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The Use of FAA Part 16 to Enforce Federal Grant Assurances Agreed to by Publicly Funded Airports

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Airports are the lifeblood of communities in the United States. They are "essential facilities" with regard to commerce, cargo, business and leisure travel. Airports help us interact with our fellow Americans (and citizens of the world) and keep us connected. The vast majority of airports are operated by well-intended public servants that help ensure that airport services are fairly priced and fully available to the traveling public and business community. Unfortunately, there are other instances in which local airport users or service providers have opted instead to treat the local airport as their personal domain or fiefdom, or at best, like a privately-owned shopping mall. Power corrupts and absolute power corrupts absolutely, and in too many situations local bureaucrats or aircraft owners have assumed inordinate powers with regard to how the airport is operated and who can access the airport for aeronautical purposes or uses. In some situations monopolies have been allowed to exist to the financial windfall of a single service provider (*e.g.*, a fixed base operator) but to the economic detriment of competitors and consumers.

And this is where 14 C.F.R. Part 16 plays an important role. In theory, the Part 16 process can be the "great equalizer" whereby anticompetitive airport practices are nipped in the bud and the airport transforms into a better-run public utility. The rules and practices are in place to fulfill this role. Unfortunately, the backlog and delay in Part 16 decisions from the FAA Office of Airport Compliance and Management Analysis ("FAA Airports") poses a serious challenge to the efficacy of the Part 16 program. "Justice delayed is justice denied," and part of infrastructure promotion should be allocation of additional resources so that the FAA Airports timetable transitions back to 6 to 12 months versus the more typical 2.5 years or more for a Director's Determination to be issued.

Overview of a proceeding pursuant to 14 C.F.R. Part 16

The most common circumstances in which an airport user files a Part 16 complaint is when access to the federally-funded airport is either denied or unreasonably restricted. For federally-funded airport "facilities that are directly and substantially related to air transportation, regardless of whether an air carrier or user is a tenant, subtenant, or nontenant, the sponsor must impose nondiscriminatory and substantially comparable rates, fees, rentals, and charges on all air carriers and users that assume similar obligations, use similar facilities, and make similar use of the airport." FAA Airport Compliance Order 5190.6B, § 9.2; *see also* Grant Assurance 22. Title 49 U.S.C. 47101, *et seq.*, provides for federal airport financial assistance for the development of public-use airports under the Airport Improvement Program ("AIP") established by the Airport and Airway Improvement Act of 1982, as amended. Title 49 U.S.C. 47107, *et seq.*, sets forth assurances to which an airport sponsor agrees as a condition of receiving federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation

between the airport sponsor and the federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. FAA Order 5190.6B, Airport Compliance Manual (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.

Consider the example of *Skydance Helicopters, Inc. v. Sedona Oak-Creek Airport Auth.*, 16-02-02, 2003 WL 1524500, *22 (FAA) (March 7, 2003) (Director's Determination), where FAA ruled that an airport sponsor violated Grant Assurances by improperly refusing to allow an aeronautical services provider to have a license that reflected the 30-year lease which it was executing. The FAA stated:

> "Making a substantial capital investment in any airport carries a level of financial risk for the aeronautical or commercial operator making that investment. The Respondents' two-year renewable license could burden the potential investor with challenges in obtaining favorable financing. The provisions allowing for termination at the sole discretion of the Authority — with seven days to quit and no appeal options — severely impacts the investor's control over maintaining a continued revenue stream to support its initial investment. The Respondents did not address the Complainant's concerns regarding the impact of a two-year renewable license on the security of the Complainant's investment.
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> The license requirement, with its two-year term and restrictive provisions, discourages private investment in airport facilities.
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> Private investment, combined with Federal financial assistance and airport user fees, collectively supports the operation of the nation's airports. When an airport owner imposes unreasonable barriers to private investors, it excludes this essential ingredient in developing a viable airport. In the process, it jeopardizes the Federal investment in those facilities.
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> The two-year license requirement, as presented, unjustly discriminates against those aeronautical operators asking the airport to give up a certain level of flexibility and control in exchange for making a substantial investment. The nature of the renewable license favors those aeronautical operators who are willing to leave the control and the risk in the hands of the Airport Authority."

2003 WL 1524500, at *24.

Anyone considering a Part 16 case should review closely the FAA Rules of Practice of Part 16 proceedings, as there are specific requirements that if ignored will result in the case being dismissed. For example, many Part 16 complaints are summarily tossed by FAA Airports because the complainant filed to certify that it made the requisite good-faith efforts to resolve the matter without FAA involvement.

What does "victory" look like in a Part 16 case? It is not damages or injunctive relief. Typically, it will be a "Corrective Action Plan" ("CAP") that FAA orders the airport sponsor to pursue to fix the grant assurance violation. Part 16 cases focus on current conditions, not the past. So if an airport was unreasonable in the past but on the day of the Part 16 Director's Determination is complying with its federal Grant Assurance obligations, the complaint will

be dismissed without a CAP being ordered. But if the complainant proves that there is ongoing noncompliance, then the CAP is the ticket for the violations to be cured.

The ultimate cudgel of the FAA is to deny federal funds until compliance is achieved. Fortunately, this threat influences reasonable airport leaders to change their misconduct. Money talks in the airport world. However, 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.

Five Key Things to Know about Part 16 Litigation

1. The Primary Grant Assurances at Issue in Part 16 Cases are Grant Assurance 22 and Grant Assurance 23

Grant Assurance 22(a), titled Economic Nondiscrimination, states that the airport sponsor "will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport." complainant does not establish a violation of Assurance 22 (unjust discrimination) simply by showing differences between two leases. The FAA has found that differences in lease terms executed at different points in time can be justified by the market conditions present at the time of lease execution. (Wilson Air Center, LLC v. Memphis-Shelby County Airport Authority, FAA Docket No. 16-99-09, Final Decision and Order (August 30, 2001)). Grant Assurance 22 prohibits only unjust economic discrimination, not all economic discrimination.

Grant Assurance 23, titled Exclusive Rights, states that an airport sponsor "will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public." It adds an important exception: that "the providing of the services at an airport by a single fixed-based operator shall not be construed as an exclusive right if both of the following apply:

a. It would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and

b. If allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport."

In addition, the airport may not, "either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities, including, but not limited to charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity, 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." *See Skydance Helicopters*, 2003 WL 1524500, at *27 ("The Complainant argues that it was prohibited from constructing hangar and office facilities on the airport under reasonable terms and conditions that have been extended to others engaged in the same activity. The record indicates that other commercial operators on the airport who have constructed hangars did so under long-term leases. By unjustly discriminating against the Complainant, the Authority has denied the Complainant a right or privilege (*i.e.*, a 30-year lease term) enjoyed by others making similar use of the airport. An exclusive rights

violation occurs when the airport sponsor excludes others, either intentionally or unintentionally, from participating in an on-airport aeronautical activity."); *id*. ("The Respondents, through their policies and practices, have constructively granted an exclusive right by imposing requirements that discourage competition among aeronautical service providers at Sedona Oak-Creek Airport in violation of Title 49 U.S.C. § 40103(e), and related Federal Grant Assurance 23, *Exclusive Rights*.")

It is important to note that Grant Assurance 23 is grounded in antitrust law. It therefore may me key to demonstrate that the airport is a "relevant market" and that the exclusive right being granted has the effect of abusing monopoly power.

2. The Complainant Has the Burden of Proof

The complainant has the burden of proof and needs to make sure that all relevant evidence is introduced into the agency record. To raise an issue with the FAA Associate Administrator on appeal of the Director's Determination, the issue and supporting facts should be presented in the first instance to FAA Airports. 14 C.F.R. 16.33(f) provides that "*Any new issues or evidence presented in an appeal or reply will not be considered unless accompanied by a petition and good cause found as to why the new issue or evidence was not presented to the Director. Such a petition must:*

> *(1) Set forth the new matter;*
>
> *(2) Contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and*
>
> *(3) Contain a statement explaining why such new issue or evidence could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed."*

The decision of the FAA Associate Administrator can be appealed to the U.S. Court of Appeals for the D.C. Circuit or the Circuit where the airport lies, but arguments must be exhausted before the FAA. See 49 U.S.C. 46110(d) ("Requirement for Prior Objection.— In reviewing an order under this section, the court may consider an objection to an order of the . . . Administrator. . . only if the objection was made in the proceeding conducted by the . . . Administrator . . . . or if there was a reasonable ground for not making the objection in the proceeding"); 14 C.F.R. 16.247. A "Director's Determination" or an initial decision of a hearing officer becomes the "final decision" of the Associate Administrator if it was not timely appealed to the Associate Administrator.

3. Part 16 Litigation is Critical for Our National Airport System

Part 16 litigation is critical to prevent airport sponsors acting like private mall owners or insular flying clubs; the key for sponsors is to act *reasonably* with regard to the airport, including access to the airport. Nevertheless, airports that act in response to difficult tenants may overcome a Part 16 challenge if the evidentiary record supports the actions. In *Aero Ways, Inc. v. Delaware River and Bay Authority*, 16-09-12 (August 30, 2010) (Director's Determination), Aero Ways alleged that the operator of the New Castle, Delaware airport improperly precluded the complainant from self-servicing its own aircraft. The FAA stated that principles outlined in *SeaSands Air Transports Inc. v. Huntsville-Madison County Airport Authority*, FAA Docket No. 16-05-17, (August 28, 2006) (Director's Determination), were applicable and offered important guidance. In SeaSands, the airport sponsor terminated its relationship with the Complainant as result of its unprofessional behavior and nonpayment of rent. The Complainant alleged that this action constituted an unreasonable denial of access. The Director stated: "An airport sponsor acts as a proprietor with regard to managing its airport to certain reasonable levels of service,

personal decorum, business professionalism and financial responsibility. Grant assurance 22 prohibits such an airport sponsor from exercising its proprietary rights to deny aeronautical access unreasonably. This allows a sponsor to apply a standard for reasonable security, personal behavior, and rules of tenancy." The FAA in Aero Ways explained that in order to show unjust discrimination, the airport user needed to demonstrate that another airport user also violated airport tenant rules but was sanctioned less severely or not at all. FAA emphasized that, "Grant Assurance 22 requires the sponsor to make the airport available to aeronautical users on reasonable terms, but still recognizes the sponsor's proprietary right to establish rules for how business will be conducted at the airport." "It is the prerogative of the airport owner or sponsor to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must be fair, equal, and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied."

4. Involvement by the FAA Associate Administrator for Airports Should Be Properly Timed

Involvement by the FAA Associate Administrator for Airports if not properly timed can result in that official having to recuse himself or herself from the case, including an appeal of the Director's Determination. 14 C.F.R. 16.301 is titled "Prohibited Ex Parte Communications." It provides that the prohibition applies "from the time a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply at the time of the acquisition of such knowledge." On the one hand, this means that once a case is set for "hearing" the parties should not contact the FAA decision makers outside of formal case channels. On the other hand, since the vast majority of Part 16 cases are never noticed for a "hearing" (which only the airport can request, and not the complainant) the ex parte rules presumably do not strictly apply for a Part 16 case in most respects.

5. The FAA May Initiate a Part 16 Complaint Without a Complaint Filed

The FAA may initiate a Part 16 complaint without an airport user filing a complaint. Although most Part 16 cases are initiated by an actual or prospective airport user that is unhappy with airport treatment, the FAA can also file its own complaint. This happened in the Love Field Litigation in 2015. The dispute originated in October 2014 when Dallas Love Field denied Delta's request for five flights per day. Eventually the City of Dallas, as the airport sponsor, filed a civil case in federal court in Dallas – in June 2015. The FAA on its own filed a Part 16 case. After briefing by the parties, the FAA decided to withdraw its own complaint.