the Respondent met the requirements of elements (a) and (b) above by working with at least three contractors, the company that created the approach lighting system, and TN DOT to fix the PAPIs. This appears evident since Complainant Keyes acknowledged that "in actuality the problem was contained in the PAPI units themselves." [FAA Exhibit 1, Item 30, pages 35-36]

As in Issues 1 and 2, the Complainants have not alleged that the Director erred in his analysis or incorrectly interpreted law and policy. In fact, here, under Issue 3, the Complainants acknowledge, "*Respondent is technically in compliance ....*" [FAA Exhibit 1, Item 32, page 6] The Associate Administrator notes that the Respondent has taken additional steps to provide dedicated staff to observe and act on any reports of equipment outages and to streamline the accounting system to rapidly accommodate requests for repair. [FAA Exhibit 1, Item 36, page 3] .The Respondent took this step even after the Director found the airport in compliance with Grant Assurance 19, *Operations and Maintenance*.

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<sup>20</sup> 5190.6A has been superseded by 5190.6B.

The Associate Administrator appreciates that the Respondent appears to be making reasonable efforts to provide timely maintenance on its navigation systems and encouraging prompt action to address these types of matters. Having been presented with no argument sufficient to overturn the Director's Determination, the Associate Administrator reaffirms the Director's Determination that the Respondent is in compliance with Grant Assurance 19 on the maintenance of the visual approach system.

3B. Failure to maintain the airport's other lighting systems properly.

On Appeal, the Complainants argue that the Director erred when he stated in reference to a repair of inoperative runway edge lighting, that the Respondent displayed a "compliant attitude." The Complainants state, "*By the Director's own admission, 'the Director is concerned that it may have taken the Respondent nearly 60 days to correct an inoperative edge lighting fixture,' and if the allegation that the fixtures were damaged as stipulated by the Complainant, 'the Director would be concerned with the Respondent's maintenance program.'*" [FAA Exhibit 1, Item 32, page 5]

The Complainants suggest "...*the Director is in error in his assessment that this is 'indicative of a compliant attitude.'* *On the contrary, the actions taken by the Respondent suggest this is indicative of an attitude of 'we will fix it, if caught.'*" [FAA Exhibit 1, Item 32, page 6]

In responding to this issue on Appeal, the Respondent "emphatically denies it has a noncompliant posture towards maintaining the system and the overall airport facility." [FAA Exhibit 1, Item 36]

The Associate Administrator shares the Director's concern as stated in the Director's Determination. The Director stated, "Based on the evidence submitted to the Record, the Director is concerned that it may have taken Respondent nearly 60 days to correct an inoperative edge lighting fixture, assuming Complainant Keyes' photograph from November 6, 2008 is undisputed." [FAA Exhibit 1, Item 30, page 37]

However, the Associate Administrator also recognizes that the Director emphasized the FAA's interest in an airport sponsor's current compliance as well as the sponsor's behavior in adopting a compliant posture. [*See Lanier Aviation LLC v. City of Gainesville, Georgia; Gainesville Airport Authority*, FAA Docket No. 16-05-03 (Director's Determination issued November 25, 2005)] As Complainant Keyes admits the Respondent fixed the displaced lighting fixture once made aware of the issue through the Part 16 Complaint. [FAA Exhibit 1, Item 12] This is indicative of a compliant posture on the part of the sponsor. While the Director found the Respondent currently is in compliance with Grant Assurance 19, *Operation and Maintenance*, regarding the operational status of its edge lighting fixture(s), the FAA recommended the Respondent set and adhere to a more timely schedule for self-inspecting the Airport. [FAA Exhibit 1, Item 30, page 37]

It is important to note that the fact that an airport lighting system is difficult to maintain does not excuse the Respondent from meeting its airport maintenance obligations on a timely basis. As referenced earlier, the Respondent has taken additional measures to provide dedicated staff to observe and act on any reports of equipment outages. The Respondent stated in its Reply that, "*Respondent will fix lights as quickly as possible. All FBO staff and county staff know to immediately report any maintenance issues as they arise.*" [FAA Exhibit 1, Item 36, page 3]

Nonetheless, the Associate Administrator reaffirms the Director's recommendation that the Respondent set and adhere to a more timely schedule for self-inspecting the Airport. The Associate Administrator believes the Respondent's added measures will help to facilitate this.

The Associate Administrator sees no evidence presented on Appeal that is sufficient to overturn the Director's conclusion that the Respondent is currently in compliance and is willing and able to comply with the requirements of Grant Assurance 19, *Operations and Maintenance*. It is not feasible or productive to reach back in time to find an airport sponsor in violation of the grant assurances for past incidents that have been corrected. Again, the FAA's compliance program seeks current compliance from airport sponsors and does not render a finding of noncompliance as a punitive measure for past noncompliance. Indeed, the Respondent appears to have taken additional measures to reassure its users that any maintenance issues that are reported will be rectified as quickly as possible.

3C. Failure to notify airmen properly of any condition affecting aeronautical use of the airport.

In their Appeal, the Complainants argue that, "*a) the Respondent was in violation of Grant Assurance 19 on the date the Director's Determination was rendered, b) the Respondent is currently in violation of Grant Assurance 19, c) The corrective action cited by the Director and the Respondent failed to rectify the ongoing issue to properly notify airmen "of any condition affecting aeronautical use of the airport," d) The respondent [sic] failed to provide its airport management appropriate guidance for complying with the issuance of NOTAMS in the future, and e) The Respondent failed to recognize the problem, indicating self-inspection of the airport is ineffective or non-existent.*" [FAA Exhibit 1, Item 32, page 8]

In its Reply to the Appeal, the Respondent states, "*The current FBO is fully aware of the NOTAM issuing process and what conditions warrant a NOTAM to be issued. If the Tennessee Division of Aeronautics or FAA disagrees, the Respondent will take the corrective action they recommend. To the best of the Respondent's knowledge there has never been a complaint received concerning the issuance of NOTAMS by any parties other than the Complainants.*" [FAA Exhibit 1, Item 36, page 3]

In the Director's Determination, the Director stated, "Complainant Keyes alleges the Respondent violated Grant Assurance 19 by failing to issue NOTAMS for the inoperative PAPI units and other unspecified and unsupported occurrence(s)." [FAA Exhibit 1, Item 30] The Director was not able to determine if NOTAMS for the PAPI or any other aeronautical services or repairs were issued in a timely manner based on the evidence in the Record. Complainant Keyes states they were not, while Respondent asserts the opposite.

The Complainants argue on Appeal that,

*"The Director's citation of corrective action taken above would hardly seem appropriate given the fact that the airport owner, the Respondent, should have had this documentation in their possession well before February 9, 2009, if it was deemed necessary to properly issue NOTAMS in the time period prior to February 2009. Given that the airport manager, contracted by the Respondent, is a FAA certified flight instructor, flying regularly for a*

*major airline, it seems doubtful that lack of the Airport Management Guide, Issuing NOTAMs, would have hampered the airport manager's ability to issue NOTAMs with the assistance of Flight Service. The Complainant(s) leave it to the judgment of the Director whether absence of the Airport Management Guide was a contributing factor in the Respondent's failure to issue the required NOTAMs." [FAA Exhibit 1, Item 32, page 7]*

The Complainants "*respectfully request that the Director find the Respondent in violation of Grant Assurance 19 and we stand by our contention that the Respondent has failed to implement the necessary corrective actions to ensure proper oversight of the airport resulting in the failure to self inspect the airport and properly issue NOTAMs as required by current Federal Aviation Regulations.*" [FAA Exhibit 1, Item 32, page 9]

As stated above, the Respondent has indicated on Appeal that it is fully aware of its responsibilities regarding NOTAMs, has provided its FBO with the appropriate information to file and close a NOTAM, and is in fact willing to be further directed in this matter by either the Tennessee Division of Aeronautics or the FAA should it be necessary. [FAA Exhibit 1, Item 36, page 3] The Complainants have not provided the Associate Administrator with evidence that the Respondent is lacking either the will or ability to meet the requirement of Grant Assurance 19. The evidence in the record is indicative of a cooperative compliance posture by the Respondent.

The Complainants may disagree with the Director's finding in this instance but their arguments on appeal are not sufficient to rise to a preponderance of evidence that the Director made an error that should be overturned by the Associate Administrator. It appears that the Complainants primarily argue that the Respondent failed at times to act in a timely manner and that the Director should have found it in noncompliance for this reason. In reviewing the Record on Appeal, the Associate Administrator agrees with the Complainants that the Respondent on occasion did not act as timely as it should have assuming Complainant Keyes' photograph from November 6, 2008 is undisputed. Thus, the Associate Administrator, as stated above, recommends that the Respondent set and adhere to a more timely schedule for self-inspecting the Airport. The Associate Administrator believes the Respondent's added measures will help to facilitate this. The Associate Administrator concurs with the Director's finding that there was no evidence in the Record of a violation of the grant assurances.

Accordingly, the Director's finding that the Respondent is currently in compliance with Grant Assurance 19, *Operations and Maintenance*, is affirmed by the Associate Administrator.

## **VII. CONCLUSION**

The FAA's role in this Appeal is to determine whether the Director erred in findings of fact or conclusions of law in issuing the Director's Determination. In fact, as stated above, the Appeal does not clearly posit an allegation of error, but rather states disagreement with the discretion of the Director. Despite this defect, the Associate Administrator addressed the issues raised by the Complainants and finds that the Director has not erred.

Specifically, upon an appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (a) the findings of fact made by the Director are supported by a

preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [See e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19 (December 30, 1999) (Final Decision and Order), page 21, and 14 CFR § 16.227.]

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

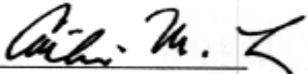
The Associate Administrator affirms the Director's Determination. This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR § 16.33(a).

### **ORDER**

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

**RIGHT OF APPEAL**

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

  
Catherine M. Lang  
Acting Associate Administrator  
for Airports

Date **July 26, 2010**