

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

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Drake Aerial Enterprises, LLC)	
d/b/a Air America Aerial Ads and)	
James Miller)	
)	
COMPLAINANT)	
)	Docket No. 16-09-02
v.)	Final February 22, 2010
)	
City of Cleveland)	
)	
)	
RESPONDENT)	
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DIRECTOR’S DETERMINATION

I. INTRODUCTION

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

James Miller, the sole member and primary operator of Drake Aerial Enterprises, LLC d/b/a Air America Aerial Ads (Complainant), filed a formal Complaint pursuant to 14 CFR Part 16 against the City of Cleveland (City or Respondent), sponsor and operator of Burke Lakefront Airport (Airport or BKL). The Complainant alleges the Respondent denied its request to conduct banner towing operations from BKL. Specifically, the Complainant alleges the City is in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, *Economic Nondiscrimination*.

With respect to the allegations presented in this Complaint, under the specific circumstances at the Airport as discussed below and based on the evidence of record in this proceeding, the FAA finds the Airport is not in violation of its Federal obligations at this time. The FAA’s decision in this matter is based on applicable Federal law and FAA policy, review of the pleadings and supporting documentation submitted by the parties, reviewed by the FAA, which comprises the Administrative Record reflected in the attached FAA Exhibit 1.

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

II. PARTIES

The Complainant, James Miller, is the sole member and primary operator of Drake Aerial Enterprises, LLC d/b/a Air America Aerial Ads. [FAA Exhibit 1, Item 2, ¶3] He is currently authorized by the FAA to conduct banner towing operations. [FAA Exhibit 1, Item 2, exhibit L, p. 9]

Burke Lakefront Airport (Airport) is a public-use airport owned and operated by the City of Cleveland, Ohio. The Airport, one nautical mile north of Cleveland, is classified as a general aviation reliever airport with 44 based aircraft and 84,101 annual operations. The Airport has two runways and an air traffic control tower. [FAA Exhibit 1, Item 2, exhibit D] The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.* Since 1982, the City has accepted \$4,869,329 in Federal AIP grants for BKL. [FAA Exhibit 1, Item 10]

III. BACKGROUND AND PROCEDURAL HISTORY

Factual Background

In 1996, the Complainant began towing banners from BKL pursuant to a verbal agreement. [FAA Exhibit 1, Item 2, ¶7] This continued until March of 1999 when the Respondent advised the Complainant that a new Instrument Landing System² precluded the use of the banner set-up area. [FAA Exhibit 1, Item 2, ¶9] In May of 2000, the Respondent invited the Complainant to resume banner towing operations at BKL on the condition that the two parties enter into a concession agreement. [FAA Exhibit 1, Item 2, ¶10] The Complainant found certain terms contained in the agreement to be “excessive, unreasonable, and intended to prevent banner towing operations” at BKL, and declined to enter into the agreement. [FAA Exhibit 1, Item 2, ¶12]

On October 21, 2008, the Complainant’s attorney advised the Respondent of the Complainant’s desire to resume banner towing operations at BKL. [FAA Exhibit 1, Item 2, ¶13] In an electronic message dated October 27, 2008, the Respondent advised the Complainant’s attorney that the “FAA has approved banning banner towing operation (sic) at Burke Lakefront Airport as indicated in the Airport Master Record and Airport Facility Directory.” [FAA Exhibit 1, Item 2, ¶14 and FAA Exhibit 1, Item 2, exhibit G] After confirming these notations, the Complainant’s attorney contacted the FAA’s Detroit Airport District Office (ADO) to determine their validity. [FAA Exhibit 1, Item 2, ¶15 and 16] The Detroit ADO advised the Complainant’s attorney that these notations were non-binding and not necessarily endorsed by the FAA. [FAA Exhibit 1, Item 2, ¶17 and 18]

On January 22, 2009, the Complainant’s attorney wrote to the Respondent reiterating the Complainant’s desire to resume banner towing operations at BKL and provided a map proposing five possible set-up locations at BKL. [FAA Exhibit 1, Item 2, ¶20 and FAA Exhibit 1, Item 2,

² An Instrument Landing System or ILS is a navigational aid is designed to provide an approach path for exact alignment and descent of an aircraft on final approach to a runway. [Aeronautical Information Manual, effective February 14, 2008, at 1-1-7]

exhibit I] On February 18, 2009, the Respondent advised the Complainant's attorney that City was reviewing this information. [FAA Exhibit 1, Item 2, ¶21 and FAA Exhibit 1, Item 2, exhibit J] On February 24, 2009, the Respondent requested and the Complainant provided copies of the Complainant's Banner Towing Certificate of Operation. [FAA Exhibit 1, Item 2, ¶22 and 23 and FAA Exhibit 1, Item 2, exhibits K and L]

On March 13, 2009, the Respondent advised the Complainant that its request to conduct banner towing operations at BKL was denied. The Respondent cited its ability to comply with 14 CFR Part 91.155³ as its reason for the denial. [FAA Exhibit 1, Item 2, ¶25 and FAA Exhibit 1, Item 2, exhibit N] On March 25, 2009, the Complainant's attorney advised the Respondent of their decision to draft a formal Complaint, and the Respondent advised that their position remained the same as stated on March 13, 2009. [FAA Exhibit 1, Item 2, ¶26 and FAA Exhibit 1, Item 2, exhibit O]

Procedural History

On April 16, 2009, FAA received the Complaint. [FAA Exhibit 1, Item 2]

On April 22, 2009, FAA docketed Drake Aerial Enterprises, LLC d/b/a Air America Aerial Ads and James Miller v. City of Cleveland. [FAA Exhibit 1, Item 3]

On May 13, 2009, the parties jointly requested the Respondent have additional time to file its answer. [FAA Exhibit 1, Item 4]

On May 15, 2009 FAA's Office of Chief Counsel granted the Respondent an extension to May 26, 2009. [FAA Exhibit 1, Item 5]

On May 26, 2009, the Respondent filed an Answer. [FAA Exhibit 1, Item 7].

On June 8, 2009, the Complainant replied. [FAA Exhibit 1, Item 8]

On June 22, 2009, the Respondent filed a rebuttal. [FAA Exhibit 1, Item 9]

On August 27, 2009, the FAA requested additional information from the Respondent. [FAA Exhibit 1, Item 11]

On September 8, 2009, the Respondent provided additional information requested by the FAA. [FAA Exhibit 1, Item 12]

On October 19, 2009, the FAA extended the due date of the Director's Determination to on or before December 31, 2009. [FAA Exhibit 1, Item 13]

³ The Respondent's denial references 14 CFR Part 91.155, but quotes from an information guide for banner tow operations (FAA/FS-I-8700-1, p. 4-1). The Respondent quotes, "*Banner pickup and (sic) banner drop should be in a predesignated (sic) area not closer than 500 feet to taxiways, runways, persons, buildings, parked automobiles, and other aircraft whenever possible.*" This publication states, "Banner pickup or banner drop should be in a pre-designated area not closer than 500 feet to taxiways, runways, persons, buildings, parked automobiles, and other aircraft whenever possible." 14 CFR Part 91.155 is titled Basic VFR weather minimums and is not specific to banner tow operations.

On December 23, 2009, the FAA extended the due date of the Director's Determination to on or before January 15, 2010. [FAA Exhibit 1, Item 15]

On January 15, 2010, the FAA extended the due date of the Director's Determination to on or before February 5, 2010. [FAA Exhibit 1, Item 16]

On February 2, 2010, the FAA extended the due date of the Director's Determination to on or before February 19, 2010. [FAA Exhibit 1, Item 17]

IV. ISSUES

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

- Whether the Respondent's failure to approve the Complainant's request to conduct banner towing operations constitutes an unreasonable denial of access in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, *Economic Nondiscrimination*.
- Whether the Respondent's conditions for approval of banner towing operations at BLK unreasonably deny access to the Complainant or unjustly discriminate against the Complainant in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, *Economic Nondiscrimination*.

V. APPLICABLE LAW AND POLICY

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

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

The Airport Improvement Program

Title 49 U.S.C. § 47101, *et seq.*, provides for federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. Title 49 U.S.C. § 47107, *et seq.*, sets forth assurances to which an airport sponsor agrees as a condition of receiving federal

financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

Airport Sponsor Assurances

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

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.⁴ FAA Order 5190.6B, *Airport Compliance Requirements* (FAA Order 5190.6B), issued on September 30, 2009, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to compliance with federal obligations of airport sponsors. The FAA considers it inappropriate to provide federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

Two federal grant assurances apply to the circumstances set forth in this Complaint: (1) Grant Assurance 22, *Economic Nondiscrimination* and (2) Grant Assurance 24, *Fee and Rental Structure*.

Assurance 22, Economic Nondiscrimination

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

“...will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.
[(a)]

b. In any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the

⁴ *See, e.g.*, the Federal Aviation Act of 1958, as amended and recodified, Title 49 U.S.C. §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and recodified, Title 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122.

public at the airport, the sponsor will insert and enforce provisions requiring the contractor to-

- (1) furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and*
- (2) charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.*

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

h. The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.

i. The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.”

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

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [See FAA Order 5190.6B, ¶14.3.]

FAA Order 5190.6B describes the responsibilities under Assurance 22 assumed by the owners or sponsor of public use airports developed with federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. [See FAA Order 5190.6B, Chapter 9]

The owner of an airport developed with federal assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination. [See FAA Order 5190.6B, Sec. ¶9.1.(a)]

Grant Assurance 24, *Fee and Rental Structure*

Grant Assurance 24, *Fee and Rental Structure*, addresses fees the owner or sponsor levies on airport users in exchange for the services the airport provides.

Title 49 U.S.C. § 47107(a)(13) requires, in pertinent part, that the owner or sponsor of a Federally obligated airport “will maintain a schedule of charges for use of facilities and services at the airport that will make the airport as self-sustaining as possible under the circumstances existing at the airport.”

Grant Assurance 24 satisfies the requirements of § 47107(a)(13). It provides, in pertinent part, that the owner or sponsor of a federally-obligated airport agrees to establish a fee and rental structure that will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection. This sponsor will maintain a fee and rental structure consistent with assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*. The intent of the assurance is for the airport operator to charge fees that are sufficient to cover as much of the airport’s costs as is feasible.

Moreover, the FAA Order 5190.6B states that the owner or sponsor’s obligation to make an airport available for public use does not preclude the owner or sponsor from recovering the cost of providing the facility. The owner or sponsor is expected to recover its costs through the establishment of fair and reasonable fees, rentals, or other user charges that will make the airport as self-sustaining as possible under the circumstances existing at the particular airport. [*See* FAA Order 5190.6B, ¶12.2.b. and ¶17.5.]

The FAA Airport Compliance Program

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

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

The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of federal property to ensure that the public interest is being served. FAA Order 5190.6B sets forth policies and procedures for the FAA Airport Compliance Program. FAA Order 5190.6B is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA’s responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition of receiving a grant of federal funds or the conveyance of federal property for airport purposes. FAA Order 5190.6B analyzes the various obligations set forth in the standard

airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [*See e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10 (August 30, 2001) (Final Decision and Order) (*Wilson*)]

FAA Order 5190.6B outlines the standard for compliance, stating, “A sponsor meets commitments when: (1). The federal obligations are fully understood; (2). A program (e.g., preventive maintenance, leasing policies, operating regulations, etc.) is in place that the FAA deems adequate to carry out the sponsor’s commitments; (3). The sponsor satisfactorily demonstrates that such a program is being carried out; and (4). Past compliance issues have been addressed.” [*See* FAA Order 5190.6B, ¶2.8.(b.)]

Enforcement of Airport Sponsor Assurances

The Federal Aviation Act of 1958, as amended (FAAAct), 49 U.S.C. § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The federal role in encouraging and developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport owner or sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport owners or sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their federal grant assurances.

The Complaint and Appeal Process

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

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the Complaint. In rendering its initial determination, the FAA may rely entirely on the Complaint and the responsive pleadings provided. Each party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [*See*, 14 CFR § 16.29]

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

Title 14 CFR § 16.31(b-d), in pertinent parts, provides that “(t)he Director's determination will set forth a concise explanation of the factual and legal basis for the Director's determination on each claim made by the complainant.” In accordance with 14 CFR § 16.33(b) and (e), upon issuance of a Director’s determination, “a party adversely affected by the Director's determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination;” however, “(i)f no appeal is filed within the time period specified in paragraph (b) of this section, the Director's determination becomes the final decision and order of the FAA without further action. A Director's determination that becomes final because there is no administrative appeal is not judicially reviewable.”

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

VI. ANALYSIS AND DISCUSSION

The FAA’s Office of Airport Compliance and Field Operations (ACO) does not mediate or arbitrate negotiation disputes between airport sponsors and potential business proponents concerning issues outside the scope of the Part 16 process and a sponsor’s Federal Grant Assurances. Rather, ACO enforces contracts between an airport sponsor and the Federal government. [*See AmAv v. Maryland Aviation Administration*, FAA Docket No. 16-05-12, (March 20, 2006) (Director’s Determination), at 23]

During the course of this formal proceeding, negotiations between the Complainant and the Respondent continued. Where applicable, the Director will turn to the Respondent’s last offer or

final negotiating posture to make a determination regarding its compliance with its Federal obligations.

Issues Identified for Analysis and Discussion

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

The Complainant states:

“Respondent has unjustly discriminated against Mr. Miller and Air America by prohibiting them from accessing the federally funded Burke Lakefront Airport.”
[FAA Exhibit 1, Item 2, ¶35-A.]

The Respondent answers:

“This proceeding no longer involves the prospect of denial of access to a banner towing operator proposing to commence service at Burke Lakefront Airport ('BKL'). [FAA Exhibit 1, Item 7, p. 1]

“The Respondent has reviewed its position and has developed a plan that will provide reasonable access to Complainants for their banner towing operations while not impairing the safety or efficiency of BKL.” [FAA Exhibit 1, Item 7, p. 2]

The Record clearly supports that on March 13, 2009, the Respondent denied the Complainant's request to begin banner towing operations at the Airport. [FAA Exhibit 1, Item 2, exhibit N] The Record also describes the Respondent's attempts to establish a blanket ban on this type of aeronautical activity.⁵ [FAA Exhibit 1, Item 2, exhibits D, G, and H] However, in its Answer to the Complaint, the Respondent adopts a new position and proposes a plan to accommodate the Complainant and other prospective banner towing operators.⁶ [FAA Exhibit 1, Item 7]

Despite the Respondent's plan to provide access to Complainant, in its Reply, the Complainant argues that:

⁵ Aerial advertising is defined as an aeronautical activity. An aeronautical activity is “any activity that involves, makes possible, or is required for the operation of aircraft or that contributes to or is required for the safety of such operations.” [FAA Order 5190.6B, Appendix Z]

⁶ The City states it will accommodate the Complainant and other prospective banner tower operations. Accordingly, the Director assumes the City will, if it has not already done so by time of this Decision's issue, promptly update its Airport Master Record (FAA Form 5010-1) to delete the outdated notation that banner towing activities are prohibited at the airport. Failure to update FAA Form 5010-1 may create the impression that the airport is not in fact open to banner towing operations. At best, the intentional failure to update FAA Form 5010-1 outright discourages banner towing operations at an airport that professes to be open to such operations. Consequently, these impressions combined with the failure to update the Airport Master Record may trigger additional Part 16 complaints by third parties or a separate FAA investigation pursuant to 14 CFR Part 16 §101.

“Air America has not yet been given access to Burke Lakefront to conduct its banner tow operations. Accordingly, the City continues to violate its federal grant assurances and judgment should be issued in favor of Air America.” [FAA Exhibit 1, Item 8, pp 3-4 and FAA Exhibit 1, Item 7, exhibit A, ¶4].

The Complainant further argues that the terms offered by the Respondent are so unreasonable that access is still effectively denied.⁷

Despite the Complainant’s arguments, the Record indicates that Respondent has assumed a compliance posture. The Respondent states:

“Respondent has offered and is prepared to pursue entering into a short term agreement under an existing Codified Ordinance to allow for 60 cumulative days of banner towing while it pursues permanent legislation to authorize and regulate banner towing and associated fees at Burke.” [FAA Exhibit 1, Item 7]

Grant Assurance 22 requires the Respondent to make the Airport available as an airport on reasonable terms. However, it does not guarantee any particular individual aeronautical user access to the airport on whatever terms that user may desire. [*See Santa Monica Airport Association, Krueger Aviation, Inc. and Santa Monica Air Center v. City of Santa Monica, California*, FAA Docket No. 16-99-21, (February 4, 2003) (Final Decision and Order) at 19 and *Pacific Coast Flyers, Inc., Donnya Daubney d/b/a Carlsbad Aircraft Pilot Supply, and Roger Baker v. County of San Diego, California*, FAA Docket No. 16-04-08, (July 25, 2005) (Director’s Determination) at 31] A potential aeronautical service provider can agree to the stated terms, negotiate different terms, or raise questions regarding the reasonableness of said terms. Until there is a meeting of the minds regarding how an aeronautical service will be offered to the public, allowing that service to commence creates some risk for the airport operator. Such an arrangement could diminish the Respondent’s proprietary right to manage the Airport generally in the public’s interest in aviation and as an ongoing concern. Additionally, it could give rise to future complaints of dissimilar treatment. The FAA understands the Respondent’s reluctance to engage in what it might perceive to be a risky business practice. As such, Grant Assurance #19, *Operation and Maintenance*, affords the Respondent some discretion with regard to these types of management decisions.

The Complainant also asserts that the Respondent’s new position does not remedy its past discrimination and should have no bearing on the Complaint. [FAA Exhibit 1, Item 8, pp 4-5] However, this claim is not consistent with the standard of compliance used by the FAA. The FAA considers the successful action by the airport sponsor to cure any alleged or potential past violation of its grant assurances to be grounds for dismissal of such allegations. (*See Wilson*)

The FAA policy and citation to *Wilson* are commonly included in Part 16 decisions and speak to the import of current compliance. [*See Clarke v. City of Alamogordo*, FAA Docket No. 16-05-19 (September 20, 2006) (Director’s Determination), at 11; *Ingram v. Port of Oakland*, FAA Docket No. 16-03-12 (April 7, 2006) (Final Decision and Order), at 21; *Roadhouse Aviation v. City of Tulsa*, FAA Docket No. 16-05-08 (December 14, 2006) (Director’s Determination), at

⁷ The Director will fully discuss the reasonableness of the Respondent’s proposed plan under Issue #2.

31; and, Atlantic Helicopters Inc./Chesapeake Bay Helicopters v. Monroe County, Florida, FAA Docket No. 16-07-12 (September 11, 2008) (Director’s Determination), at 26] FAA Airports’ compliance policy is directed at ensuring ‘current compliance’ and also ‘voluntary compliance.’

The grant assurances serve to protect the public’s interest in civil aviation and achieve compliance with Federal law. Therefore, the goal of the FAA’s Compliance Program is to benefit aviation users through the voluntary compliance of airport sponsors. These concepts are central to the FAA’s Compliance Program. However, the Complainant ultimately misinterprets this mission in its request for relief. The Complaint requests that the FAA not only compel the Respondent to provide immediate access to the Airport for the purpose of banner towing, but also seeks to terminate the sponsor’s eligibility for Federal investment.⁸ [FAA Exhibit 1, Item 2, ¶46] The Director believes this misconception should be clarified to assist the Complainant in its understanding of the FAA Compliance Program as well as relief available through the Part 16 complaint process. The FAA generally takes punitive compliance actions, such as withholding funds under 49 U.S.C. § 47114, when reasonable efforts have failed to achieve voluntary compliance. [See FAA Order 5190.6B ¶2.4.(a.)] This is because aviation users receive direct benefits from the Federal investments made at public use airports via grants from the FAA to airport sponsors. The FAA’s decision to withhold these funds can potentially deprive aeronautical users of the benefit of capital improvements which may enhance safety or expand capacity. Such a decision is not made lightly, and this action is not used to penalize sponsors who may have unknowingly breached their commitments, but corrected past errors after becoming aware of their full obligations.

The concept of voluntary compliance also voids the Complainant’s argument that “a proposal” made in the Respondent’s Answer is still a denial of access. The Complainant argues that the FAA must find the Respondent to be in noncompliance due to the timing of its offer to accommodate the Complainant. The Complainant concludes this argument stating:

“The City’s late attempts to remedy its egregious behavior by making unreasonable proposals to Air America do not resolve the issue before the FAA.”
[FAA Exhibit 1, Item 8, p. 5]

The Director disagrees. The Respondent proposed to accommodate the Complainant’s proposed aeronautical activity. [FAA Exhibit 1, Item 7] Provided the terms are reasonable (See Issue 2 below), the Respondent’s voluntary compliance would have fully cured the initial allegation of denial of access contained in the Complaint. When both parties continue to negotiate their differences during the pleading stage of a Part 16 investigation, the Director will consider the last offer or negotiating posture taken by the Respondent as reflected in the Record (*i.e.*, to permit banner towing operations at BKL). [FAA Exhibit 1, Item 7 and Item 9] This is because the FAA’s primary role in this Part 16 investigation is to determine if the airport sponsor is *currently* acting in a manner consistent with its Federal obligations.

⁸ The Complainant also requests the FAA “Issue an Order that Respondent pay for Complainants’ attorneys’ fees and costs associated with filing this Complaint”. [FAA Exhibit 1, Item 2, ¶46] The FAA’s Part 16 airport enforcement proceeding is an administrative proceeding designed to determine an airport sponsor’s compliance with its Federal obligations. It does not create a right of private action. Accordingly, there is no mechanism for making complainants whole or awarding damages.

The Director also rejects the Complainant's assertion that absent its filing of this Complaint, "the City's discrimination against banner tow operators may have continued indefinitely." [FAA Exhibit 1, Item 8, p. 4]⁹ While possible, this claim is speculative. First, under 14 CFR Part 13.1, any person who knows of a violation of Federal aviation laws, regulations, rules, policies, or orders may report the violation to the FAA informally. The Record contains nothing to suggest that the Complainant sought the FAA's assistance through an informal complaint. The Complainant made the decision to file a formal complaint under 14 CFR Part 16 after approximately six months of negotiations with the Respondent. The Complainant then proceeded to continue negotiating with the Respondent after the Complaint was docketed by the FAA. Secondly, the Respondent developed a plan to accommodate the Complainant's proposal as well as other future banner towing operations. [FAA Exhibit 1, Item 7, p. 2]

The fact that the Respondent has proposed to develop a plan to accommodate banner towing operations at the Airport, including a short term agreement to grant interim access, demonstrates its understanding of its Federal obligations.¹⁰ As such, this posture corrects any past allegations of noncompliance. Therefore, the Director finds the Respondent is not in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, Economic Nondiscrimination with regard to denial of access.

Issue 2: *Whether the Respondent's conditions for approval of banner towing operations at BLK unreasonably deny access to the Complainant or unjustly discriminate against the Complainant in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, Economic Nondiscrimination.*

In its Answer, the Respondent proposed nine terms to accommodate the Complainant's request to re-establish its banner towing business at Burke Lakefront Airport. [FAA Exhibit 1, Item 7, pp 2-5] The Complainant, in its Reply, specifically objected to three of these terms. The Complainant states:

"... certain aspects of the proposal are entirely unreasonable and are included to discourage banner towers from operating at Burke Lakefront. By including such terms, the City is attempting to make access burdensome, expensive, and impractical for Air America and other banner tow operators." [FAA Exhibit 1, Item 8, p. 5]

Specifically, the Complainant objected to the following three facets of the Respondent's plan: the proposed locations for banner towing activities, contingencies contained in the proposal, and the cost. The Director will discuss each issue separately below.

⁹ Several Part 16 decisions address circumstances where lengthy, ongoing negotiations are construed as a denial of access under Grant Assurance 22. [*See Centennial Express Airlines, Golden Eagle Charters, d/b/a Centennial Express Airlines v. Arapahoe County Public Airport Authority*, FAA Docket No. 16-98-05, (August 21, 1998) (Director's Determination) at 27 (a delay in excess of 16 months and still pending at the time of the Director's Determination); *United States Construction Corporation v. City of Pompano Beach, Florida*, FAA Docket No. 16-00-14, (July 10, 2002) (Final Agency Decision) at 18-19 (a delay over a year); and *Jim Martyn v. Port of Anacortes*, FAA Docket No. 16-02-03, (April 14, 2003) (Director's Determination) at 31 (a delay of three years). This is not the case here.

¹⁰ See Footnote 6.

Proposed Locations for Banner Towing Activities

In its Answer, the Respondent proposes to accommodate the Complainant and other future banner towing operators at two locations. [FAA Exhibit 1, Item 7, pp 2-3] The first site is located on the northeast corner of the Airport's property. [FAA Exhibit 1 Item 7, exhibit A] The second site is located on land north of the Airport's perimeter road on property controlled by the Army Corps of Engineers. [FAA Exhibit 1, Item 7, p. 3] In its Reply, the Complainant objects to both locations. The Complainant states that the first site is unsuitable:

"Because of the close proximity to the north and east dike walls, potential complications exist. For example, wind flow or fouled drops could result in a banner landing in water. The area is unsuitable because it is surrounded by tall grass and susceptible to flooding." [FAA Exhibit 1, Item 8, pp 6-7]

"The distance between the City's proposed banner tow pick up/drop off and hooking area is unreasonable and makes banner tow operations at Burke Lakefront Airport impractical, costly, and burdensome. The distance between the proposed locations is approximately 1.65 miles. Moreover the proposed areas are at the furthest locations of the airport." [FAA Exhibit 1, Item 8, Exhibit A, p. 1, ¶6].

The Complainant states that the second site is not a true offer because the City lacks the ability to grant access to this land. [FAA Exhibit 1, Item 8, p. 6]

The Director has reviewed the statements and opinions of both parties. However, for the purpose of making a final determination on reasonableness when aviation safety is at issue, FAA safety determinations pursuant to the Federal Aviation Regulations take precedence over any airport sponsor views or local ordinances pertaining to safety. [*See Skydive Paris Inc. v Henry County, Tennessee*, FAA Docket No. 16-05-06, (January 20, 2006) (Director's Determination) at 15; *Florida Aerial Advertising v St. Petersburg-Clearwater International Airport*, FAA Docket No. 16-03-01, (December 18, 2003) (Director's Determination) at 11; and *In the Matter of Compliance with Federal Obligations by the City of Santa Monica, California*, FAA Docket No. 16-02-08, (July 8, 2009) (Final Agency Decision)] This is especially true when the Director is asked to make a determination regarding a sponsor's compliance with its Federal obligations in cases where restrictions or limitations are instituted in the interest of safety. Under 49 U.S.C. § 40103, the FAA, on behalf of the United States, preempts flight safety, flight management, and the control of navigable airspace.

The Director's determination is guided by FAA Order 5190.6B which states:

"The Associate Administrator for Airports, working in conjunction with Flight Standards and/or the Air Traffic Organization, will carefully analyze supporting data and documentation and make the final call on whether a particular activity can be conducted safely and efficiently at an airport. In all cases, the FAA is the

final arbiter regarding aviation safety and will make the determination regarding the reasonableness of the sponsor's proposed measures that restrict, limit, or deny access to the airport.” [See FAA Order 5190.6B, ¶14.3.]

As part of its investigation of these allegations, the FAA initiated a safety study to determine whether and how banner tow activities could be safely conducted at the Airport. This study was conducted by the Cleveland Flight Standards District Office. It included a review of the Airport's layout and airfield configuration and banner tow flight demonstrations.

On October 5, 2009, the Cleveland Flight Standards District Office, with the support of the Burke Lakefront Air Traffic Control Tower staff, conducted several banner tow demonstration flights. Airport staff were briefed on the demonstration and invited to observe the flights. A full review of this demonstration is discussed in a letter¹¹ from Thomas J. Leahy, FAA Aviation Safety and Principal Operations Inspector, to Thomas T. Schauer, FAA Regional Compliance Officer. [FAA Exhibit 1, Item 14]. This letter states:

“There are three possible sites to conduct Banner towing at KBKL. The two that were used for this demonstration were suitable without any improvements. The third site which is north and east [sic] the approach end of Runway 24L would have required some mowing prior to use and additionally is not visible in its entirety from the ATC control tower, but again outside of the ATC movement area.

The Cleveland Flight Standards Office is of the opinion that it is reasonable to expect that banner towing could be conducted safely from the Cleveland Burke Lakefront Airport (KBKL).” [FAA Exhibit 1, Item 14, p. 3]

Figure 1 depicts the three possible locations suitable for banner tow activities.

¹¹ A copy of this letter is enclosed to both parties as part of this Determination.



Figure 1 FAA conducted banner tow demonstration flights from Areas 1 and 2. FAA was not able to conduct banner tow demonstration flights from Area 3 as it will require mowing before it can be used.

Contingencies Contained in the Proposal

In its Answer, the Respondent states:

“Final arrangements with banner towing operators would be subject to the approval of the Director of Port Control. The Director has reviewed the terms of the proposal set forth in Paragraphs 1 through 8 of this Initial Statement, and is supportive of them. Certain aspects of these arrangements may also require approval by the Cleveland City Council. The Respondent is prepared to submit the necessary legislative drafts to the Council once final arrangements for banner towing have been fully developed and approved by the Director, and to request expeditious approval of them. The Respondent also believes that it may be able to

temporarily permit operations on an interim basis pending action by the City Council following approval by the Director.” [FAA Exhibit 1, Item 7, pp 4-5]

The Complainant states that because the proposal is contingent upon the approval of the Director of Port Control and the Cleveland City Council, it cannot be considered a true offer of access and is merely a delay tactic. The Complainant also expresses concern that if either the Director of Port Control or the City Council refuse to agree to the proposal, the Respondent may continue to deny access. Lastly, the Complainant argues “that approval by the City Council is entirely unnecessary.” [FAA Exhibit 1, Item 8, pp 5-6]

In its Rebuttal, the Respondent reiterates its offer to the Complainant and notes that it is supported by the Director of Port Control. [FAA Exhibit 1, Item 9, p. 9] The Respondent concludes stating:

“Respondent has offered and is prepared to pursue entering into a short term agreement under an existing Codified Ordinance to allow for 60 cumulative days of banner towing while it pursues permanent legislation to authorize and regulate banner towing and associated fees at Burke.” [FAA Exhibit 1, Item 9, p. 10]

Grant Assurance 22 requires an airport sponsor to operate its facility for the use and benefit of the public on reasonable terms and without unjust discrimination. However, Grant Assurance 22 does not void an airport sponsor’s proprietary rights to establish a process for determining whether or not potential aeronautical service providers are qualified to conduct business on the airport before granting such access. In order to objectively guide these decisions in a nondiscriminatory manner, the FAA recommends airport sponsors develop minimum standards. [FAA Order 5190.6B, ¶10.2.]

To better understand the Respondent’s process for reviewing and approving new aeronautical businesses at Burke Lakefront Airport, the Director asked the Respondent to describe its process or provide a copy of the minimum standards in which it is outlined. The Director specifically asked the Respondent to “describe the approval process the City used when reviewing the most recently accepted aeronautical business at the Airport.” [FAA Exhibit 1, Item 11]

The Respondent’s response to this request for additional information noted that there are no minimum standards at the Airport. [FAA Exhibit 1, Item 12, p.3] It explained a four-step process whereby the Airport staff works with the interested party to develop a letter of intent describing the terms of its proposed operation. The letter of intent is then submitted to the Director of Port Control for approval. Upon approval by the Director of Port Control, Airport staff works with the City’s Law Department to prepare draft legislation for approval by the City Council. This legislation is merely authorization for the Respondent to enter into a long-term contract. Once the City Council approves the legislation, the Law Director then prepares a lease or other concession agreement which is signed by the aeronautical service provider and the Airport Director. [FAA Exhibit 1, Item 12, p. 2] In the interim, the City can provide a temporary approval which permits parties to perform up to 60 cumulative days of operations while awaiting legislative approval. [FAA Exhibit 1, Item 12, p. 3]

With regard to the Complainant's proposal, the Respondent did note one distinction:

“In most cases, legislation approving the proposed operation is all that is required. In the case of Drake, the legislation will also need to authorize banner towing operations for all interested parties at the Airport. This is not expected to affect the timing of legislative action.” [FAA Exhibit 1, Item 12, p. 2]

The Respondent explained how this process was applied to its most recently accepted aeronautical business as:

“Premier Flight Academy (‘Premier’), a flight training school, is the business that was most recently accepted as an aeronautical business at the Airport. The approval process described in response to the FAA’s first inquiry above was used for Premier’s operation. In response to the FAA’s specific questions [FAA asked the City to describe the approval process it used when reviewing the most recently accepted aeronautical business at the Airport], Premier was required to obtain the approval of the Director of Port Control for its operation at the Airport. It was also necessary to obtain legislative approval for that operation from the Cleveland City Council. The approval process required approximately four months. An agreement was signed with Premier on July 15, 2009. Premier did not seek interim approval to inaugurate its operations at an earlier time.” [FAA Exhibit 1, Item 12, p. 3]

Generally, the FAA will not substitute its judgment for that of the airport sponsor in matters of administration. [*See* FAA Order, 5190.6B, ¶2.4.b] Therefore, in determining whether or not the Respondent's contingencies are reasonable, the Director will consider its attainability and analyze if it might result in an unreasonable delay in granting access. The Respondent claims this same approval process resulted in an agreement with Premier Flight Academy. [FAA Exhibit 1, Item 12, p. 3] In its Reply, the Complainant only speculates that this process might result in a denial of access. [FAA Exhibit 1, Item 8, pp 5-6] This does not meet the burden of proof, and the Director does not find this process to be so restrictive that it is unattainable. With regard to the second test, the Respondent notes that the City must provide its approval for both the Complainant's business proposal as well as the activity of banner towing. It appears that the Respondent envisions similar requests from other prospective banner towers and seeks to position itself to act on the merits of those proposals as well. By ensuring that other providers of this same service have equal access to the approval process, the Respondent avoids inadvertently treating similarly situated parties in a discriminatory manner. While the Director notes the approval process may be cumbersome, based on the Record, it does not appear to be unreasonable. Moreover, the Complainant has submitted no documentation to establish any alternative type of business approval process used at the Airport.

Additionally, the Director finds that this approval process is not being used in an unjustly discriminatory manner. Although the Complainant's request is distinguished by the City's need to approve the aeronautical activity itself, the Director believes the analysis provided by the Cleveland Flight Standards District Office will assist the City in developing the appropriate

legislation. Lastly, the Respondent has agreed to provide the Complainant with interim access while the approval process is completed.

While the Director cannot predict whether or not the Port Director or the Cleveland City Council will approve the Complainant's request, the FAA has identified where banner tow activities can be safely conducted at Burke Lakefront Airport. As a result, future efforts to unreasonably prohibit or further limit this aeronautical activity may be construed as inconsistent with the City's Federal obligations.

Cost

In its Answer, the Respondent proposes to initially charge the Complainant \$20 per banner towed. In addition, the Complainant would be required to pay any other applicable charges for use of the Airport's facilities, such as landing and takeoff fees. [FAA Exhibit 1, Item 7, pp 3-4] The Complainant objects to this arrangement stating:

"...the proposed banner tow fees are unreasonable and an attempt to discourage banner tow operators from utilizing Burke Lakefront Airport. Moreover, use of the word 'initial' indicates a possibility that fee structure may be increased in the future. Any increase in fees would make banner towing at Burke Lakefront not economically feasible." [FAA Exhibit 1, Item 8, p. 7]

The Complainant argues that because the City currently lacks an established fee arrangement for banner tow operators, it should adopt rates assessed by similarly situated airports in the region. [FAA Exhibit 1, Item 8, p. 8] While the Director realizes that this methodology for establishing aeronautical rates and charges is commonly used within the general aviation community, this approach may not accurately reflect airport sponsors' airfield costs. Grant Assurance 24, *Fee and Rental Structure*, requires an airport sponsor to maintain a fee and rental structure which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport. This is best achieved through the use of a rate-setting methodology which quantifies airfield costs and services currently in use and establishes charges linked to those costs. [See Robert Kihlstrom v Port of Orcas, Washington State, FAA Docket No. 16-02-07, (September 1, 2004) (Director's Determination) at 25] Federal law does not prescribe a single approach to rate-setting; airports may utilize their preferred methodology as long as that methodology is applied consistently to similarly situated aeronautical users and conforms to other requirements outlined in the FAA's Rates and Charges Policy. [See 61 Fed. Reg 31944, 32019 (Jun. 21, 1996) and Union Flights, Inc. v. San Francisco International Airport and City & County of San Francisco, FAA Docket No. 16-99-11, (February 15, 2000) (Director's Determination) at 15]

Ordinarily, the FAA will not investigate the reasonableness of a general aviation airport's fees absent evidence of a progressive accumulation of surplus aeronautical revenues. [See 61 Fed. Reg. 31944, 31997 (Jun. 21, 1996) and Wadsworth Airport Association, Inc. v City of Wadsworth and Wadsworth City Council, FAA Docket No. 16-06-14, (August 8, 2007) (Director's Determination) at 13-14] The Complainant provides no details regarding the nature of Burke Lakefront's aeronautical revenues. Nothing in the Record suggests that the proposed \$20 per banner towed fee will result in surplus aeronautical revenues. Furthermore, the

Complainant has not established that the proposed fee exceeds the Respondent's costs for providing airfield services and assets currently in use. Instead, the Complainant compares the proposed fee to financial arrangements made with other airports where it conducts banner tow activities and states, in an affidavit:

“The City’s proposed fee structure is also unreasonable and excessive. The proposed fee structure makes operations at Burke Lakefront Airport not economically feasible.” [FAA Exhibit 1, Item 8, exhibit A, ¶7]

The Respondent states that it may incur new maintenance costs and additional administrative costs as a result of banner tow activities. Specifically, the Airport will likely be required to clear, mow, and maintain an area not presently used. [FAA Exhibit 1, Item 9, p. 7]

The Respondent is permitted to recover its costs associated with supporting this aeronautical activity. [See FAA Order 5190.6B, ¶12.2.b.] While the proposed fee may seem unreasonable for the Complainant's business plan, the Complainant has not documented that \$20 per banner towed is inconsistent with the Respondent's Federal obligation to make the airport available on fair and reasonable terms. Moreover, it is not the FAA's responsibility to establish airport rates. [See JetAway Aviation, Inc. v Montrose County, Colorado and the Montrose County Building Authority, FAA Docket No. 16-08-01, (July 2, 2009) (Director's Determination) at 44]. Based on the Record before the Director, the \$20 per banner towed fee does not appear to be unreasonable.

The Complainant also objects to the possibility that charges for banner towing could be increased over time. The Director rejects this argument as speculative. Again, Grant Assurance 24 requires an airport sponsor to pursue the goal of self-sustainability. Entering into an agreement which sets fees in perpetuity could prevent the sponsor from meeting its Federal obligations. In fact, the FAA recommends airport sponsors include escalation provisions for periodic adjustments when entering into ground leases with terms of five or more years. [See FAA Order 5190.6B, ¶9.5.e.; Wilson at 16; and Aerodynamics of Reading, Inc. v Reading Regional Airport Authority, FAA Docket No. 16-00-03, (December 22, 2000) (Director's Determination) at 19-20] Likewise, the FAA anticipates that airport sponsors will review their leases and airfield charges from time to time to ensure its ongoing compliance with Grant Assurance 24 as well as its ability to best serve the needs of its aeronautical public as an ongoing concern. [See Wilson at 16]

Additionally, the Complainant's argument here prematurely implies a violation of the Respondent's Federal obligations. Under 14 CFR Part 16, the Director cannot investigate allegations of an airport sponsor's grant assurance violations if the Complainant has not yet been harmed. [See 14 CFR Part 16.23] The Respondent may contemplate a future action which alters its fee schedule. But the issue is not ripe for review until the Complainant is adversely affected by it. [See Northwest Airlines, Inc., Delta Airlines, Inc., AirTran Airways, Inc., Continental Airlines, Inc., Southwest Airlines, Inc. v Indianapolis Airport Authority, Indianapolis International Airport, BAA-Indianapolis., FAA Docket No. 16-07-04, (August 18, 2008) (Director's Determination) at 28 and 37]

Summary of Issue Two

In conclusion, the FAA has identified three locations which are suitable for banner towing operations at Burke Lakefront Airport. If the Complainant still desires to begin conducting banner tow operations at this Airport, the Complainant should consider the Respondent's offer of immediate access under a short term agreement and work with the City on longer term access through its administrative process to review and approve new aeronautical businesses at the Airport. While this process may be cumbersome, the Director does not find it to be unreasonable or unjustly discriminatory. It would not be appropriate for the Director to make findings concerning proposed or possible future banner tow fees.

VII. CONCLUSION

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

- (1) The Respondent's conditional approval of the Complainant's request to conduct banner towing operations does not constitute an unreasonable denial of access and is not a violation of Grant Assurance 22, *Economic Nondiscrimination*.
- (2) The Respondent's conditions for approval of banner towing operations at BLK are not sufficiently unreasonable as to deny access or unjustly discriminate against the Complainant and do not constitute a violation of Grant Assurance 22, *Economic Nondiscrimination*.

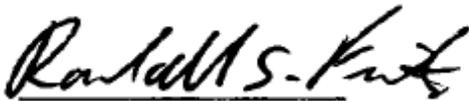
ORDER

Accordingly, it is ordered that:

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

RIGHT OF APPEAL

This Director's Determination is an initial agency determination and does not constitute final agency action and order subject to judicial review. [14 CFR 16.247(b)(2).] A party to this Complaint adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR 16.33(b) within thirty (30) days after service of the Director's Determination.



Director
Office of Compliance and Field Operations

February 22, 2010

Date