

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 REPLY TO RESPONDENTS' APPEAL OF THE
DIRECTOR'S DETERMINATION**

Communications with respect to this document should be sent to:

Marshall S. Filler
Catherine Dépret
Obadal, Filler, MacLeod & Klein, P.L.C.
117 North Henry Street
Alexandria, VA 22314-2903
T: (703) 299- 0784
F: (703) 299-0254
E: msf@potomac-law.com
catherine@potomac-law.com

Dated: May 19, 2003

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I. Introduction

Pursuant to 14 CFR §16.33(c) of the Federal Aviation Administration's (FAA) Rules of Practice for Federally-Assisted Airport Enforcement Proceedings, 14 CFR §16.33(c), Complainant Skydance Helicopters, Inc. d/b/a Skydance Operations, Inc. ("Complainant" or "Skydance") submits this Reply to Respondents' Appeal of the Director's Determination¹ filed on April 28, 2003. Respondents are the Sedona Oak-Creek Airport Authority d/b/a the Sedona Airport Administration (SAA, or the Authority) and Yavapai County, Arizona (collectively, the "Respondents").

II. Status of Pending Motions

On May 8, 2003, Complainant submitted an Opposition to Respondents' Motions for Leave to Supplement the Record and for Reconsideration of the Director's Determination filed on April 28, 2003. As of the date of this filing, the FAA has not yet ruled on those motions.

¹ When citing to the Director's Determination, the abbreviation "DD" may also be used.

In the same pleading, Respondents also filed an Appeal of the Director's Determination in the event the Motion for Reconsideration is denied. Pursuant to 14 CFR §16.33(c), Complainant is required to reply to Respondents' appeal within 20 days after the date of service, or May 19, 2003. Accordingly, Complainant submits this Reply to Respondents' Appeal and respectfully requests that it be granted an additional 30 days to evaluate and reply to the additional documents offered by Respondents' in the event their Motion for Leave to Supplement the Record is granted.

III. Scope of review

In reviewing the Director's Determination, the Associate Administrator must determine (1) whether the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (2) whether each conclusion of law is made in accordance with applicable law, precedent, and public policy. Wilson v. Memphis and Shelby County Airport Authority, Docket No. 16-99-10 Final Agency Decision and Order, 2001 WL 1085348 (FAA) (August 30, 2001).

For the reasons set forth below, Complainant urges the Associate Administrator to affirm the Director's Determination.

IV. Background

To facilitate the Associate Administrator's review of Respondents' Appeal, the following two and one-half year timeline summarizes the salient facts of this case (all which are supported in the record), culminating in the issuance of the Director's Determination.

- October 9, 2000- In response to incidents involving several of the commercial tour operators at the Sedona Airport, SAA's Board of Directors (the Board) held a special meeting where it decided not to renew Complainant's rental agreement when it expired on March 31, 2001. At the same meeting, the Board voted to terminate the lease of another tour operator, Red Rock Biplanes. [Respondent's Answer and Motion to Dismiss, exhibits C, D and E].
- October 23, 2000- The Board approved the implementation of a commercial license for all aeronautical operators as a requirement for operating on the airport. [DD at page 13].
- October 31, 2000- Complainant and SAA met and agreed that Complainant would move its operation to a new and safer location to the undeveloped south end of the airport in exchange for a 30-year lease to construct a hangar and office. [Complaint exhibits 7 and 15].
- November 1, 2000- SAA sends letter to Complainant memorializing the October 31, 2000 discussions. The letter confirms that Complainant would construct an office and hangar on the proposed site. The airport would determine how road improvements would be made and implement them.

Complainant would be given a 30-year land lease with a monthly rent of 4.4 cents per square foot with increases tied to the federal consumer price index. [Complaint exhibit 7].

- February 10, 2001- SAA provided Complainant with a draft copy of the lease with a termination date of May 31, 2031. In the same letter, SAA mentioned that Complainant would be required to obtain a commercial license. This was the first time that Complainant had been informed of this requirement. The license agreement was not provided to Complainant at this time. [Complaint exhibit 10].
- February 12, 2001- Complainant requested a copy of the proposed business license. [Complaint exhibit 11].
- March 5, 2001- Complainant reiterated its request for a copy of the proposed business license. [Complaint exhibit 12].
- April 20, 2001- Complainant received the proposed license. [Complaint exhibit 15]. In part, the license agreement included the following provisions, all of which were contained in paragraph 3:
 - It was terminable immediately and at the will of SAA
 - It could be revoked with or without cause at the sole discretion of SAA
 - Upon licensee's breach, it had seven days to quit the premises
 - Licensee forfeited all appeal rights (including, of course, recourse under 14 CFR Part 16)
- April 25-May 10, 2001-Complainant and SAA exchange further correspondence regarding the lease and the license. [Complainant's Reply, exhibit 3].
- July 6, 2001- Complainant noted its serious concerns about the legality of the proposed license agreement. In the same letter, Complainant's counsel indicated that the proposed 30-year lease was "balanced, fair and reasonable" subject only to some minor additions. [Complaint exhibit # 17].
- July 30, 2001- Citing the fact that its lease with Respondent Yavapai County would expire in 29 years and 10 months (May 2031), SAA retracted its offer for a 30-year lease and instead proposed a standard two-year rental agreement and commercial license. [Complaint exhibit 18].
- August 8, 2001- Complainant advised SAA of its intention to file a complaint with the FAA, asserting that the proposed commercial license was "unfair and discriminatory". [Complaint exhibit 19].
- August 17 and 20, 2001- Complainant offered a revised draft of the license agreement to SAA's counsel. [Complaint exhibits 20 and 21].
- August 22, 2001- SAA rejected Complainant's proposed changes to the license and offered a 10-year lease in which SAA would construct the hangar for Complainant. The annual rent would be 4.4 cents per square foot plus 13% of all capital costs for development of the property. Complainant's principals were required to personally guarantee the lease. [Complaint exhibit 22].
- August 23, 2001- Skydance requested Tony Garcia of the FAA's Western Pacific Region to mediate the dispute with SAA, citing its inability to obtain fair and non-discriminatory treatment. [Complaint exhibit 24].

- September 6, 2001- SAA's counsel agrees to some revisions to the proposed license agreement; however, they were expressly conditioned on the approval of SAA's board that was never granted. [Respondents' Answer and Motion to Dismiss, Exhibit N].
- September 19, 2001- Counsel for the parties make their final attempt to negotiate changes to the license agreement. Following productive discussions, SAA's counsel agrees to submit the changes to his client for approval. SAA's [Complainant's Reply, exhibit 1].
- September 23, 2001- Counsel for SAA informed Complainant's counsel that SAA had rejected the changes and that Skydance would be required to sign the original license agreement provided to it on April 20, 2001. [Complainant's Reply, Exhibit 1].
- October 26, 2001- Mr. Garcia of the FAA concluded his investigation, finding that the license was reasonable and not unjustly discriminatory. [Complainant's Exhibit 25].
- October 29, 2001- SAA requested that Complainant either sign a new lease and license agreement or vacate the premises by November 12, 2001. [Complaint exhibit 29].
- November 13, 2001- Complainant evicted after refusing to sign license agreement.
- November 14, 2001- Complainant files a lawsuit in the Verde Valley Justice Court seeking restitution of the premises. The court transferred the matter to the Superior Court and the Complainant decided not to pursue the matter.
- March 5, 2002- Part 16 complaint filed.
- March 28, 2002- Part 16 Complaint dismissed without prejudice because of need to make Respondent Yavapai County a party to the proceeding.
- April 6, 2002- Amended Part 16 Complaint filed
- May 8, 2002- Complainant files a Notice of Claim and Statement of Claim in the local jurisdiction against Respondents.
- May 20, 2002- Respondent SAA filed Part 16 Answer and Motion to Dismiss.
- May 21, 2002- Respondent Yavapai County joins in SAA's Part 16 Answer and Motion to Dismiss
- May 30, 2002- Complainant filed a Reply under Part 16.
- No further pleadings filed by Respondent prior to the Director's Determination
- March 7, 2003- Director's Determination issued. The Director's findings and conclusions are set forth below:²

A. The Respondents' requirement for a renewable two-year business license agreement with restrictive provisions effectively denied the Complainant reasonable use and access to Sedona Oak-Creek Airport for the purpose of leasing space for the construction of a hangar and office under a long-term lease arrangement. The

² Because they are not directly relevant to the issues raised by Complainant, the evidence of potential additional violations of airport grant assurances and Federal Airport Act obligations noted by the Director are omitted. [DD page 37.]

Respondents' actions of offering a 30-year lease term to other airport tenants making a substantial investment in the airport, but not to the Complainant, constitutes unjust discrimination. Consequently, we find the Respondent in violation of Title 49 U.S.C. §47107(a)(1)(5), and related Federal Grant Assurance 22, Economic Nondiscrimination.

B. 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. [DD at page 37].

V. Discussion

A. Respondents' legitimate safety concerns do not justify denying Complainant reasonable use and access to Sedona Oak-Creek Airport.

Respondents argue that the Director did not fully understand their justification for imposing stringent license terms on its commercial operators (and an even more stringent combination of a license and short term lease agreement to Complainant). Respondents cited unprofessional behavior and potentially unsafe operations in general and of Complainant in particular.

As they attempted to do in the proceedings before the Director, Respondents are again blaming Complainant for every conceivable ill at the Sedona Airport, even citing incidents involving other tour operators. They offered numerous documents that could have, and indeed should have, been made a part of the record prior to the Director's Determination. As Complainant indicated previously, Respondents' have not made the requisite showing to admit these materials. [Complainant's Opposition to Motion for Leave to Supplement the record at pages 3 and 4]. Even if they had, they appear to be nothing more than a rehash of the same arguments made in their Answer and Motion to Dismiss.

Complainant was willing to sign a fair, reasonable and non-discriminatory commercial license agreement and the Director agreed "with the FAA Western Pacific Regional Headquarters, Airports Division, that the requirement for a license, as a standard by itself, does not form the basis for a violation of the Federal Grant Assurances." [DD at page 27]. However, license requirements cannot be used to circumvent the Federal Grant Assurances and deny Complainant reasonable use and access to a public-use airport.

The Director was fully aware of the problems Respondents were having with the airport's scenic tour operators. [DD at page 35]. Indeed, the Director carefully analyzed those incidents and concluded that they were "jeopardizing the safety

and efficiency of the airport.” [DD at page 35]. The Director agreed “that the Respondents were well within their authority to require additional standards for the conduct of business on the airport.” [DD at page 35]. These particular license requirements, however, violated Respondents’ federal obligations.

Much of the tension among the tour operators resulted from their proximity to one another. Indeed, this situation was of Respondents’ own making. Nevertheless, Respondent SAA asked Complainant to move to an undeveloped portion of the airport, build its own facility and receive a 30 year lease that would enable Skydance to recoup its planned \$300,000 investment. This is already well documented in the record and was acceptable to Complainant as a way to resolve the continuing problems with Red Rock Biplanes.

Respondents’ unjustified attempts to portray Complainant as a “bad apple” are perhaps best revealed by comparing the dates when the specific incidents occurred (**prior to October 31, 2000**) with Complainant’s specific objections to the commercial license that gave rise to this Part 16 proceeding (**subsequent to July 6, 2001**). Indeed, the airport’s desire to move Skydance to the undeveloped south portion of the field was designed to address the very safety issues that all parties and the Director have acknowledged required attention. SAA’s letter of November 1, 2000 reflected the parties’ agreement (from the meeting held only a day earlier) to put the previous incidents behind them and work toward a long-term solution. [Complaint exhibit 7].

In contrast, Complainant’s objections to the license agreement were not formally conveyed to SAA until July 6, 2001, over eight months after the authority’s November 1, 2000 letter. [Complaint exhibit 17]. These objections resulted in retaliation and retribution against the Complainant in the form of SAA’s withdrawal of its offer to enter into a 30-year lease. [DD at page 31]. Instead, SAA offered a two-year lease and commercial license in return for Complainant’s proposed \$300,000 investment. The justification offered by the Authority for this “about face” was that it had only in excess of 29 and one-half years left in its own lease with Respondent Yavapai County! This fact was clearly recognized by the Director, who also contrasted the Authority’s behavior in this case with prior instances in which it sought an extension from the County that would enable it to offer a longer-term lease to a prospective airport tenant. [DD at page 32].

B. The Combination of a long-term or short-term lease with a two-year license, as applied to Complainant, is unreasonable and unjustly discriminatory.

Federal Grant Assurance 22 ensures that a sponsor cannot treat “similarly situated” users differently without appropriate justification. As we will demonstrate below, Skydance is “similarly situated” to the airport’s private hangar tenants. Yet, when Complainant proposed a substantial investment in the airport (similar yet more substantial than the one made by private hangar

tenants), Respondents did not offer it the same opportunities to recoup that investment. Finally, Respondents provided no appropriate justification for treating two “similarly situated” tenants in such a disparate manner, thereby violating their obligation not to treat Complainant in a discriminatory manner.

1. Complainant's situation more closely resembles the private hangar tenants'.

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

The Director did not intend to suggest that Complainant, a Part 135 air carrier, was subject to the same FAA operating rules as a private hangar tenant. This is a Part 16 proceeding and the distinctions employed by the Director were based on existing FAA guidance and policy that requires an airport to negotiate in good faith with a tenant proposing to make (at the urging of the Authority) a substantial investment in airport property. [DD at page 36].

The Director's use of the term “aeronautical operator” (to describe the air tour operators) and “commercial operator” (to apply to those engaged in hangar construction) was used only for “ease of reading.” [DD at page 4]. The Director pointed out that Respondents' own Minimum Standards did not cover commercial operators subject to long-term leases although the FAA considers this to be a commercial aeronautical activity. [DD at page 26, footnote 19]. Therefore, the Director reasoned that the Complainant's willingness to invest in the airport and the level of risk associated with that investment made its situation more closely resemble the private hangar tenants than the other tour operators. [DD at page 28]. Furthermore, the Director rightfully found that, because of Skydance's willingness to make a substantial investment, the “[a]uthority would be *required* to treat the Complainant somewhat differently [from the other air tour operators] in order to maintain access to the airport on fair and reasonable terms.” [DD at page 28, emphasis in original].

Second, the Director's analogy to the hangar tenants for purposes of comparing the leases is proper and supported by the record. 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 recognized that Skydance, as a Part 135 commercial operator, differs from the private hangar tenants in the kind of service it provides. More importantly, however, 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 four operators that were not proposing to make a similar investment to that of Complainant.

2. Complainant was treated differently from “similarly situated” tenants without any adequate justification.

Respondents challenge the Director’s Determination regarding the dual license-lease requirements because even if it constitutes “disparate treatment, [their actions] are not unreasonable because of the past history of Complainant”. [Respondents’ appeal at page 18]. Respondents’ argument was already presented to the Director who properly decided that the dual requirement of the lease and the license, as applied in this case, was “unreasonable and unjustly discriminatory.” [DD at page 33].

The Director stated that safety concerns do not allow an airport owner to impose conditions on users or tenants that are unfair, unequal and unjustly discriminatory. [DD at page 35]. The Director reasoned that “combining [the two-year feature of the license with] the other provisions regarding termination, revocation, breach of agreement, and appeal rights exacerbates the adverse effect of the short period of the business license in comparison to the lease term.” [DD at page 29].

Indeed, the Director’s economic analysis of the dual requirements is well grounded in the “applicable law, precedent, and public policy.”³ Even a long-term lease, coupled with an unreasonable two-year license, impairs the “business operation’s ability to generate sufficient return on its investment.” [DD at page 30]. The DD cited Complainant’s contemplated \$300,000 investment, the comparison to airport tenants having made similar investments to construct their own hangars, 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 FAA Order 5190.6A, Airports Compliance Handbook, paragraph 6-3(c) recognizes that while there is normally no compliance requirement restricting the duration of an agreement, a tenant will usually seek an agreement for a sufficient number of years to amortize a substantial investment it intends to make in the property.

Respondents' reliance on the fact that the Director mischaracterized the Respondents third lease offer (for a 10-year term on August 22, 2001) because it contemplated that Respondents would construct the hangar is misplaced. First, the record reflects that Complainant was ultimately presented with a "take it or leave it" two-year, unreasonable and discriminatory license agreement regardless of the lease term being offered. Second, the 10-year lease would have resulted in Complainant paying SAA 13% annually of the airport's capital costs to construct a hangar and office complex for Complainant (in addition to the 4.4 cents per square foot for the ground lease). It also would have required the principals of Skydance to execute a personal guaranty of the lease. [Complaint exhibit 22]. Even simple calculations reveal that Complainant would have paid far more under this scenario than under the long-term lease option (where Skydance would construct its own facilities) and it would still be subject to tremendous risk as a result of the annual 13% capital cost add-on and the personal guarantee demanded by the Authority.

Given Complainant's willingness to make a substantial investment, it is hard to imagine how SAA's offer of a 10-year lease (with it constructing the hangar) could be construed as either fair or reasonable under these circumstances. Nevertheless, the Director did not find the 10-year lease offer to be unreasonable because the Complaint focused on the offensive license agreement. Indeed, virtually all of the "negotiations" between the parties' counsel during the summer of 2001 focused on the license agreement.

It is Complainant's belief, and now it has been confirmed by the Director, that Respondent SAA simply changed the lease term in retaliation for Complainant's objections to the license agreement. [DD page 31]. Indeed, the only thing more transparent was SAA's justification for it – that it had only 29 and one-half years remaining on its lease with the airport sponsor!

3. Complainant "seriously negotiated" with Respondent SAA.

Respondents argue that the Director improperly compared the two-year license with the 30-year lease since the negotiations did not proceed to the point where the term of the commercial license had been "seriously negotiated." [Respondents appeal at page 21]. Indeed, Complainant wanted an agreement so badly that it was willing to sign a two-year commercial license if only it had not been required to leave itself defenseless in the process. Thus, Complainant agrees with the Respondents that the term (i.e., duration) of the commercial license was not seriously negotiated. Of course, that does not preclude the Director from finding that the two-year term was unreasonable and discriminatory under the circumstances particularly when SAA insisted that the license be signed as originally presented to Complainant in April 2001.

On the subject of “serious negotiations”, Complainant made every attempt to offer constructive solutions to resolve the impasse. On some occasions, Respondent SAA’s counsel did the same, culminating in a lengthy telephone conference on September 19, 2001 and an exchange of revised language shortly thereafter. [Complainant’s Reply, exhibit 1]. Perhaps in an attempt to punish Complainant for asking Tony Garcia of the FAA’s Western Pacific Region to intervene on August 23, 2001, SAA ultimately rejected any the changes negotiated by the two lawyers only days earlier. Instead, it presented Skydance with an ultimatum – either sign the original license agreement or be evicted from the premises.

C. Respondents’ license agreement is unreasonable and unjustly discriminatory

The Director found Respondents’ requirement for a renewable two-year commercial license agreement with additional restrictive provisions to have effectively denied Complainant reasonable use and access to the airport. [DD at page 37]. Indeed, in addition to the two-year license term,⁴ the agreement contained the following provisions:

- The license was terminable at the will of the licensor (i.e. Respondent SAA).
- The license could be revoked with or without cause at the sole discretion of Respondent SAA.
- Upon licensee’s breach of the agreement, it had seven days to quit the premises, notwithstanding its 30-year lease and the \$300,000 it would have invested in new facilities.
- Licensee gave up all rights to appeal (including to the FAA).

Respondents first argue that the original license should withstand FAA scrutiny because it contains a general cure provision. Next, Respondents assert that if the standard (original) license proposed to Complainant was unreasonable and unjustly discriminatory, the license “ultimately” proposed to Complainant was not.

⁴ Skydance was reasonably concerned about the possibility that a two-year, renewable license agreement could potentially undermine the benefits of a 30-year lease and put its \$300,000 investment at risk.

1. Even if paragraph 29.2 of the license agreement provides for a general cure provision, it would not have affected Respondents' exercise of the arbitrary powers conferred by paragraph 3.

Respondents argue that the Director failed to properly review the terms of the commercial license because he did not review the license's cure provisions. Respondents are correct when they point to paragraphs 11, 19, 24 and 25 of the license for specific "cure" provisions.⁵ [Respondents' appeal at page 14]. However, they refer to a general default provision in section (paragraph) 29.4. [Respondents' appeal at page 14, citing Complaint's exhibit 15, paragraph 29]. There is no paragraph 29.4 in the license agreement. (Respondents are probably referring to paragraph 29.2.)

Paragraph 29 provides that any of the listed "events" constitutes a material breach and default of the license. Paragraph 29.2 states:

Licensee's failure to observe or perform any of the covenants, conditions or provisions of this license, if such failure continues for fifteen (15) days after written notice of such breach and demand for compliance.

Although this appears to be the "general cure provision" to which Respondents refer, it is clearly contrary to and superseded by paragraph 3 (the section that Complainant insisted be modified before he would sign the license).

Paragraph 3 reads, in pertinent part, as follows:

... the License granted herein is **terminable at the will** of the lessor pursuant to the terms and conditions of this License. **Nothing herein to the contrary**, this [license] shall **immediately** terminate upon the License's breach of any provision of the lease, including but not limited to section 5 of the lease. If licensor determines **in its sole discretion** and authority that Licensee has (i) taken action that would be a breach of the License or Lease, or (ii) engaged in any behavior prescribed by the Licensor herein, the Licensor shall revoke this License, **with or without cause**. Licensor's determination ... shall be binding upon Licensee and **Licensee hereby waives all rights to take legal action regarding Licensor's**

⁵ Section 11 discusses Complainant's obligation to furnish its accommodations and/or services on a fair, equal and not unjustly discriminatory basis to all users. Section 19 relates to Complainant's obligations toward airport obstructions. Section 24 relates to environmental laws. Section 25 relates to Complainant's insurance obligations.

decision and Licensee shall have no further right or interest whatsoever to contest Licensor's decisions or actions. Upon notice to Licensor of Licensee's breach and revocation of the License, Licensee shall quit the Premises and terminate all business activities with seven (7) days of such notice.
(Emphasis added.)

Complainant submits that the so-called general cure provision is an after-the-fact rationalization offered by the Respondents to show that the license agreement was not so unreasonable after all. In response, Complainant urges the Associate Administrator to consider the fact that paragraph 3 is directly contrary to paragraph 29.2. More importantly, paragraph 3 contains language that would supersede paragraph 29.2 because it expressly states that it applies notwithstanding any other contrary provision. Certainly, any party about to sign a contract under these circumstances would want the agreement to be as clear as possible.

Lastly, the "cure" provisions of the license do not alter the fact that the license could be terminated immediately and at the will of the licensor. Moreover, the Complainant was deprived of a major element of fundamental fairness, the right to appeal Respondents' decisions to the courts, the FAA or any other body with jurisdiction. If paragraph 29.2 was intended to be the general cure provision that Respondents now assert they intended all along, why did they so vigorously reject Complainant's attempt to revise paragraph 3? [Complaint exhibit 20].

The Director's Determination is clear and supported by a preponderance of reliable, probative, and substantial evidence. Considering the license agreement as a whole:

Aeronautical operators at a public-use airport should have the opportunity to cure or address an airport violation, and they cannot be required, as a condition of access, to waive their rights to appeal to the FAA for violations of Federal law and policy on the part of the airport sponsor. [DD at page 27].

2. Complainant had no alternative other than signing the unlawful license agreement

Respondents argue that they ultimately agreed to consider "almost all" of Complainant's substantive revisions and that the revised license ultimately proposed to Complainant was not unreasonable or unjustly discriminatory. [Respondents' appeal at page 26].

Respondents' so-called "revised license" should be disregarded because the revisions were conditioned upon the board of directors' approval that never occurred.⁶ Skydance encourages the Associate Administrator to review Complainant's Reply, Exhibit 1 because it describes in great detail the discussions of September 19, 2001 between the lawyers for both parties and the "tentative agreement" (subject, of course, to the approval of SAA's board) that resulted. Unfortunately, SAA's board did not go along with "our revisions" (in the words of SAA's counsel⁷) although they were acceptable to Complainant. SAA's counsel showed flexibility and a willingness to bridge the gap between Complainant and SAA. Unfortunately, his client did not agree. Throughout the negotiations, SAA's board of directors never approved any changes to the standard license agreement.

The duty to negotiate in "good faith" did not require Respondents to ratify every change proposed by Complainant but it did require them to be fair, reasonable and not unjustly discriminatory. In the end, after months of negotiations, SAA presented Complainant with an ultimatum; either sign the two- year license as originally presented, or be evicted from the premises. One would expect a different attitude from an airport that has received four million dollars in federal airport improvement grants, in addition to the very property on which it sits.

D. Respondents' lease was unjustly discriminatory as applied to Complainant

Respondents are correct in their assertion that the 10-year lease contemplated that the airport would build a hangar for Complainant and that this was omitted from the Director's Determination. However, 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, a personal guarantee would have been necessary as well.

Although the Director did not mention which party would construct the hangar when he discussed the 10-year lease in his Determination, he 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 the basis for a remand. Moreover, the Associate Administrator may clarify this factual issue in the final agency decision.

⁶ Respondents' Answer exhibit N

⁷ Complainant's Reply exhibit 1, (specifically Owens-5)

1. The 30-year lease was withdrawn in retaliation for Complainant's objecting to the license.

Respondent SAA's behavior during the lease negotiations was characterized by bad faith and a desire for retribution. Indeed, as the Director noted, "it was not until after Complainant criticized the provisions of the two-year renewable business license agreement that the Authority withdrew its offer of a 30-year lease." [DD at page 31]. The Director adequately considered the record and properly concluded, that if a 30-year lease could not be executed under the specific circumstances of the airport " ... a lease of nearly 30 years would have been possible within the Authority's remaining lease term." [DD at page 36].

Furthermore, the Director was not convinced that " the timing of these additional standards, or the notice provided to those who may be affected by these increased standards, represents reasonable and not unjustly discriminatory actions on the part of the Respondents." [DD at page 35]. The Director properly reached this legal conclusion after carefully reviewing the timeline of the negotiations.

The Director's finding is supported by the evidence in the record and was made in accordance with the principle that an airport that has received federal grants may not impose requirements, even those adopted in the interests of safety, in an unreasonable and unjustly discriminatory manner. Respondents' erratic behavior throughout the negotiations is amply supported in the record and properly taken into consideration by the Director when he analyzed the license requirements imposed on Complainant.

2. The lease is useless to Complainant in the absence of a commercial license.

Respondents argue that the Director did not make the proper finding regarding Complainant's status:

The lease would have been unaffected by the termination of the Commercial License. In the event of termination of the Commercial License, Complainant could have continued to use the hangar in a non-commercial capacity (like the rest of the long term private hangar tenants) or transferred its lease to another tenant." [Respondents' appeal at page 13].

The Director properly considered Complainant's status and adequately supported its finding of facts by a preponderance of reliable, probative, and substantial evidence. Unlike private hangar tenants housing their aircraft, Complainant is the operator of a business, relying on a steady stream of income to pay its rent and amortize its investment. Furthermore, any transfer of Skydance's lease to

another tenant could only take place if Respondents approved it. [Complaint exhibit 10, page 14].

The Director conducted an extensive economic analysis of the Complainant's business concerns:

Prospective tenants considering a substantial investment in the airport generally seek a lease term sufficiently long to ensure that the tenant gets not only a return of its investment, but a return *on* its investment as well.

* * * *

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. [DD at pages 29-30, emphasis in original].

Respondents, by their unlawful actions in this matter, deprived the airport of approximately \$70,000 per year in revenue from Complainant's operations [Respondents' appeal at page 3] and lost additional revenue that would have resulted from Complainant's proposed investment in the \$300,000 hangar and office complex.

3. Unilateral termination of a lease or license is unreasonable under these circumstances

Respondents assert that unilateral termination of a commercial lease is a common provision among airports and that such a practice, in itself, is not unreasonable. Respondents then 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.

The Director certainly was not required to separately analyze each objectionable provision of the license (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 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. Furthermore, Respondents have not shown that these provisions withstood either the scrutiny of the FAA or the courts.

Further, Respondents cite Ashton v. City of Concord, Docket No. 16-00-01 Director's Determination, 2000 WL 1642458 (F.A.A.) (October 16, 2000) 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].

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. The case involved the termination of a permit held by an individual convicted of trespassing into areas that were outside the permit area. In contrast, Complainant encountered problems with one tour operator while using an area specifically designated for his operations by Respondent SAA.⁸ In addition, Ashton was merely leasing a hangar that he did not build with his own funds as Complainant was proposing in this case.

Ashton signed the permit and was later evicted. Complainant refused to sign the license and continuously protested its unreasonableness and the Authority's unjust discrimination. Further, the permit in Ashton contained appeal rights upon the eviction notice whereas Respondents' license provided Complainant with no such luxury. In fact, Respondents asserted in their Answer and Motion to Dismiss that Complainant lacked standing to bring a Part 16 complaint because it was no longer a tenant! Now, they are invoking the same appeal rights that they attempted to deny Complainant in the unreasonable and discriminatory 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.

4. As a result of their unreasonable and unjustly discriminatory treatment of Complainant, Respondents also violated Federal Grant Assurances Provision 23 on exclusive rights.

Respondents argue that since their dual commercial license and lease requirement was not unjustly discriminatory, they did not violate the Federal Grant provision on exclusive rights.

As the above discussion and analysis demonstrate, the Director was correct when he found Respondents in violation of the Exclusive Rights provision of FAA Grant Assurance 23. The Director's Determination is well grounded in FAA policy and law:

By unjustly discriminating against the Complainant, the Authority has denied the Complainant a right or

⁸ Based on the Respondents' own supplemental exhibits, Complainant was not the only tenant that encountered problems with this other operator.

privilege (i.e. a 30-year lease term) enjoyed by others making similar use of the airport [the private hangar tenants]. An exclusive rights violation occurs when the airport sponsor excludes others, either intentionally or unintentionally, from participating in an on-airport aeronautical activity. [DD at page 33].

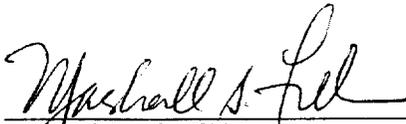
VI. Conclusion

The Director undertook a detailed analysis of the numerous documents provided in the record and concluded that, in spite of Respondents' assertions to the contrary, they treated Complainant in an unreasonable and unjustly discriminatory manner, thus violating their Federal obligations of economic nondiscrimination and exclusive rights.

For all the foregoing reasons, Complainant urges the Associate Administrator to affirm the Director's Determination because (1) the findings of facts were supported by a preponderance of reliable, probative, and substantial evidence, and (2) each conclusion of law was made in accordance with applicable law, precedent, and public policy.

Finally, Complainant renews its request for an additional 30 days to evaluate Respondents' additional materials in the event the Associate Administrator grants the Respondents' Motion for Leave to Supplement the Record.

Respectfully submitted,



Marshall S. Filler
Catherine Dépret

Counsel to Complainant Skydance Helicopters, Inc.

Obadal, Filler, MacLeod & Klein, P.L.C.

117 North Henry Street

Alexandria, VA 22314-2903

T: 703-299-0784

E: msf@potomac-law.com

F: 703-299-0254

E: catherine@potomac-law.com

May 19, 2003

CERTIFICATE OF SERVICE

I, Kristy Herrick, certify that on May 19, 2003, I caused the executed original and three (3) copies of the foregoing Complainant's Reply to Respondents' Appeal 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 19, 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