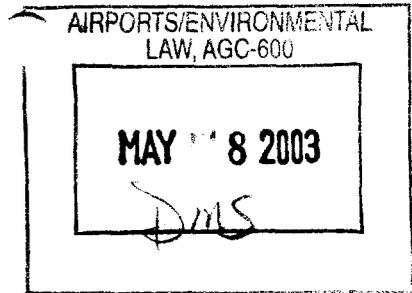


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FAA-02-13068-15

May 8, 2003

**BY MESSENGER**

Office of the Chief Counsel (Room 922B)  
ATTN: FAA Part 16 Airport Proceedings Docket (AGC-610)  
Federal Aviation Administration  
800 Independence Avenue, S.W.  
Washington, DC 20591-0004

Re: Skydance Helicopters, Inc. d/b/a Skydance Operations, Inc. v. Sedona Oak-Creek  
Airport Authority and Yavapai County, Arizona, FAA Docket Number 16-02-02

Dear Ladies and Gentlemen:

Enclosed is an executed original and three copies of the Complainant's Opposition to the Motion for Leave to Supplement the Record and for Reconsideration of the Director's Determination filed by Respondents on April 28, 2003.

Sincerely,

Marshall S. Filler  
Counsel to Complainant Skydance Helicopters, Inc.

Enclosures

AGC-610  
MAY 15 11 50 AM '03

U.S. DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC 20591-0004

SKYDANCE HELICOPTERS, INC. d/b/a )  
SKYDANCE OPERATIONS, INC., )  
 )  
Complainant )  
 )  
vs. )  
 )  
SEDONA OAK-CREEK AIRPORT )  
AUTHORITY )  
 )  
and )  
 )  
YAVAPAI COUNTY, ARIZONA )  
 )  
Respondents )  
 )

DOCKET NO. 16-02-02

**COMPLAINANT'S OPPOSITION TO MOTION FOR LEAVE TO SUPPLEMENT  
THE RECORD AND  
FOR RECONSIDERATION OF THE DIRECTOR'S DETERMINATION**

COMMUNICATIONS WITH RESPECT TO THIS DOCUMENT SHOULD BE  
SENT TO:

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Dated: May 8, 2003

U.S. DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC 20591-0004

SKYDANCE HELICOPTERS, INC. d/b/a	)	
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Complainant	)	
	)	
vs.	)	
	)	
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AUTHORITY	)	
	)	
and	)	
	)	
YAVAPAI COUNTY, ARIZONA	)	
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	)	

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**COMPLAINANT’S OPPOSITION TO MOTION FOR LEAVE TO SUPPLEMENT  
THE RECORD AND  
FOR RECONSIDERATION OF THE DIRECTOR’S DETERMINATION**

**Introduction**

Pursuant to 14 CFR §16.19 (c) of the Federal Aviation Administration’s (FAA) Rules of Practice for Federally-Assisted Airport Enforcement Proceedings, 14 CFR §16.19(c), Complainant Skydance Helicopters, Inc. d/b/a Skydance Operations, Inc. (“Complainant” or “Skydance”) submits this Opposition to the Motion for Leave to Supplement the Record and for Reconsideration of the Director’s Determination filed by Respondents Sedona Oak-Creek Airport Authority d/b/a the Sedona Airport Administration (SAA) and Yavapai County, Arizona (collectively, the “Respondents”) on April 28, 2003.

Complainant urges:

- (1) The Associate Administrator to deny Respondents’ Motion for Leave to Supplement the Record because Respondents’ motion fails to meet the required legal standard.

(2) The Director to deny Respondents' Motion for Reconsideration of the Director's Determination because the Director properly analyzed the Record of Determination. The Director's Determination was based on the applicable law, FAA policy, a review of all arguments and supporting documents submitted by the parties, and the administrative record in this proceeding.

### **Discussion and Analysis**

I. The Associate Administrator should deny Respondents' Motion for Leave to Supplement the Record because it fails to meet the required legal standard.

It is a well established tenet of administrative law that in "an internal agency appeal process new evidence need not be admitted unless the evidence was not available and could not have been discovered or presented at the prior proceeding." Ricks v. Millington Municipal Airport Authority, Docket No. 16-98-19 Final Decision and Order, 1999 WL 1295210 (F.A.A.) (December 30, 1999), citing *Charles H. Koch, Jr. Administrative Law and Practice*, Vol. 1, § 6.76 (1997).

Not surprisingly, the FAA has consistently applied this legal principle to its Part 16 decisions. Respondents are mistaken when they cite Turner v. City of Kokomo for the proposition that they may "raise new issues on appeal." [Respondents' Motion for Leave to Supplement the Record and for Reconsideration of the Director's Determination, or in the alternative, an Appeal of the Director's Determination, at page 3]. Turner v. City of Kokomo, Docket No. 16-98-16 Final Decision and Order, 1999 WL 636158 (FAA) (July 27, 1999).

The proper standard for introducing new evidence on appeal is stated in Ricks:

[T]he new evidence need not be admitted unless [it] was not available and could not have been discovered or presented at the prior proceeding.... The new evidence will not be considered if the party could reasonably have known of its availability. Ricks at 15 n.3.

Pursuant to 14 CFR §16.23(b)(2) and (g), the parties are required to have submitted all their pleadings "with all documents then available in the exercise of reasonable diligence" in support of their case. The Director can then rely entirely on the documents contained in the record. 14 CFR §16.29(b)(1).

The Respondents could have attempted to submit this new information by filing their second authorized pleading (a rebuttal in accordance with 14 CFR §16.23(f)). If they had done so, they could have attached their exhibits as a matter of right. Having missed that opportunity, they could have filed the instant motion under 14 CFR §16.19(a) at any time prior to the issuance of the DD.

There was ample opportunity to do so here because the DD was issued 11 months after the Amended Complaint was filed.

Instead, Respondents now request the FAA to consider these additional documents either on reconsideration or appeal. Respondents not only failed to mention the governing legal standard but also made no attempt to demonstrate their compliance with it. We hardly see how the purpose of Part 16 (i.e., to “expedite substantially the handling and disposition of airport related complaints,” 61 FR 53998 (1996)), would be served by granting these motions.

The Respondents’ supplemental exhibits include “new” affidavits, a litany of incident reports (many of which have nothing to do with Complainant) and sample leases at other airports not parties to this proceeding. All of it could have introduced at the proper time. Indeed, these same arguments were previously asserted by Respondents to justify their unreasonable and discriminatory treatment of Complainant. The Director was fully aware of the airport’s safety concerns and still found that the Respondents had violated Grant Assurances 22 and 23 by attempting to impose an unreasonable and unjustly discriminatory commercial license and lease term.

For the foregoing reasons the Associate Administrator should deny Respondents’ Motion for Leave to Supplement the Record. Should the Associate Administrator decide to grant Respondents’ motion, Complainant requests an additional 30 days to fully evaluate the supplemental information before being required to submit its Reply to Respondents’ Appeal.

II. The Director should deny Respondents’ Motion for Reconsideration. The Director properly analyzed the applicable law, FAA policy, the arguments and supporting documents submitted by the parties and the administrative record in this proceeding.

Respondents move for Reconsideration of the DD to “permit the Director to more fully consider the relevant facts and examine the potentially far-reaching implications of his initial conclusion that terms of the commercial license form an unreasonable requirement for access.” [Respondents’ appeal page 2]. Further, Respondents “respectfully submit that the Director made several errors in his findings of fact and conclusions of law.” [Respondents’ appeal page 3]. In short, Respondents urge the Director to reconsider his Determination that the Respondents’ actions (for the purpose of leasing space for construction of a hangar and office under a long-term lease arrangement) constitute unreasonable denial of access and unjust discrimination in violation of Title 49 U.S.C. §47107 (a)(1)(5), and Federal Grant Assurance 22, Economic Nondiscrimination.

### A. Supplemental Evidence

As stated previously, the Respondents have not provided any grounds for considering the new documents.

Part 16 does not specifically provide for a Motion for Reconsideration and therefore does not articulate the applicable legal standard for determining whether this motion should be granted. However, an analogy to 14 CFR Part 13 is particularly useful since the provisions governing motions under Part 16 are based on similar provisions in the "FAA Rules of Practice in Civil Penalty Actions (14 CFR part 13, subpart G)."

14 CFR §13.234 governs a petition to reconsider a final decision under Part 13. Section 13.234 (c) (2) applies when the petition is based "in whole or in part, on new material not previously raised in the proceedings." Section 13.234 (c)(2) defines the standard for introducing new evidence and provides that "the party shall explain, in detail, why the new material was not discovered through due diligence prior to the hearing." (Emphasis added). Indeed, Respondents provided no explanation at all and a cursory review of the Respondents' supplemental exhibits demonstrates that the new evidence was available prior to the issuance of the DD.

### B. The Director made no material errors in his findings of fact and properly based his Determination on the applicable law, FAA policy, review of all arguments and supporting documents submitted by the parties, and the administrative record in this proceeding.

Respondents' arguments can be summarized as follows:

(1) The Director erred in its consideration of the 10-year lease because he failed to recognize that Respondents would be constructing the hangar; therefore, the shorter lease term was reasonable under the circumstances.

(2) The Director erred in concluding that private hangar tenants were "similarly situated" to Skydance because the Complainant does not share the same characteristics; therefore, the DD's basis for finding unjust discrimination was flawed.

(3) The Director erred in finding the license provisions unreasonable because he did not make specific findings of unreasonableness for each provision of the license. Respondents also assert that unilateral termination of a commercial lease is a common provision among airport licenses and that such a practice, in itself, is not unreasonable.

(1) The 10-year lease

Respondents are correct in their assertion that the 10-year lease contemplated that the airport would build the hangar for Complainant and that this was omitted from the DD. The record also reflects that Respondents behaved in a bizarre and erratic manner throughout the negotiations with Complainant.

On October 9, 2000, the Respondent SAA decided not to renew Complainant's lease when it expired on March 31, 2001. Then, on November 1, 2000, it agreed to proceed with negotiations for a 30-year lease in which Complainant agreed to relocate his operations and construct a new hangar and office facilities. [Complaint, Exhibit 7]. Several months later, it provided Complainant with an unreasonable two-year renewable license agreement that contained several objectionable provisions that are described more fully below. [DD at pages 7-10].

When Complainant raised legitimate objections to the license agreement, Respondent SAA withdrew the 30-year lease offer. Because SAA only had 29 years and six months remaining on its lease with the county, Complainant was offered a two-year lease! In each of the lease options presented to Complainant, however, the Respondent SAA insisted on its unreasonable two-year license agreement.

With respect to the 10-year lease on which Respondents rely in their motion, the construction costs would have been passed on to Complainant in the form of dramatically increased rent (13% annually of the capital costs plus 4.4 cents per square foot). [Complaint, Exhibit 22]. This substantially exceeded the cost of a 30-year lease if Complainant built the hangar itself. In addition, Complainant would have had no ownership interest in the property.

Notwithstanding that the Director did not mention which party would construct the hangar when he discussed the 10-year lease in his Determination, the Director stated that he "cannot find those [10-year] lease terms unreasonable." [DD at page 31]. Because the Director did not rely on the fact cited by Respondents to reach his decision, it certainly cannot form a basis for a Motion for Reconsideration. Moreover, the Associate Administrator may consider Respondents' argument on appeal because the issue is clearly reflected in the record before the FAA.

(2) The "similarly situated" argument

The Respondents contend that the Director erred in concluding that the private hangar tenants were "similarly situated" to Skydance for purposes of lease comparison because Skydance does not share the same characteristics as that group. Therefore, the Respondents assert that the Director's finding of unjust discrimination is flawed.

First, the Director did not intend to provide a “legal definition” of the Complainant’s operations. The Director’s terminology in comparing Skydance with other tenants of the airport, as expressly stated in the DD, was used for “ease of reading.” [DD at page 4].

The Director pointed out that Respondents’ *Minimum Standards* do not address commercial operators constructing long-term leases although the FAA considers this to be a commercial aeronautical activity. Therefore, the Director reasoned that the Complainant’s willingness to invest in the airport and the level of risk associated with that investment made Complainant’s situation more closely resemble the private hangar owners’ more than the other tour operators’. [DD at page 28].

Second, the Director’s analogy to the hangar tenants for purposes of comparing the leases is proper and supported by the record. As defined in National Airlift, “similarly situated” tenants may be found when examining factors such as “level of investment, job creation, business type or other relevant factors.” National Airlift v. Fremont County Board of Commissioners, Docket No. 16-98-18 Final Decision and Order, (F.A.A.) (September 20, 1999). The Director properly followed the National Airlift standard to find that if Skydance, as a commercial operator, differs from the private hangar tenants; it shares with them the common characteristics of having a substantial financial investment in the airport and the interest of a long-term lease to recoup that investment. In the same regard, the Director distinguished Complainant from the other tour operators that were not proposing to make a similar investment to that of Complainant.

The Director adequately found that a long-term lease, coupled with an unreasonable two-year license, could impair the “business operation’s ability to generate sufficient return on its investment.” [DD at page 30]. The DD is amply supported by the record: a contemplated \$300,000 investment, the comparison to airport tenants having made similar investments to construct their own hangar, the level of risk accepted by the Complainant, and the consistency between the level of proposed investment and the acceptance of risk. All of these factors were examined in the light of Complainant’s request for a long-term lease. [DD at page 28]. The Director reached the appropriate conclusion:

...offering the Complainant lease terms coupled with a license agreement of significantly different lengths while offering other aeronautical operators [i.e., the private hangar tenants] same length/concurrent rental and license agreements is inconsistent with current airport practice and is, therefore, unjustly discriminatory. [DD at page 30].

### (3) The Objectionable Provisions of the License

Respondents contend that the Director erred in finding the license provisions unreasonable because he did not make specific findings for each objectionable provision of the license. Respondents also assert that unilateral termination of a commercial lease is a common provision among airport licenses and that such a practice, in itself, is not unreasonable.

The Director properly decided “the license provisions ... form an unreasonable requirement for access to a federally obligated public-use airport in violation of the grant assurances.” [DD at page 27]. The Director found that the two-year license was, in itself, unreasonable in this case because it discouraged private investment in airport facilities. [DD at page 29]. He also determined that several other provisions, taken together, exacerbated the situation. He certainly was not required to separately analyze each objectionable provision (including termination, revocation, breach of agreement and forfeiture of appeal rights) because the agreement presented for his review contained them all.

Moreover, the fact that other airports may have termination at will provisions is not particularly helpful when those agreements are not properly before the agency nor are they being examined in light of the record in this case. Moreover, Respondents have not shown that these provisions withstood either the scrutiny of the FAA or the courts.

Respondents cite Ashton for the proposition that the “FAA will not review the terms of a lease that allows an airport to evict a tenant at will. Such terms must be either distributed or applied in a discriminatory manner.” [Respondents’ appeal at page 23]. Ashton v. City of Concord, Docket No. 16-00-01 Director’s Determination, 2000 WL 1642458 (F.A.A.) (October 16, 2000). This proposition is taken out of context.

In Ashton, the Director decided that the Respondent was not in violation of 49 U.S.C. 47107 (a)(1) when it terminated the Complainant’s permit for use of a hangar. Ashton relates to the termination of a permit held by an individual that was convicted of trespassing into areas of the airport that were outside the permit area. In contrast, Complainant encountered problems with one tour operator while using an area designated for his operations by Respondent SAA.<sup>1</sup> In addition, Ashton was merely leasing a hangar that he did not build with his own funds as Complainant was proposing to do in this case.

Ashton signed the permit and was later evicted. Skydance refused to sign the license and continuously protested its unreasonableness and unjust discrimination. Further, the permit in Ashton contained appeal rights upon the eviction notice whereas Respondents’ license provided Complainant with no

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<sup>1</sup> Based on the Respondents’ own supplemental exhibits, Complainant was not the only tenant that encountered problems with this other operator.

such luxury. In fact, Respondents asserted in their Answer and Motion to Dismiss that Complainant even lacked standing to bring a Part 16 complaint because he was no longer a tenant! Now, they are invoking the same appeal rights that they attempted to deny Complainant in its license agreement. Finally, and contrary to the record in this case, Ashton did not present the Director with evidence showing that other "similarly situated tenants" were treated differently.

Respondents claim that "[a]dditional restrictions are appropriate where a prospective tenant does not comply with airport policy or safety procedures." [Respondents' appeal at page 26]. Respondents' continuing attempts to blame Complainant for every conceivable ill at the airport is understandable given their failure to address the merits of this case. As the Director indicated, "the Respondents were well within their authority to require additional standards for the conduct of business on the airport, but not standards that violate the grant assurances."

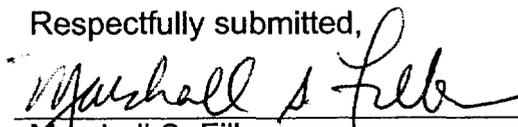
For the above-mentioned reasons, the Director should deny Respondents' Motion for Reconsideration based on the license provisions argument.

### **Conclusion**

For all the foregoing reasons, Skydance urges:

- (1) The Associate Administrator to deny Respondents' Motion for Leave to Supplement the Record because Respondents' motion fails to meet the required legal standard.
- (2) The Director to deny Respondents' Motion for Reconsideration of the Director's Determination because the Director properly analyzed the Record of Determination. The Director's Determination was based on the applicable law, FAA policy, a review of all arguments and supporting documents submitted by the parties, and the administrative record in this proceeding.

Respectfully submitted,



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May 8, 2003

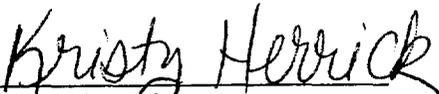
CERTIFICATE OF SERVICE

I, Kristy Herrick, certify that on May 8, 2003, I caused the executed original and three (3) copies of the foregoing Complainant's Opposition To Motion For Leave To Supplement The Record And For Reconsideration Of The Director's Determination to be hand-delivered to:

Office of the Chief Counsel (Room 922B)  
ATTN: FAA Part 16 Airport Proceedings Docket (AGC-610)  
Federal Aviation Administration  
800 Independence Avenue, S.W.  
Washington, DC 20591-0004  
ATTN: Frank San Martin

I further certify that on May 8, 2003, I have caused true copies of the document referenced above to be delivered, via messenger, to the following:

Kenneth P. Quinn, Esq.  
Jennifer E. Trock, Esq.  
Pillsbury Winthrop LLP  
1133 Connecticut Avenue, N.W.  
Washington, D.C. 20036

  
Kristy Herrick