

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

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Sterling Aviation, LLC)	
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COMPLAINANT)	
)	Docket No. 16-09-03
v.)	April 13, 2010
)	
Milwaukee County, Wisconsin)	
)	
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 16.¹

Sterling Aviation, LLC (Complainant) filed a formal Complaint pursuant to 14 CFR Part 16 against Milwaukee County, Wisconsin (County or Respondent), sponsor and operator of the General Mitchell International Airport (Airport or GMIA). The Complainant alleges the Respondent is engaged in disparate treatment of similarly situated aeronautical service providers with regard to fueling practices. Specifically, the Complainant alleges the City is in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, *Economic Nondiscrimination* as well as 49 U.S.C. § 40103(e) and Grant Assurance 23, *Exclusive Rights*.

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 currently in violation of its Federal obligations. The FAA's decision in this matter is based on applicable Federal law and FAA policy, review of the pleadings and supporting documentation submitted by the parties, reviewed by the FAA, which comprises the Administrative Record reflected in the attached FAA Exhibit 1.

II. PARTIES

In March of 2004, Sterling Aviation Holdings acquired the stock of Scott Aviation, a company based at GMIA since 1984. [FAA Exhibit 1, Item 1, ¶6 and 7] The business' name was changed

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.

to Sterling Aviation and later converted to a limited liability corporation. [FAA Exhibit 1, Item 1, ¶7] Sterling Aviation, LLC is an FAA approved Part 145 Repair Station² for airframe, instrument, and radio repairs. [FAA Exhibit 1, Item 1, ¶1] The Complainant is also a Part 135 charter operator³ with 13 aircraft listed on its certificate. [FAA Exhibit 1, Item 1, ¶1]

General Mitchell International Airport (Airport) is a public-use airport owned and operated by Milwaukee County, Wisconsin. The Airport, five nautical miles south of Milwaukee, is classified as a medium-hub commercial service airport with 110 based aircraft and 196,045 annual operations. The Airport has five runways and an air traffic control tower. [FAA Exhibit 1, Item 12] 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 County has accepted \$167,812,061 in Federal AIP grants for GMIA. [FAA Exhibit 1, Item 11]

III. BACKGROUND AND PROCEDURAL HISTORY

Factual Background

In 1983, Tom Scott founded Scott Aviation, formerly known as (f/k/a) Scott Air Charter; this company moves onto GMIA on or about June 1, 1984. [FAA Exhibit 1, Item 1, ¶6]

On September 11, 1989, Milwaukee County executes a lease agreement with The Cessna Aircraft Company (Cessna). The initial term is approximately five years⁴ and automatically renews, subject to an adjustment of the lessee's rental payments, for seven additional consecutive terms of five years. [FAA Exhibit 1, Item 1, exhibit A]

On September 1, 1993, the FAA certifies Scott Air Charter as a Part 145 Aircraft Repair Station. [FAA Exhibit 1, Item 1, ¶6]

On April 17, 1997, Milwaukee County executes a lease agreement with Scott Air Charter, Inc. The lease provides for an initial ten-year term and allows the lessee to renew, on the same terms and conditions, for two additional five-year periods. [FAA Exhibit 1, Item 1, exhibit C]

In October 2003, the Respondent amends its Schedule of Minimum Standards for Commercial Aeronautical Activities on Milwaukee County's Airports. [FAA Exhibit 1, Item 1, exhibit B] The Respondent also executes a lease amendment with Scott Air Charter "for the rights to perform airframe and power plant overhauls, lot sections, inspections and repair services on aircraft engines" at the Airport. [FAA Exhibit 1, Item 17, exhibit C]

² The term "Part 145" refers to 14 CFR Part 145, Repair Stations. This regulation prescribes the FAA's requirements for issuing repair station certificates and associated ratings.

³ The term "Part 135" refers to 14 CFR Part 135, Operating Requirements: Commuter and On Demand Operations and Rules Governing Persons on Board Such Aircraft. 14 CFR § 135.1 requires entities conducting commuter and on-demand operations to hold an Air Carrier Certificate or Operating Certificate as prescribed by 14 CFR Part 119.

⁴ Cessna's lease describes its initial term as running "from the date the agreement is executed until the expiration of five (5) years from the date a City of Milwaukee occupancy permit is issued for the proposed Cessna hangar facility, or until December 31, 1995, whichever date is earlier." [FAA Exhibit 1, Item 1, exhibit A, p. 2]

In March 2004, Scott Aviation is sold to Sterling Aviation Holdings.⁵ [FAA Exhibit 1, Item 1, exhibit D, ¶2] As part of this transaction, Sterling assumes two hangar lease agreements from Scott Aviation. [FAA Exhibit 1, Item 7, exhibit B, ¶4] Sterling Aviation then enters into agreements with Milwaukee County for the operation of commercial aeronautical activities at GMIA. [FAA Exhibit 1, Item 5, AF2]

At a meeting held on September 13, 2005, representatives from GMIA and Sterling Aviation discuss Sterling's ability to dispense fuel as specified under its lease with regard to its commercial aeronautical operating permits⁶ and the Airport's Minimum Standards. [FAA Exhibit 1, Item 7, exhibit F] A follow up letter from the Respondent to the Complainant summarizes the Respondent's views as follows:

“At our meeting, we clarified Sterling's authority to dispense fuel under these permits and the Schedule of Minimum Standards for Commercial Aeronautical Activities on Milwaukee County's Airports (Minimum Standards).

1. *Under its aircraft charter authority, Sterling is authorized to fuel aircraft listed on its FAA charter certificate when those aircraft are being used for FAR Part 135 public charter purposes.*
2. *Under its aircraft management authority, Sterling is not authorized to fuel aircraft being managed by Sterling.*
3. *Aircraft, even though they may be on the Sterling charter certificate, (FAR Part 91 operation) may not be fueled by Sterling when they will be operated by or for the transportation of the aircraft owner.*
4. *Aircraft that Sterling charts from other operators to augment its charter operation may not be fueled by Sterling.”* [FAA Exhibit 1, Item 7, exhibit F, p. 1]

In March 2006, GMIA initiates a compliance audit of Sterling Aviation. The audit finds that Sterling Aviation appears to be fueling Part 91 flights in violation of its lease, handling aircraft that are not owned by Sterling or listed on its Part 135 Certificate, and offering commercial fueling services in conjunction with management of aircraft. [FAA Exhibit 1, Item 5, AF12 and FAA Exhibit 1, Item 7, exhibit B, ¶11] On September 22, 2006, GMIA writes a letter to Sterling Aviation expressing these concerns and requesting more specific information needed to begin a formal compliance audit. [FAA Exhibit 1, Item 7, exhibit B ¶12 and FAA Exhibit 1, Item 7, exhibit C] Sterling Aviation never responds to this request. [FAA Exhibit 1, Item 7, exhibit B ¶13]

⁵ The Record is unclear as to when this transaction occurred. While an affidavit provided by Tom Scott states he sold his business in March of 2004, the Respondent executed a lease amendment with Scott Air Charter dated March 5, 2004. [FAA Exhibit 1, Item 1, exhibit D, ¶ 2 and FAA Exhibit 1, Item 17, exhibit D] This lease amendment authorized Scott Air Charter to perform aircraft management services at GMIA. However, the amendment specifically states, “Permittee agrees that it will not sell, convey, transfer, pledge, or assign this Agreement of [sic] any part hereof or any rights created hereby. Any attempted sale, conveyance, transfer, pledge or assignment of the Agreement, or any rights of Permittee hereunder, shall be null and void, and shall be a material breach hereof and this Agreement shall immediately and automatically terminate at the time Permittee sells, conveys, transfers, pledges or assigns this Agreement.” [FAA Exhibit 1, Item 17, exhibit D, ¶ 7]

⁶ At this time, Sterling holds Commercial Operating Permits to perform aircraft charter operations, aircraft management services, and power plant and airframe repair services. [FAA Exhibit 1, Item 7, exhibit F, p. 1]

On January 26, 2007, Sterling Aviation notifies GMIA of its decision to exercise the first five year lease renewal option. This extends Sterling's lease through March 31, 2012. [FAA Exhibit 1, Item 17, exhibit E]

During 2007, Sterling Aviation and GMIA meet and exchange correspondence discussing Sterling's fueling rights. [FAA Exhibit 1, Item 5, ¶AF14; FAA Exhibit 1, Item 7, exhibits G, H, and I; and FAA Exhibit 1, Item 18, exhibits A and B] An August 1, 2007 letter from Sterling to GMIA states:

"Sterling Aviation seeks to clarify the fuel rights afforded to us by our land lease with the County. It is our desire to perform, and confirm our rights to fuel:

1. *Only aircraft listed on our Air Carrier Certificate in which we have either an operating agreement or a lease, regardless of whether those flights are conducted under FAR 91 or FAR Part 135 regulations and;*
2. *Aircraft of other Air Carriers with whom we have contracted with to transport our clients under FAR Part 135 regulations; and*
3. *Aircraft we are demonstrating to purchase or which have been recently purchased by either ourselves or one of our clients; and which are or will be going through the FAA process of being listed on our Air Carrier Certificate; and*
4. *Aircraft in which our FAA approved repair station is performing maintenance. (The same rights afforded Cessna's Citation's Service Center in their land lease.)*

It is Sterling Aviation's position that our existing land lease with the County allows for all the above fueling rights and we are in possession of the appropriate County issued permits to conduct commercial operations at Mitchell Field."
[FAA Exhibit 1, Item 18, exhibit B]

In response, GMIA offers to amend Sterling's lease to permit Sterling to fuel aircraft it is demonstrating to purchase and aircraft that had been repaired at Sterling's repair station, as long as Sterling's proposal does not violate the terms of its lease or the Minimum Standards. [FAA Exhibit 1, Item 5, AF13; FAA Exhibit 1, Item 7, exhibit G, pp 2-3; and FAA Exhibit 1, Item 7, exhibit H, p. 2]

On October 10, 2007, the Complainant, through its counsel, writes to the Respondent stating it has the right to fuel the following:

1. *Aircraft listed on Sterling's Air Carrier Certificate in which it has either an operating agreement or a lease, regardless of whether those flights are conducted under FAA Part 91 or FAA Part 135 Regulations;*
2. *Aircraft of other Air Carriers with whom it has contracted to transport its clients under FAA Part 135 Regulations;*

3. *Aircraft that it is demonstrating to purchase or which have been recently purchased by either Sterling or one of its clients; and which are or will be going through the FAA process of being listed on Sterling's Air Carrier Certificate; and...*” [FAA Exhibit 1, Item 7, exhibit I, p. 1]

In June of 2008 GMIA completes a competitive request for proposal process to select a second Fixed Base Operator.⁷ Sterling Aviation does not submit a proposal. [FAA Exhibit 1, Item 5, ¶AF18 and FAA Exhibit 1, Item 7, exhibit B, ¶19]

In August 2008, the Respondent seeks an advisory opinion from the FAA regarding the Complainant's right to provide into-plane fueling services. [FAA Exhibit 1, Item 5, ¶AF15 and FAA Exhibit 1, Item 7, exhibit D] In response, the FAA's Airports Division Manager for the Great Lakes Region provides general guidance on self-fueling and encloses a copy of a letter the FAA sent to a Part 135 operator discussing its self-fueling rights in 2003 (AmAv letter). [FAA Exhibit 1, Item 7, exhibit J]

On February 15, 2009, the Complainant's counsel met with the Respondent's counsel in an attempt to resolve the issue. [FAA Exhibit 1, Item 1, ¶15 and FAA Exhibit 1, Item 5, ¶15]

On March 30, 2009, the Complainant requests the FAA's opinion on issues now raised in this formal Complaint. [FAA Exhibit 1, Item 14] The FAA's Airports Division Manager for the Great Lakes Region responds with information regarding the grant assurances and the Part 16 complaint process. A copy of the AmAv letter is also enclosed. [FAA Exhibit 1, Item 15]

Procedural History

On June 8, 2009, FAA received the Complaint. [FAA Exhibit 1, Item 1]

On June 19, 2009, FAA docketed Sterling Aviation, LLC v. Milwaukee County, Wisconsin. [FAA Exhibit 1, Item 2]

On June 30, 2009, the Respondent requested additional time to file its answer and advised that Complainant had no objection. [FAA Exhibit 1, Item 4]

On July 31, 2009, the Respondent filed an Answer, Motion to Dismiss, and Memorandum in Support of Respondent's Motion to Dismiss. [FAA Exhibit 1, Items 5, 6, and 7]

On August 7, 2009, the Complainant filed a Reply and an Answer to Respondent's Motion to Dismiss. [FAA Exhibit 1, Items 8 and 9]

On August 20, 2009, the Respondent filed a Rebuttal. [FAA Exhibit 1, Item 10]

On November 12, 2009, the FAA requested additional information from both parties and extended the due date of the Director's Determination to on or before February 12, 2010. [FAA Exhibit 1, Item 13]

⁷ A fixed-base operator (FBO) is an individual or firm operating at an airport and providing general aircraft services such as maintenance, storage, and ground, and flight instruction. [FAA Order 5190.6B, Appendix Z]

On December 8, 2009, the Respondent submits additional information requested by the FAA. [FAA Exhibit 1, Item 18]

On December 9, 2009, the Complainant submits additional information requested by the FAA. [FAA Exhibit 1, Item 17]

On February 12, 2010, the FAA extended the due date of the Director's Determination to on or before March 12, 2010. [FAA Exhibit 1, Item 21]

On March 10, 2010, the FAA extended the due date of the Director's Determination to on or before April 16, 2010. [FAA Exhibit 1, Item 22]

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 County's compliance with applicable Federal law and policy:

- Whether the Respondent's refusal to grant the Complainant the same fueling rights as those purportedly granted to another aeronautical service provider constitutes unjust discrimination in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, *Economic Nondiscrimination*.
- Whether the Respondent has granted an Exclusive Right to The Cessna Aircraft Company by refusing to recognize the Complainant as a Specialized Aircraft Repair Service operator in violation of 49 U.S.C. § 47107(a)(4) and Grant Assurance 23, *Exclusive Rights*.
- Whether the Respondent has granted an Exclusive Right to The Cessna Aircraft Company by refusing to allow the Complainant the right to fuel its customers, business invitees, and guests in violation of 49 U.S.C. § 47107(a)(4) and Grant Assurance 23, *Exclusive Rights*.

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.⁸ 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 23, *Exclusive Rights*.

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

⁸ *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.

for limiting access. Grant Assurance 22 of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part:

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

b. In any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to-

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

(2) charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

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

d. Each air carrier using such airport shall have the right to service itself or to use any fixed-base operator that is authorized or permitted by the airport to serve any air carrier at such airport.

f. It will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees [including, but not limited to maintenance, repair, and fueling] that it may choose to perform.

g. In the event the sponsor itself exercise any of the rights and privileges referred to in this assurance, the services involved will be provided on the same conditions as would apply to the furnishing of such services by commercial aeronautical service providers authorized by the sponsor under these provisions.

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)]

Assurance 23, *Exclusive Rights*

Title 49 U.S.C. § 40103(e), provides that “[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended.”

Title 49 U.S.C. § 47107(a)(4), similarly provides that “a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport...”

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

“...will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public...and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49, United States Code.”

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

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

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

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

The Complaint and Appeal Process

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

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

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden

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

Title 14 CFR § 16.31(b), 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, (AIA), 49 U.S.C. § 47106(d) and 47111(d).

VI. ANALYSIS AND DISCUSSION

Prior to the filing of this Complaint, both parties sought the FAA’s informal guidance on matters related to self-fueling. Below is a discussion of those exchanges.

Review of FAA’s Informal Guidance to Both Parties

In August of 2008, the Respondent requested informal guidance regarding its responsibilities under Grant Assurance 22(d) and (f). [FAA Exhibit 1, Item 7, exhibit D] The FAA’s Manager of the Airports Division for the Great Lakes Region responded by letter advising of general guidance on self-fueling. [FAA Exhibit 1, Item 7, exhibit J] This letter specifically states that Grant Assurance 22(d) “allows an air carrier to service itself or to use any fixed-base operator that is authorized or permitted by the airport to service an air carrier.” The letter notes that Grant Assurance 22(f) “prohibits an airport from restricting a corporation’s right to perform services on its *own aircraft* but there must be evidence that there is adequate ownership interest in the aircraft to qualify as ‘*own aircraft*,’ for the purposes of this Assurance.” To further explain how self-fueling rights may be practiced by Part 135 operators, the FAA enclosed a copy of a letter sent to AmAv, Inc. (AmAv letter), in 2003. This letter notes that when a corporation lacks adequate ownership interest in an aircraft, that particular aircraft does not qualify as the corporation’s “own” aircraft for the purposes of Grant Assurance 22(f). The Director reaffirms this guidance.

In March of 2009, the Complainant requested the FAA provide informal guidance on issues similar to the questions now before the Director. [FAA Exhibit 1, Item 14] The FAA's Manager of the Airports Division for the Great Lakes Region responded by letter. [FAA Exhibit 1, Item 15] In addition to discussing the obligations contained in Grant Assurance 22(d) and (f), as was explained to the Respondent, the letter stated:

“For an airport sponsor to offer a tenant the right to expand its self-fueling activity to aircraft that it does not own, lease, rent, or operate for its exclusive use, would be outside the definition and protection of Assurance 22. This could lead to allegations that an airport sponsor was acting in an unjustly discriminatory manner towards its tenants that have the right to sell fuel commercially.” [FAA Exhibit 1, Item 15]

The FAA also enclosed a copy of the AmAv letter to further explain how self-fueling rights apply to Part 135 operators. The Director reaffirms this guidance.

It is important to clarify that issues raised in this Complaint do not pertain to the Complainant's right to self-fuel under Grant Assurance 22(d) or (f). Grant Assurance 22(d) protects an air carrier's right to service its own aircraft. Grant Assurance 22(f) explicitly protects the rights of individuals and corporations to perform services, such as fueling, on their own aircraft with their own employees. The Director notes this distinction due to previous documented requests for informal guidance from both parties regarding self-fueling.

Issues Identified for Analysis and Discussion

Issue 1: *Whether the Respondent's refusal to grant the Complainant the same fueling rights as those purportedly granted to a similarly situated aeronautical service provider constitutes unjust discrimination in violation of 49 U.S.C. § 47107(a)(1) and Grant Assurance 22, Economic Nondiscrimination.*

As noted above and previously explained to the Complainant, when an airport sponsor allows a tenant to expand its self-fueling activities to aircraft it does not own, lease, rent or operate for its exclusive use, it offers a privilege outside its obligations contained in Grant Assurance 22(d) and (f). The extant Complaint thus centers around a privilege negotiated and articulated in one lease between the Respondent and an aeronautical service provider at the Airport.

In 1989, GMIA entered into a lease with Cessna. [FAA Exhibit 1, Item 1, exhibit A] This lease allows Cessna to fuel its “customers, business invitees, and guests only”. [FAA Exhibit 1, Item 1, exhibit A, p. 9] Eight years later, in 1997, Scott Air Charter, Inc. entered into a lease which limits its fueling rights to self-fueling. [FAA Exhibit 1, Item 1, exhibit C, p. 6] In March of 2004, the Complainant acquired Scott Air Charter's stock and assumed the 1997 lease. [FAA Exhibit 1, Item 1, ¶6]

Given the time which has elapsed since the Complainant's lease was executed and renewed⁹ – 12 years – the Director relies on a principle involving a rent disparity issue from Penobscot Air Services v. Knox County, FAA Docket No. 16-97-04 (September 25, 1997) (Director's Determination)(*Penobscot DD*):

“The purpose of the grant assurances is to protect the public interest in the operation of Federally obligated airports. The purpose is not to provide alternative or supplemental rights to those normally available to commercial tenants in disputes with their landlords, i.e. negotiation or commercial litigation under applicable state and local laws. The FAA does not consider that Congress intended grant assurances and the FAA compliance process to provide a device by which a commercial aeronautical tenant can abrogate an otherwise valid commercial lease with a sponsor because the operations under the lease are less profitable than the tenant anticipated. Such use of the grant assurances would be especially inappropriate in a case like this, where the complainant did not negotiate directly with the sponsor but elected to assume a prior tenant's lease through acquisition.” [*Penobscot DD*, at page 24, citing to Sky East Services, Inc. and Hampton Air Transport System, Inc. v. Suffolk County, New York, FAA Docket Nos. 13-88-6 and 13-89-1]

Aerodynamics of Reading, Inc. v Reading Regional Airport Authority, FAA Docket No. 16-00-03, (July 23, 2001) (Final Decision and Order) at 16, (*Aerodynamics FAD*) states that it is “incumbent upon the Complainant to prove its allegations of unjust discrimination by providing evidence that similar terms and conditions were requested and were subsequently denied without adequate justification.”

In this instant complaint, the Complainant provides no evidence to support that it requested fueling rights similar to those granted to Cessna when the Complainant acquired the Scott lease in 2004. The Complainant provides no evidence to support it requested additional fueling rights, similar to Cessna, when it exercised a five-year lease renewal option in 2007. Agreeing to contract terms with the Respondent, and then complaining later that the contract terms are not similar to Cessna's, does not mean the Complainant has been treated in an unjustly discriminatory manner. The Director has routinely found in favor of the airport sponsor in complaints where an aeronautical tenant has negotiated a rental agreement that requires a particular payment and rate schedule, commences doing business and earning profits, and then complains that the deal was unfair. Under this type of scenario the Director has rejected buyer's remorse as a rationale or justification to support an argument that terms previously negotiated and accepted should be now altered. Absent any evidence to demonstrate that the Complainant objected to the terms of the lease or was denied access to pertinent information during negotiations, the Director concludes that there can be no unjust discrimination. [*See Adventure Aviation v City of Las Cruces, New Mexico*, FAA Docket No. 16-01-14, (August 7, 2002) (Director's Determination) at 13 (*Adventure*) and 41 North 73 West, Inc. dba Avitat Westchester

⁹ Scott Air Charter's lease expired on March 31, 2007. [FAA Exhibit 1, Item 1, exhibit C] Sterling Aviation exercised an option to renew the lease for an additional five-year term. Sterling's notice exercising its renewal option requested changes to Section 12, “Eminent Domain” and to Exhibit B. [FAA Exhibit 1, Item 1, exhibit C and FAA Exhibit 1, Item 17, exhibit E]

v Westchester County, New York, FAA Docket No. 16-07-13, (June 12, 2008) (Director’s Determination) at 25 (*Avitat*)]

The Complainant describes its history and Scott’s history of fueling all aircraft listed on its Part 135 certificate despite whether they were flown for Part 135 or Part 91 operations. [FAA Exhibit 1, Item 1, ¶¶6 and ¶14; FAA Exhibit 1, Item 1, exhibit 4, ¶2; FAA Exhibit 1, Item 8, exhibit A, ¶ 3 and 8; and FAA Exhibit 1, Item 9, exhibit A, ¶3 and 8] The Respondent disputes that it was aware of this practice and states that it “never gave permission to Scott Aviation to engage in those fueling practices.” [FAA Exhibit 1, Item 10, exhibit B, ¶3]

Had the Respondent known that Scott Aviation/Sterling was exercising fueling rights beyond those authorized by its lease, the Airport may have exposed itself to allegations of unjust discrimination from other tenants. The Record indicates the Respondent met with the Complainant to discuss its fueling activities and clarify its specific lease terms in September of 2005. [FAA Exhibit 1, Item 5, AF11 and FAA Exhibit 1, Item 7, exhibit F] Taking steps to ensure its compliance with its Federal obligations demonstrates that the Respondent is striving to achieve the standard of compliance as stated in Section V of this Determination. Most importantly, the fact that the Respondent has chosen to enforce the terms of the lease by limiting the Complainant’s fueling rights to self-fueling does not constitute a grant assurance violation.

Against this background, it is simply unreasonable for the Director to find that the Respondent has unjustly discriminated against the Complaint based on the fact that two aeronautical users have been granted different fueling rights. [*See Avitat* at 25] As stated in Rick Aviation, Inc. v. Peninsula Airport Commission, FAA Docket No. 16-05-18, (May 8, 2007) (Director’s Determination) at 17, (November 6, 2007) (Final Agency Decision) at 15 (*Rick Aviation*), “The FAA will not step in to overturn a lease provision simply because the aeronautical tenant has discovered the provision the tenant agreed to has created an undesirable position for the tenant.”

With that said, recognizing that future negotiations between both parties will hinge upon whether or not Sterling is similarly situated to Cessna, the Director will address this issue. The Complainant’s March 30, 2009 letter¹⁰ raised this issue and requested FAA guidance in response to the following questions:

“Is Sterling similarly situated to Cessna?”

“Would it be unjust discrimination to deny Sterling the same or similar fueling rights as Cessna?” [FAA Exhibit 1, Item 14, p.5]

The Complainant states:

“The complaint centers on unjust discrimination related to the disparate treatment of similarly situated aeronautical service providers’ ability to fuel aircraft. Both Sterling and The Cessna Aircraft Company (‘Cessna’) are Part

¹⁰ The Respondent’s counsel via letter dated June 29, 2009, advised it responded to Complainant’s March 30 letter by letter of May 29. [FAA Exhibit 1, Item 3] Counsel further advised that on the date this matter was docketed, June 19, 2009, the Complainant sent a letter in response to the May 29 letter.

145 Repair Stations and GMIA's website lists both as providers of 'Aircraft Maintenance.' While Milwaukee County has granted Cessna a broad right to fuel aircraft of 'its customers, business invitees and guests,' the airport sponsor is attempting to deny Sterling the same right to fuel aircraft that they maintain for their customers." [FAA Exhibit 1, Item 1, p. 1]

The Respondent:

"Admits that Sterling is a Part 145 Repair Station, that Sterling provides Aircraft Charter Services, and that Sterling and Cessna are listed on the employment page of GMIA's website as companies that perform aircraft maintenance, but denies that the County holds Cessna out to the public as an aircraft maintenance provider..." [FAA Exhibit 1, Item 5, ¶2]

"Denies that Cessna and Sterling are similarly situated." [FAA Exhibit 1, Item 5, ¶4]

The Complainant argues that when an airport sponsor offers a privilege to one aeronautical service provider, Grant Assurance 22 compels that airport to offer that same privilege to other similarly situated aeronautical service providers. Grant Assurance 22 at (c), (h) and (i) provides that an airport may treat dissimilar aeronautical users of the airport dissimilarly. This limits the Director's analysis to whether or not the Respondent is treating the Complainant in an unjustly discriminatory manner.

The Complainant relies on a standard cited from Kent J. Ashton v. City of Concord, North Carolina, FAA Docket No. 16-99-09, (July 3, 2000) (Final Decision and Order) at 18 (*Ashton*):

"The FAA will determine that the airport is acting in a manner that is unjustly discriminatory if they find that 'another entity, in a similar situation, was unjustly denied a similar situation.'" [FAA Exhibit 1, Item 1, ¶2]

However, this statement only recognizes half of the standard used by the FAA in determining whether or not an airport sponsor has engaged in unjust economic discrimination. As noted in Penobscot Air Service LTD v. County of Knox Board of Commissioners, FAA Docket No. 16-97-04, (September 25, 1997) (Record of Determination) at 22 (*Penobscot ROD*), "Assurance 22, Economic Nondiscrimination prohibits only unjust discrimination among users. Differences in treatment including rental rates, are permissible as long as those differences are not unjust."¹¹ As a result, the FAA has long held that in order to sustain a finding of unjust economic discrimination, a complainant must establish that it requested similar terms and conditions as other similarly situated airport users and was denied for unjust reasons. [*See Aerodynamics of Reading, Inc. v Reading Regional Airport Authority*, FAA Docket No. 16-00-03, (December 22, 2000) (Director's Determination) at 19 (*Aerodynamics DD*)]

¹¹ The U.S. Court of Appeals upheld this finding in Penobscot Air Services, Ltd. V. FAA, 164 F.3d 713, 726 (1st Cir. 1999).

In *Ashton*, the Associate Administrator upheld the sponsor's distinctions and variations in services as reasonable because they reflected dissimilar uses of the airport and were drawn in pursuit of appropriate goals. [*See Ashton* at 18] The Respondent correctly describes this two-pronged test in its Memorandum in Support of Respondent's Motion to Dismiss. [FAA Exhibit 1, Item 7, p. 6] Incidentally, applying this test will allow the Director to answer the two questions related to similarly situated tenants and unjust discriminatory treatment.

Prong 1: Are Sterling and Cessna similarly situated?

The Director will analyze evidence in the Record which discusses the Complainant's and Cessna's use of the Airport and the business models they utilize. This evidence includes leases, commercial operating permits, the Respondent's Schedule of Minimum Standards for Commercial Aeronautical Activities, and descriptions of both aeronautical service providers.

Leases

GMIA entered into leases with Cessna and the Complainant. Both leases:

- include dated terms and renewal provisions;
- describe how the lessee may use the airport property leased;
- stipulate fueling rights; and
- note specific prohibitions and limitations imposed on the lessees.

The Complainant's lease was for an initial term of ten years (from April 1, 1997 to March 31, 2007)¹², and provided the lessee with the right to renew for two additional periods of five years on the same terms and conditions. [FAA Exhibit 1, Item 1, exhibit C, p. 2] Cessna's lease provided for an initial term of approximately five years¹³ and automatically renews, subject to an adjustment of the lessee's rental payment, for seven additional terms of five years. [FAA Exhibit 1, Item 1, exhibit A, p. 2]

Both leases are specific about how the lessee may use its leasehold. The Complainant is provided "the right and privilege to engage in and perform Aircraft Charter and Air Taxi Services" as defined in GMIA's Minimum Standards. [FAA Exhibit 1, Item 1, exhibit C, p. 2] The lease also specifically permits the Complainant to use its leasehold "for the purpose of storage, repair, fueling, maintenance, and operation of the Lessee's owned or leased aircraft." [FAA Exhibit 1, Item 1, exhibit C, p. 2] Cessna's lease is:

"for the purpose of storing, servicing, repairing and performing maintenance of aircraft, aircraft assemblies, aircraft accessories, radios and electronic equipment and any components thereof; for the sale or lease of aircraft, aircraft assemblies, aircraft radio and electronic equipment and components or parts thereof; and, for the business and operations offices and shops in connection with the purposes authorized herein;" [FAA Exhibit 1, Item 1, exhibit A, p. 3]

¹² The Complainant acquired Scott Air in March of 2004 and assumed the existing lease. [FAA Exhibit 1, Item 1, ¶7]

¹³ Cessna's lease describes its initial term as running "from the date the agreement is executed until the expiration of five (5) years from the date a City of Milwaukee occupancy permit is issued for the proposed Cessna hangar facility, or until December 31, 1995, whichever date is earlier." [FAA Exhibit 1, Item 1, exhibit A, p. 2]

The leases discuss specific rights and responsibilities associated with fueling. The Complainant's lease allows it to utilize the existing aviation fuel and oil storage and dispensing facilities in its leasehold areas or to install additional or replacement facilities at a location approved by the Airport Director "to serve its requirements only". [FAA Exhibit 1, Item 1, exhibit C, p. 6] The Complainant's lease further states:

"Lessee agrees that it shall not sell or furnish aviation fuels and oil to others, except to those who own, lease, rent or operate aircraft for exclusive use of Lessee, it being expressly understood that the permission granted herein is intended to authorize storage of said products for use in airplanes owned, leased, rented or operated exclusively by or for Lessee." [FAA Exhibit 1, Item 1, exhibit C, p. 8]

Cessna's lease states, "[a]viation fuel storage and dispensing facilities to serve the requirements of Lessee and its customers, business invitees, and guests only, may be installed on Lessee's premises." [FAA Exhibit 1, Item 1, exhibit A, p. 9]

Both leases require the lessee to provide monthly reports to the Airport Director regarding the aviation fuels and oil delivered to its respective leasehold.¹⁴ [FAA Exhibit 1, Item 1, exhibit A, pp 9-10 and FAA Exhibit 1, Item 1, exhibit C, p. 7] Cessna is required to pay fuel flowage fees based on its monthly reports. [FAA Exhibit 1, Item 1, exhibit A, p. 10] However, the Complainant has the option of paying fuel flowage fees or executing a separate agreement to pay landing fees. [FAA Exhibit 1, Item 1, exhibit C, p. 8] The Complainant elected to pay landing fees. [FAA Exhibit 1, Item 7 exhibit B, ¶14 and FAA Exhibit 1, Item 18, p. 2]

Both leases contain specific prohibitions and limitations. The Complainant must obtain the Airport Director's consent before storing aircraft in its hangar for any purpose other than those specifically contemplated in the lease. [FAA Exhibit 1, Item 1, exhibit C, pp 3-4] Cessna is prohibited from engaging in any practices normally considered those of an FBO. [FAA Exhibit 1, Item 1, exhibit A, p. 3] Both lessees must obtain Milwaukee County's approval before engaging in any business or activity not specifically authorized or contemplated within the lease. [FAA Exhibit 1, Item 1, exhibit A, pp 8-9 and FAA Exhibit 1, Item 1, exhibit C, p. 9]

Commercial Operating Permits

The Respondent now requires tenants engaged in airside commercial activities to obtain a commercial operating permit, even if the tenant's lease permits that activity. Commercial operating permits serve the following purposes:

"...they (a) inform GMIA management of the scope and location of commercial activities being conducted on the airport; (b) require insurance and indemnification for the protection of the airport and its tenants, users and the public; (c) inform a permittee of airport security requirements and other rules

¹⁴ GMIA notes that this requirement is usually only enforced on charter operators during an audit or when there is some reasonable basis to conclude that a lease violation may exist. [FAA Exhibit 1, Item 18, p.2]

and regulations; (d) ensure that a permittee has entered into an agreement for appropriate airport space from which to conduct its activities; (e) prohibit discrimination by a permittee; and (f) reflect the requirements of GMIA's grant assurance obligations." [FAA Exhibit 1, Item 18, p. 1]

The Complainant holds commercial operating permits to conduct aircraft charter and air taxi services, and airframe and engine maintenance and repair and/or modification. [FAA Exhibit 1, Item 17, exhibit A and B] Cessna is not required to obtain any commercial operating permits because it does not offer commercial services to the general public. [FAA Exhibit 1, Item 18, p. 2]

Respondent's Schedule of Minimum Standards for Commercial Aeronautical Activities

In October of 2003, the Respondent adopted new Minimum Standards for 11 different aeronautical activities and special requirements for subtenants at GMIA. The Minimum Standards define two different types of aeronautical repair activities:

1. Airframe and Engine Maintenance and Repair and/or Modification
2. Specialized Aircraft Repair Services

[FAA Exhibit 1, Item 1, exhibit B, Index]

The Complaint inaccurately describes the Minimum Standards applicable to both the Complainant and Cessna. The Complainant states:

"Both Sterling and Cessna meet the requirements to provide Specialized Aircraft Repair Services as defined by the GMIA Minimum Standards." [FAA Exhibit 1, Item 1, ¶ 2]

"Sterling exceeds the Minimum Standards for a Specialized Aircraft Repair Service operator, which is the same minimum standard applied by Milwaukee County to Cessna. An attempt by Milwaukee County to claim that Sterling is not such a service provider would contradict their granting of the right to perform maintenance on other people's airplanes Sterling's predecessor, Scott Air Charter, Inc. (Scott Air), and would be in conflict with Milwaukee County's own listing of Sterling as a provider of 'Aircraft Maintenance' on their website." [FAA Exhibit 1, Item 1, ¶ 5]

"GMIA Minimum Standards provide for two different categories of maintenance and repair. Airframe and Engine Maintenance And Repair and/or Modification requires Part 145 Class 1 and 3 airframe ratings as well as a Class 1 powerplant rating. Neither Sterling nor Cessna hold such ratings. Rather both Cessna and Sterling hold Limited Ratings for specific makes and models. By nature of the Part 145 Limited Rating both Sterling and Cessna would meet the GMIA Minimum Standards for Specialized Aircraft Repair Services." [FAA Exhibit 1, Item 1, ¶ 10]

However, the Respondent's Answer states:

"...neither admits nor denies because of insufficient knowledge or information the allegation that Sterling meets the requirements to provide Specialized Aircraft Repair Services under the Minimum Standards; denies that Cessna meets the requirements to provide Specialized Aircraft Repair Services under the Minimum Standards because Cessna performs maintenance only on Cessna's Citation model aircraft; and states that neither Sterling nor Cessna is licensed to perform, or has applied for a license to perform, Specialized Aircraft Repair Services." [FAA Exhibit 1, Item 5, ¶ 2]

"...Sterling is not licensed to perform, and has not applied for a license to perform, Specialized Aircraft Repair Services..." [FAA Exhibit 1, Item 5, ¶ 5]

"...neither admits nor denies because of insufficient knowledge or information the allegation that both Sterling and Cessna would meet the Minimum Standards for Specialized Aircraft Repair Services; and states that neither entity is licensed to perform, or has applied for a license to perform, Specialized Aircraft Repair Services." [FAA Exhibit 1, Item 5, ¶ 10]

While the Complainant may believe it met GMIA's Minimum Standards for specialized aircraft repair services, nothing in the Record indicates that the Complainant has requested such designation from the Respondent. Nothing in the Record indicates that Cessna has sought such designation. However, the Record does establish that the Complainant is authorized by the Respondent to perform airframe and engine maintenance and repair and/or modification activities because it holds a commercial operating permit for this activity. [FAA Exhibit 1, Item 5, ¶1 and FAA Exhibit 1, Item 17 exhibit B]

Descriptions of Both Aeronautical Service Providers

The Complaint offers the following descriptions and comparisons:

"Sterling is an FAA approved Part 145 Repair Station for airframe, instrument and radio repairs. Sterling is also a Part 135 charter operator with 13 aircraft listed for operation on its Part 135 certificate. Some of these aircraft are owned by private individuals who have contracted with Sterling to maintain their aircraft. Sterling provides these owners excellent maintenance and an opportunity to minimize their costs of ownership by listing their aircraft with Sterling's Part 135 certificate for charter when not in use by the owners." [FAA Exhibit 1, Item 1, ¶1]

"Cessna is a FAA approved Part 145 Repair Station specializing in the repair of Cessna Citation aircraft." [FAA Exhibit 1, Item 1, ¶2]

"While both Sterling and Cessna perform maintenance to the high standards imposed under Part 145, Cessna is not required to meet the additional

maintenance standards of Part 135 for all of its customers.” [FAA Exhibit 1, Item 1, ¶3]

The Respondent offers the following descriptions:

“...admits that Sterling is an FAA-approved Part 145 Repair Station...”

“Admits that Sterling is a Part 135 charter operator with 13 aircraft listed on its FAR Part 135 Charter Certificate...” [FAA Exhibit 1, Item 5, ¶1]

“...Cessna specializes in the repair of Cessna Citation aircraft; states that the only activities Cessna is permitted to perform are maintenance and warranty work on Cessna Citation aircraft, sales of Citation aircraft (and parts, equipment and accessories)...” [FAA Exhibit 1, Item 5, ¶2]

Sterling’s website describes its business as:

“Sterling Aviation is a privately held, full-service corporate aviation firm specializing in aircraft management, air charter, aircraft maintenance, and acquisition support of aircraft for private travel. Sterling holds certifications as an FAA Part 135 on-demand air carrier and an FAA Part 145 repair station.” [FAA Exhibit 1, Item 7, exhibit E, p. 1]

The Cessna Aircraft Company, on its website, describes its facility at GMIA as:

“The Milwaukee Citation Service Center is located at General Mitchell International Airport and is dedicated to the support of Citation aircraft in the upper Midwest.” [FAA Exhibit 1, Item 16]

In its second pleading, the Complainant adds the following description of Cessna:

“The Cessna Aircraft Company is a charter operator and has been for the last 21 years, Cessna holds FAA Certificate Number CNQA918C. In fact, Cessna’s “CitationShares”¹⁵ program, a division of Cessna Aircraft Company according to the CitationShares website, holds FAA Certificate Number Z5FA890K. According to FAA records as of August 5, 2009, these two certificates account for 93 aircraft available for charter from Cessna.” [FAA Exhibit 1, Item 8, AF8, Item 9, pp. 2-3]

To support this statement, the Complainant provides an affidavit by Robert Gort, President and Chief Operation Officer of Sterling, which states:

“I have regularly seen CitationShares program aircraft on the Cessna ramp at General Mitchell International Airport (“GMIA”).” [FAA Exhibit 1, Item 8, exhibit A, ¶ 6]

¹⁵ Cessna’s “CitationShares” program is now known as “CitationAir by Cessna”. [FAA Exhibit 1, Item 19, p.1]

The Complainant also provides airline certification information on the Cessna Aircraft Company and CitationShares Management, LLC, as printed from the FAA’s website. [FAA Exhibit 1, Item 8 exhibits B and C and FAA Exhibit 1, Item 9, exhibits B and C] Additionally, the Complainant provides information from CitationShares’ website entitled “Company Overview” which states:

“CitationShares, a division of Cessna Aircraft Company, offers the best in fractional jet ownership, jet card membership and whole aircraft management.”
[FAA Exhibit 1, Item 8, exhibit D and FAA Exhibit 1, Item 9, exhibit D]

The Respondent’s Rebuttal notes:

“Sterling does not offer a shred of evidence to show that Cessna operates charter services or aircraft management services out of its Service Center at GMIA.”
[FAA Exhibit 1, Item 10, p. 3]

In furtherance of this position, the Respondent provided an affidavit from the General Manager at the Milwaukee Citation Service Center who states that “Cessna does not operate aircraft charter or fractional ownership management services for CitationShares program aircraft, or any other aircraft, out of the Service Center at GMIA.” [FAA Exhibit 1, Item 10, exhibit A]

The Cessna Aircraft Company is a large corporation engaged in numerous sectors of the aviation industry, including, but not limited to, fractional ownership and charter services. However, the Record does not support the Complainant’s claim that The Cessna Aircraft Company is engaged in these activities at GMIA. In fact, when the Director reviewed the website page submitted by the Complainant as an exhibit (FAA Exhibit 1, Item 8, exhibit D and FAA Exhibit 1, Item 9, exhibit D) in support of this argument, the Director accessed the link labeled “Contact Us” and was directed to a mailing address in Greenwich, Connecticut. [FAA Exhibit 1, Item 19, p. 3] Furthermore, Cessna’s lease with the Respondent does not contemplate, nor does it permit, Cessna to conduct aircraft management or charter activities at GMIA. As the Complainant originally noted, “Cessna is a FAA approved Part 145 Repair Station specializing in the repair of Cessna Citation aircraft.” [FAA Exhibit 1, Item 1, ¶2] Therefore, based on the Cessna employee’s statement and absent any evidence to the contrary, it is reasonable to deduce that any CitationShares aircraft on Cessna’s ramp, as witnessed by Robert Gort, were visiting the Cessna Citation Service Center for maintenance or repairs.

Conclusion of Prong 1

The Respondent originally envisioned two different types of aeronautical service providers, and this is reflected in the respective lease agreements. The Complainant’s lease describes an aircraft charter and air taxi service provider with the right to self-fuel and maintain its owned or leased aircraft as guaranteed by Grant Assurance 22(d) and (f). Cessna’s lease is more descriptive of an aeronautical repair station and aircraft sales business.

While both leases require their respective lessees to pay a ground rent, the Complainant, as an air carrier, was given the choice to pay either a fuel flowage fee or landing fees. Cessna is required to pay a fuel flowage fee, and reports provided by the Respondent indicate it has done so. [FAA Exhibit 1, Item 18, exhibit D]

Sterling's operations have evolved beyond those originally contemplated in the lease it assumed from Scott. At present, Sterling advertises itself as a "*full-service corporate aviation firm specializing in aircraft management, air charter, aircraft maintenance, and acquisition support of aircraft for private travel.*" [FAA Exhibit 1, Item 7, exhibit E, p. 1] The Record supports that it is currently authorized by GMIA to provide charter services and perform maintenance. [FAA Exhibit 1, Item 17, exhibits A and B] The Complainant states that it is indeed engaged in these activities. [FAA Exhibit 1, Item 1, ¶1] The Record of evidence, including the Complainant's initial description of Cessna, indicates that Cessna's activities have consistently been limited to the sale, repair, and maintenance of Cessna Citation aircraft. While there is some overlap between the activities of these two entities – both repair and maintain aircraft – these activities have always been a complimentary component to Sterling's Part 135 charter requirements. Sterling's business model and wide ranging menu of services is quite different from the Cessna Citation Service Center at GMIA. Therefore, the Director finds that Sterling is not similarly situated to Cessna.

Prong 2: Are the Respondent's reasons for the disparate treatment unjustly discriminatory?

Although the Complainant fails the first of the two-prong test needed to establish a violation of Grant Assurance 22, the Director will discuss the second prong in order to answer this question posed by the Complainant:

"Would it be unjust discrimination to deny Sterling the same or similar fueling rights as Cessna?" [FAA Exhibit 1, Item 14, p.5]

The FAA has long held that aeronautical users agreeing to different rights, restrictions, responsibilities and terms in their agreements with an airport sponsor may necessarily support the conclusion that the parties are not similarly situated for the purposes of finding unjust economic discrimination. [*See Penobscot Air Services, Ltd. V. FAA*, 164 F.3d 713, 726 (1st Cir. 1999) (*Penobscot*); *Aerodynamics FAD* at 13; *Adventure* at 13; and *Avitat* at 30] As discussed at great length above, the Complainant accepted different terms when it assumed the Scott lease in 2004 and made no attempts to renegotiate its fueling rights when it requested to extend the lease in 2007. Because the Complainant fails to establish that it is similarly situated, the Director cannot find that it has been treated in an unjustly discriminatory manner. Whatever reasons or motivations the Respondent had for granting Cessna its fueling privilege no longer matters because the Complainant, at the time it assumed the Scott lease in 2004 and exercised its right to extend the term of its lease in 2007, made no attempt to negotiate a change to its lease with the County concerning fueling. There is nothing in the Record to demonstrate that the Complainant submitted a petition or any other written request to expand its right to fuel in 2004 or 2007.

Recognizing that the two parties may revisit this matter in future lease negotiations, the Director offers the following observations:

- An airport's prime obligation is to serve the interest of the aeronautical using public. [*See United States Construction Corporation v. City of Pompano Beach, Florida*, FAA Docket No. 16-00-14, (July 10, 2002) (Final Agency Decision) at 21. GMIA must remain mindful of this in developing minimum standards and leases. However, the Director has consistently concluded that Grant Assurance 22 does not require an airport sponsor to offer lease rates and terms that are identical to other leases negotiated at different points in time. As a result, a sponsor is permitted to pursue agreements that more nearly serve the interests of the public with more recent leaseholders. [*See, Penobscot; Wilson* at 12-13; *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 17; *Aerodynamics FAD* at 11; and *Rick Aviation* at 28]

In going forward, the Respondent should evaluate whether or not special fueling privileges serve the interest of the aeronautical using public. As discussed in its Memorandum in Support of Respondent's Motion to Dismiss, the Respondent is concerned that providing additional fueling privileges to the Complainant could impact the long-term viability of its Fixed Base Operator. [FAA Exhibit 1, Item 7, p. 10] The Respondent states that the Complainant has consistently "refused to provide any records" related to its fueling activities. [FAA Exhibit 1, Item 7, p. 10 and Item 18, p. 2] Given that these reports are required in the Complainant's lease, the Respondent may wish to enforce this provision to ensure compliance with the minimum standards and the rights of other aeronautical users as reflected in their agreements with the County.

- A tenant's history and relationship with the airport sponsor matter. [*See Rick Aviation* at 16] The Record documents the Complainant's claim that fueling was exercised outside those articulated in its current lease. [FAA Exhibit 1, Item 1, ¶6 and 14; FAA Exhibit 1, Item 1, exhibit 4, ¶2; FAA Exhibit 1, Item 8, exhibit A, ¶ 3 and 8; and FAA Exhibit 1, Item 9, exhibit A, ¶3 and 8] The Complainant was unresponsive to the Respondent's request for information needed to conduct an audit.¹⁶ [FAA Exhibit 1, Item 7, exhibit B, ¶14 and FAA Exhibit 1, Item 18, p. 2] The Respondent can consider these factors in future contract offers and negotiations.
- An airport sponsor is not obligated to provide application assistance or incubate business development proposals. [*See Atlantic Helicopters Inc./Chesapeake Bay Helicopters v Monroe County, Florida*, FAA Docket No. 16-07-12, (December 3, 2008) (Director's Determination) at 35] To address the inherent friction among competing aeronautical service providers and promote the orderly development of the airport, the FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. [See FAA Order 5190.6B, ¶10.4] Once the airport sponsor has established minimum

¹⁶ In *Rick Aviation*, the Director described a sponsor's audit of its tenant as, "common and acceptable business practices." [*See Rick Aviation* at 37]

standards, it should apply them objectively and uniformly to all similarly situated on-airport aeronautical activities and services. [FAA AC 150/5190-7, section 1.1.] [*See Flightline v. Shreveport*, FAA Docket No. 16-07-05 (March 7, 2008) (Director’s Determination) at 16 and *Gina Michelle Moore, individually, and d/b/a Warbird Sky Ventures, Inc. v. Sumner County Regional Airport Authority*, FAA Docket No. 16-07-16, (February 27, 2009) (Director’s Determination) at 44]

The Record indicates the Complainant’s history of evolving its business model and proposing new ventures. [FAA Exhibit 1, Item 1, ¶14; FAA Exhibit 1, Item 1, exhibit 4, ¶4 and 5; FAA Exhibit 1, Item 7, exhibit B, ¶5 and 6; FAA Exhibit 1, Item 7, exhibit G; and FAA Exhibit 1, Item 7, exhibit H] The Respondent can require the Complainant to adapt its future business plans to better conform to the requirements outlined in the Airport’s Minimum Standards.

- An airport sponsor has a fundamental responsibility to ensure that aeronautical business activities can be conducted safely and do not diminish the existing and planned use of the Airport.¹⁷

As noted above, the Respondent never consented to fueling practices beyond those described in the Scott lease. [FAA Exhibit 1, Item 10, exhibit B, ¶3] An affidavit provided by Steven A. Wright, Airport Properties Manager at GMIA raises additional concerns:

“Sterling’s hangars are currently located in a row of hangars designated for based corporate aircraft storage near the intersection of Taxiway ‘P’ and Taxiway ‘B.’ Taxiway ‘B’ is used by large commercial airline aircraft. Safety concerns increase as more aircraft use these taxiways. For this reason, GMIA’s long term Master Plan anticipates that General Aviation support activities will be located away from the intersection of Taxiway ‘P’ and Taxiway ‘B.’

If Sterling succeeds on its Complaint and is allowed to fuel a large number of aircraft that Sterling neither owns nor controls, as if Sterling were an FBO, then safety concerns are likely to arise as a result of the increased taxiing activity of General Aviation aircraft mixed with the larger airline aircraft already using the taxiways near Sterling’s facilities.” [FAA Exhibit 1, Item 7, exhibit B, ¶22 and 23]

The Director reviewed these concerns with a Senior Engineer in the FAA’s Great Lakes Region. The engineer noted that the cumulative impact of significant, additional fueling activities on Taxiway P could result in capacity and congestion concerns for the air traffic control tower. [FAA Exhibit 1, Item 20]

¹⁷ Grant Assurance 19, *Operation and Maintenance* requires, in pertinent part, “[t]he airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned and 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.”

Grant Assurance 22 at (h) and (i) provides that an airport sponsor may treat dissimilarly, dissimilar aeronautical uses of the airport. This is especially true when it comes to matters of safety and the airport's operational efficiency. [See FAA Order 5190.6B ¶11.5.c] The Respondent is obligated¹⁸ to ensure that any future rights negotiated with the Complainant do not create an adverse impact on safety or limit the future utility of the airport as planned.

Conclusion of Prong 2

The Complainant cannot establish that it is similarly situated. This effectively precludes the Director from finding unjust discrimination. Grant Assurance 22 permits an airport sponsor to treat dissimilar aeronautical uses of the airport in a dissimilar manner.

Conclusion of Issue 1

The Complainant and Scott Aviation assumed and exercised broader fueling rights than those contained in its actual lease with the Respondent for over 20 years. Once the Respondent became aware of this situation, it took steps to enforce the terms stipulated in its lease with the Complainant. This does not constitute a violation of Grant Assurance 22, and the Director will not abrogate a valid lease simply because the Complainant now realizes that it does not contain the explicit rights it desires.

In order to sustain a finding of unjust economic discrimination, a complainant must establish that it requested similar terms and conditions as other similarly situated aeronautical users and was denied for unjust reasons. First and foremost, the Complainant agreed to more limited fueling rights when it assumed the Scott lease in 2004 and again when it exercised its option to extend its lease in 2007. Secondly, even if the Complainant had petitioned the County to expand its fueling rights in 2004 or 2007 and was denied, the Director does not find the Complainant to be similarly situated to the Cessna Citation Service Center. The Record identifies the Complainant as an aircraft charter and taxi service provider and aircraft maintenance facility. Moreover, the Complainant's own website describes a broader offering of services, and contradicts its agreement with the County. Lastly, the Respondent may treat dissimilar users in a dissimilar manner when its distinctions are reasonable. The Director dismisses the Complainant's allegations with regard to Grant Assurance 22, *Economic Nondiscrimination*.

Issue 2: *Whether the Respondent has granted an Exclusive Right to The Cessna Aircraft Company by refusing to recognize the Complainant as a Specialized Aircraft Repair Service operator in violation of 49 U.S.C. § 47107(a)(4) and Grant Assurance 23, Exclusive Rights.*

The Complainant states:

¹⁸ Grant Assurance 29, *Airport Layout Plan*, requires an airport to "keep up to date at all times an airport layout plan of the airport showing... the location and nature of all existing and proposed airport facilities and structures... The sponsor will not make or permit any changes or alterations in the airport or any of its facilities which are not in conformity with the airport layout plan as approved by the Secretary and which might, in the opinion of the Secretary, adversely affect the safety, utility or efficiency of the airport."

“Milwaukee County’s implicit refusal to recognize the fact that Sterling meets the requirements to provide Specialized Aircraft Repair Services, as defined by the Minimum Standards, is a violation of Grant Assurance 23, Exclusive Rights.”
[FAA Exhibit 1, Item 1, ¶5]

As noted above, the Record contains no evidence to establish that the Complainant requested such designation from the Respondent. The Complainant provides no evidence to establish that Cessna is recognized as a Specialized Aircraft Repair Service operator. In fact, the Respondent states that neither party is, nor has applied to be, a Specialized Aircraft Repair Service operator. [FAA Exhibit 1, Item 5, ¶ 10]

In a Part 16 investigation, the Director weighs the documentation and information submitted to the Record by a preponderance of evidence. Here, the record does not show that another party similarly situated to the Complainant received preferential treatment denied to the Complainant in similar situations. [See Richard M. Grayson and Gate 9 Hangar, LLC v. DeKalb County, Georgia, FAA Docket No. 16-05-13, (February 1, 2006) (Director’s Determination) at 11] The Record fails to substantiate Complainant’s claim. As such, the Director dismisses this allegation.

Issue 3: *Whether the Respondent has granted an Exclusive Right to The Cessna Aircraft Company by refusing to allow the Complainant the right to fuel its customers, business invitees, and guests in violation of 49 U.S.C. § 47107(a)(4) and Grant Assurance 23, Exclusive Rights.*

The Complainant states:

“Milwaukee County expressly granted Cessna the right to fuel ‘customers, business invitees, or guests’ with no reference to the Minimum Standards. The refusal to grant a similar right to Sterling is a grant of an exclusive right to Cessna.” [FAA Exhibit 1, Item 1, ¶5]

The Respondent denies the allegation that it has granted an exclusive right to Cessna. [FAA Exhibit 1, Item 5, ¶5]

In the Complainant’s second pleading, it clarifies that its allegations related to Grant Assurance 23 are dependent upon its allegations regarding Grant Assurance 22. The Complainant states:

“...Sterling has established that Cessna and Sterling are similarly situated entities, yet the County prefers to grant Cessna the exclusive right to fuel ‘its customers, business invitees and guests.’ This dissimilar treatment amounts to both a violation of Assurance 22 and 23.” [FAA Exhibit 1, Item 9, p. 6]

The Complainant cites Maxim United, LLC v. Board of County Commissioners of Jefferson County, Colorado, FAA Docket No. 16-01-10, (April 2, 2002) (Director’s Determination) (Maxim) in support of this reasoning. In Maxim, the Complainant sought self-fueling rights similar to those granted to other tenants. The Complainant then successfully established that it

was similarly situated to two other tenants with contemporaneous leases. Lastly, because only Maxim was prohibited from self-fueling, the Director found that a constructive exclusive right was granted to the group of other tenants who were allowed to self-fuel during this same period.

The extant case is quite different. Sterling seeks to obtain a right to fuel aircraft that is not provided for by its lease with the County. Fueling is a privilege granted by an airport sponsor to a prospective aeronautical service provider. It is not a right that may be exercised at will by a prospective service provider. Secondly, the Complainant consented to limited rights to fuel when it assumed Scott's lease in 2004 and then extended that lease in 2007. Most significantly, the Complainant has not established that it is similarly situated to any other aeronautical service provider exercising broader fueling rights. Given these stark differences, the Director does not view the findings made in Maxim as applicable to this Determination.

Grant Assurance 23, *Exclusive Rights*, prohibits an airport sponsor from granting to one entity the right to provide a particular aeronautical service to the public while preventing other similarly situated entities from offering the same aeronautical service. FAA Order 5190.6B defines an exclusive right as, "a power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege or right." [FAA Order 5190.6B, ¶8.2.]

FAA Advisory Circular 150/5190-6, *Exclusive Rights at Federally-Obligated Airports*, notes that the exclusive rights prohibition has existed since 1938. Its purpose "is to prevent monopolies and combinations in restraint of trade and to promote competition at federally-obligated airports. This Advisory Circular further states "[s]ignificant to understanding the exclusive rights policy, is the recognition that it is the impact of the activity, and not necessarily the airport sponsor's intent, that constitutes an exclusive rights violation." Therefore, the Director will analyze the impact of Cessna's broader fueling rights.

The Complainant asserts the gravamen of the Complaint is that "both Sterling and Cessna are still similarly situated aeronautical service providers with regard to their repair service classification at GMIA..." [FAA Exhibit 1, Item 1, ¶2] Scott Air was certified as a Part 145 Aircraft Repair Station on September 1, 1993; this is approximately four years after Cessna executed its lease. [FAA Exhibit 1, Item 1, ¶6] Scott Air's lease was amended so that it could perform aircraft engine repairs and maintenance services in October of 2003. [FAA Exhibit 1, Item 17, exhibit C] Sterling executed its most recent Commercial Operating Permit to perform airframe and engine maintenance and repair services on June 2, 2009. [FAA Exhibit 1, Item 17, exhibit B] The fact that Cessna may fuel its customers, business invitees, and guests has not precluded the Complainant from offering competing aircraft maintenance and repair services with gross revenues in excess of one million dollars in 2008. [FAA Exhibit 1, Item 1, ¶2 and FAA Exhibit 1, Item 8, exhibit A, ¶4]

GMIA's Minimum Standards prescribe requirements for FBOs under the operating category of line services. [FAA Exhibit 1, Item 5, AF7] FBOs providing line services are the only aeronautical service providers authorized by the Minimum Standards to sell fuel commercially to the general public. [FAA Exhibit 1, Item 1, exhibit B, p. 1 and FAA Exhibit 1, Item 5, AF7] Although only one FBO is currently operating at the Airport, the Respondent solicited for a

second FBO which was selected in June 2008.¹⁹ [FAA Exhibit 1, Item 5, AF17 and AF18] The Complainant opted not to respond to this solicitation and states that it has no desire to operate an FBO. [FAA Exhibit 1, Item 5 AF18; FAA Exhibit 1, Item 8, AF 18; FAA Exhibit 1, Item 8, exhibit A, ¶3] Given that one FBO is permitted to sell fuel commercially and GMIA took steps to establish a second FBO, the Director cannot conclude that Cessna has an exclusive right to fuel aircraft it does not own or lease.

Cessna's fueling rights are conveyed through its lease. However, there is nothing in the Cessna lease which would prohibit the Respondent from conferring the same or similar privilege to another aeronautical service provider. The Complainant acquired a lease with different terms as compared to Cessna. An airport sponsor does not have an obligation to award new rights requested by its aeronautical tenants, especially if such rights would not be consistent with the airport's minimum standards or violate the contract rights of other aeronautical tenants. [*See, Penobscot; Wilson* at 12-13; *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 17; *Aerodynamics FAD* at 11; and *Rick Aviation* at 28]

Cessna enjoys a privilege which may be unique at this time. But the plain language contained in the lease does not bar other aeronautical service providers from potentially securing the same type of privilege. Moreover, the impact of this privilege has not precluded other FBO aeronautical service providers from providing competing services or engaging in the commercial sale of fuel under the Minimum Standards. Therefore, the Record, by a preponderance of reliable and probative documentation and information, does not support the allegation that the Respondent has granted an exclusive right in violation of Grant Assurance 23.

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 refusal to grant the Complainant the same fueling rights as those granted to another aeronautical service provider does not constitute unjust discrimination in violation of 49 U.S.C. § 47107(a)(1) or Grant Assurance 22, *Economic Nondiscrimination*.
- (2) The Respondent has not granted an Exclusive Right to The Cessna Aircraft Company by refusing to recognize the Complainant as a Specialized Aircraft Repair Service operator. This does not constitute a violation of 49 U.S.C. § 47107(a)(4) or Grant Assurance 23, *Exclusive Rights*.
- (3) By refusing to allow the Complainant the right to fuel its customers, business invitees, and guests, the Respondent has not granted an Exclusive Right to The Cessna Aircraft Company in violation of 49 U.S.C. § 47107(a)(4) or Grant Assurance 23, *Exclusive Rights*.

¹⁹ GMIA selected Mercury Aviation's FBO proposal; however, Mercury Aviation has yet to begin construction of its new facilities due to economic uncertainties. [FAA Exhibit 1, Item 5, AF18]

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

April 13, 2010

Date