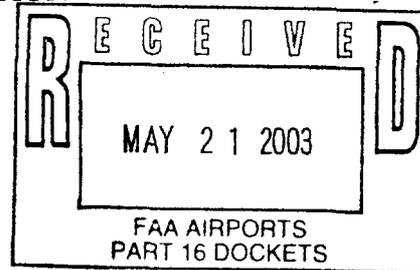


BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC



Skydance Helicopters, Inc.
d/b/a Skydance Operations, Inc.

Complainant

vs.

Sedona Oak-Creek Airport Authority
and
Yavapai County, Arizona

Respondents

FAA Docket No. 16-02-02

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

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I. INTRODUCTION

Respondents seek to supplement the record to provide the relevant FAA decisionmaker² with a more complete understanding regarding the circumstances of this case – such as employees of commercial tour operators carrying firearms with them at the airport and Complainant refueling its running helicopters in close proximity to a restaurant and fuel truck – that required stringent commercial license terms, and to clarify the timing of the commercial license agreement. Much of this evidence was presented to the FAA Western-Pacific Region investigator, Tony Garcia, and thus is already before the FAA. This information cannot be ignored. Nothing in Part 16 limits the FAA’s determinations to facts in the record, and the FAA has broad discretion to allow the record to be supplemented at this stage of an informal administrative proceeding. This is especially true in cases like this where such supplementation would be in the interest of justice and is critical to the disposition of the case.

The Director or the Associate Administrator should allow the supplemental exhibits into the record for a number of reasons.³ First, informal adjudications are not subject to the requirements of the Administrative Procedures Act and the FAA has broad discretion to consider supplemental evidence at this stage in the proceeding. Second, it is in the interest of justice to do

² Respondents have filed a Motion for Reconsideration before the Director, or in the alternative, an appeal before the Associate Administrator. It makes no substantive difference which decisionmaker grants the motion to supplement the record to correct the obvious deficiencies in the Director’s Determination.

³ As the FAA is aware, Part 16 proceedings are rather extraordinary, very expedited, and relatively new to most airports, especially small general aviation airports like Sedona Airport. In preparing their initial answer to the Part 16 complaint, Respondents were optimistic that the Director would agree with the decision of the FAA Western-Pacific Region that the commercial license requirement imposed upon Skydance was not unjustly discriminatory and that Respondents were in full compliance with their federal grant obligations. Given the informal determination and the strong precedent in favor of the airport sponsor, Respondents relied on counsel who was experienced in real estate and general aviation matters, but not in Part 16 administrative proceedings. As a result, no affidavits and no case law were presented to the Director for his review. After the Director’s Determination, Respondents engaged counsel experienced in regulatory proceedings before the FAA. Thus, while it is true that some of supplemental information presented in the Motion to Supplement the Record could have been presented earlier, in light of these unique facts and circumstances, the safety significance of the information presented, and no rule precluding the consideration of supplemental evidence, the FAA ought to grant Respondents’ request, limited to the unique facts of this case.

so – the information contained in the exhibits go to pivotal facts on which the Director’s Determination turned. Third, the information contained in these exhibits was communicated to the investigator, who *came to the opposite conclusion as the Director*. Not only does this underscore the pivotal nature of these facts, but it also shows why the Director and Associate Administrator are entitled to the same information as the original fact finder. Since courts are entitled to review the whole administrative record, including evidence presented to the original fact finder, it behooves the Director or Associate Administrator to avail themselves of these same facts, particularly when they reach conclusions that are at odds with the original fact finder.⁴

With the exception of the sample license agreements attached as Supplemental Exhibits 46-48, which would be available to the FAA independent of Respondent’s Motion to Supplement the Record, the supplemental evidence clarifies and expands upon information already contained in the record. Respondents believe that this supplemental evidence will significantly aid the FAA in its evaluation of Respondents’ position. However, in the event that the supplemental evidence is not admitted, the record contains underlying facts to support Respondents’ arguments.

Finally, Respondents’ Motion for Reconsideration should be granted because the Determination contained material errors of fact that affected the disposition of the case. First, the Director’s determination that the 10-year lease offer was unreasonable was based on the erroneous conclusion that Complainant, not Respondent, would construct the hangar. Second, the characterization of Complainant as analogous to a private hangar tenant was flawed, as no meaningful similarities between the two exist. Third, the Determination’s conclusion that the

⁴ Respondents do not object to Complainant’s requested 30-day extension of time to file a Reply to Respondents’ Appeal to evaluate the supplemental evidence. A 30-day extension would not prejudice the Complainant, as Complainant is no longer operating at the airport nor has it indicated a desire to return to the airport.

terms of the license agreement were unreasonable was based on insufficient review of the license and is not supported by analysis in the Determination. In fact, Respondents have demonstrated that the terms of its license agreement were commercially reasonable and standard for the industry. The Director's conclusion, without the requisite analysis, cannot be reconciled with the FAA's general position that license agreements are a reasonable means to enforce compliance with airport safety and policy requirements. For these reasons, the Director's Determination should be reconsidered.

II. PART 16 DOES NOT PREVENT THE ADMISSION OF NEW EVIDENCE AS IT IS NOT A FORMAL ADJUDICATION AND AS SUCH IS NOT SUBJECT TO THE ADMINISTRATIVE PROCEDURE ACT

Unlike a formal adjudication, nothing in Part 16 limits the Director to base his determination solely on the information included in the record. Nothing in Part 16 forbids the FAA from accepting supplemental evidence at any stage in its adjudicative process. This proceeding is not a formal adjudicative proceeding, nor is such a proceeding currently available to the parties. In an informal proceeding, unlike the stricter provisions of the formal APA process, the agency has broader discretion in how it conducts its investigations. *See U.S. v. Florida East Coast Railway Co.*, 410 U.S. 238, 237 (1973)(permitting Interstate Commerce Commission to hold "hearing" with documentary evidence only). The FAA has broad discretion governing the conduct of its own Part 16 investigations. Accordingly, it is well within the FAA's authority to accept the supplemental evidence offered by Respondents.⁵ It is also appropriate for the FAA to review the Director's Determination in view of the safety considerations raised by the supplemental evidence.

⁵ Even the APA "provides that, on appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision" *In re: Pacific Sky Supply Inc.*, 1995 WL 853915, *9 n. 4 (F.A.A.).

III. THE DECISIONMAKER HAS THE AUTHORITY TO SUPPLEMENT THE RECORD WHEN IT IS IN THE INTEREST OF JUSTICE

A. Supplementation of the Record is in the Interest of Justice

The Associate Administrator has broad discretion to supplement the record, and may do so in the interests of justice. *See e.g. In re ATX, Inc. Fitness Investigation*, Docket No. 48780 Final Decision and Order, 1994 DOT Av. LEXIS 174, *59 (F.A.A.)(April 5, 1994). No provision in Part 16 prevents the admission of supplemental evidence in the proceeding. In this regard, the FAA can be guided by the courts, which permit supplementation of the record on issues if it is in the interests of justice to do so.

Generally, courts have been permitted to supplement administrative records where they are inadequate for courts to understand the basis for an agency's ruling. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420-421 (1971). In addition, the courts have supplemented the records of administrative agencies in a number of other situations. *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C.Cir. 1989). For example, exceptions to the general rule have been recognized:

(1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.

Id. (Citations omitted).

Indeed, a court may supplement the record if doing so is in the interests of justice. *CSX Transportation, Inc. v. City of Garden City*, 235 F.3d 1325, 1330 (11th Cir. 2000). While generally reluctant to grant supplementation, the courts have the inherent equitable power to do

so, and can exercise their discretion to allow it on a case-by-case basis. *Id.* In *CSX Transportation*, the District Court found that the City's lack of insurance rendered its contract null and void. *Id.* Because the matter had not been properly raised by the parties, appellant offered supplemental information showing that the City indeed did have insurance, and the Court of Appeals found that the supplemental information offered "was pivotal to the District Court's resolution of [the] case" and, for that reason, allowed it into the record. *Id.* The court held that "a primary factor which we consider in deciding a motion to supplement the record is whether acceptance of the proffered material into the record would establish beyond any doubt the proper resolution of the pending issues." *Id.*

Similar to the situation in *CSX Transportation*, the supplemental evidence offered here was pivotal to the Director's Determination, because it is evidence demonstrating the safety and regulatory hazard that the Complainant posed at the airport, which, had it been available to the Director, would have prevented his erroneous conclusion that Respondents requirement that Complainant execute a short-term license agreement along with the long-term hangar agreement was unreasonable. Thus like the evidence of insurance in *CSX Transportation*, this supplemental evidence is pivotal and should be admitted.

Complainant's reliance on *Ricks v. Millington Municipal Airport Authority*, Docket No. 16-98-19 Final Decision and Order, 1999 WL 1295210 (F.A.A.)(Dec. 30, 1999) is misplaced. While it is true that new evidence *need not* be admitted should the FAA choose in its discretion not to accept it, the FAA *may* also exercise its discretion and permit new evidence if the benefits to be derived from a complete and accurate record outweigh procedural concerns inherent in accepting the supplement. *ATX, Inc. Fitness Investigation* at *134.

In this case, the Director quite obviously and erroneously gave short shrift to significant safety concerns that are detailed more fully in evidence under consideration. In addition, as the supplemental evidence demonstrates, the Director was not making proper comparisons in evaluating “unjust discrimination” by comparing a commercial tour operator (where no such operators have longer than two-year leases) with private hangar tenants (where the norm is 30-year leases, yet where the airport has never offered to construct a \$300,000 hangar at its own expense). Here, correcting the record and proper safety and policy decisionmaking weigh more strongly in favor of an accurate record than procedural niceties. Thus, the decisionmaker should permit Respondent’s supplemental facts to be entered into the record.

B. Public Safety Concerns Outweigh Any Procedural Limitations On the Inclusion of Supplemental Evidence

The supplemental evidence demonstrates Respondents’ very real public safety concerns regarding Complainants’ operations at the airport. It shows that Complainant consistently disregarded safety directives, which in the opinion of the airport, were vital to protecting the safety of commercial tour operators and other users of the airport. As just one of many examples cited by the supplemental evidence, despite repeated warnings, Complainant parked its fuel truck in close proximity to its operational area and the airport restaurant. On occasion, Complainant was observed fueling its helicopters in this location while the rotor was running. (Supp. Exhibits 27 and 42). This situation endangered the lives of all persons in the area. Had a piece of debris or a malfunction by the rotor caused the fuel truck to ignite, the consequences could have been disastrous.

Other examples of serious safety concerns documented by the supplemental evidence include: employees carrying concealed weapons at the airport (Supplemental Exhibits 1 and 4);

Complainant's use of drywall screws in parking cones that punctured a tire on a competitor's truck and could have severely damaged an aircraft (Supplemental Exhibits 1, 19-23); Complainant's failure to move its operations from the area near the restaurant to a helipad approximately 150 yards away and to comply with approach/departure procedures (Supplemental Exhibits 1-3, 28, 29, 34, 35, and 38).

It was because of these safety concerns that the Board voted unanimously to require the commercial license for all commercial tour operators, regardless of other lease arrangements for facilities at the airport.

Where public safety is at issue, technical procedural requirements are given less weight. For example, in *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (Brewer, J., dissenting), the Supreme Court recognized the government's interest in protecting public safety by seizing and destroying food deemed unfit for consumption prior to a hearing on the merits. *Id.* At 320. *See also Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (Jackson, J. and Frankfurter, J. dissenting)(upholding the provision of the Food, Drug, and Cosmetic Act that permits seizure of misbranded items that pose a risk to public health prior to administrative determination). Similarly, this case involves the protection of public safety at the airport, and the inclusion of the supplemental evidence outweighs procedural concerns raised by the Complainant.

IV. BOTH THE ASSOCIATE ADMINISTRATOR AND THE DIRECTOR ARE ENTITLED TO THE SAME EVIDENCE AS THAT CONSIDERED IN THE INFORMAL INVESTIGATION CONDUCTED BY THE REGION

Much of the evidence submitted to the FAA in the supplemental exhibits was reviewed in the initial, informal investigation by Tony Garcia of the FAA Western-Division Regional Office.

The Associate Administrator and Director are entitled to review the entire administrative record when they decide a matter before them, just as the courts would be if and when they review the FAA's final decision.

A. The Information Contained in the Supplemental Exhibits was Information Reviewed in the Original FAA Investigation

The first, informal investigation conducted by the FAA included a review of the information contained in many of the supplemental exhibits. In the course of his investigation, the investigator, Tony Garcia, conducted interviews with Edward "Mac" McCall, Airport Manager and Dave Webster, SAA Board Member. These individuals shared with the investigator the facts contained in the affidavits that have been added as supplemental exhibits. Specifically, the following Paragraphs of Mr. McCall's affidavit reflect information provided in the course of the investigation: ¶¶ I 5-9, 11-14; IV 1, 8. The remaining paragraphs contain background information already in the record, but which provide necessary context to understand the affidavit. Additionally, information contained in Mr. Webster's affidavit was also discussed with Mr. Garcia.

Additionally, the report of Mr. Garcia's telephone conversation with Mr. Cain demonstrates that Mr. Garcia was aware of "all the complaints against Skydance from airport officials and from the community." FAA Exhibit 1, Index of Administrative Record, Item 8. Thus, absent the affidavits and supplemental exhibits, the Director's Determination was not based on the same evidence that was available to Mr. Garcia. It is appropriate that the Director review the same dispositive facts on which Mr. Garcia's decision turned. Therefore, the facts discussed above should be entered into the record.

B. Appellate Review of Administrative Proceedings Includes All of the Evidence Gathered at Each Stage of the Investigation

In reviewing agency decisions, courts review the entire administrative record, including things considered both directly, and *indirectly* by agency decision makers. *Thompson v. U.S. Dept. of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). The dispute in *Thompson* centered around settlement letters that had been copied to the ALJ, but that the ALJ had not forwarded to the Secretary as a part of the administrative record. *Id.* The court found that the letters officially became a part of the administrative record when Thompson attached them to his Motion for Reconsideration. *Id.* at 556. The FAA imposes similar requirements in its own proceedings. When the FAA reviewed an ALJ decision to impose attorney's fees under the Equal Access to Justice Act, it held that the ALJ failed to hold a hearing or otherwise supplement the record before issuing its order. *In re: Pacific Sky Supply Inc.*, 1995 WL 853915, *7 (F.A.A.). The court noted that the attorney's failure to supplement the record was understandable where copies of the exhibits had already been submitted. *Id.* at *8 n. 3.

The courts' review includes the record at *each stage* of the administrative review, particularly where an agency overturns the findings of an earlier fact finder. *Gold Coast Restaurant Corp. v. Nat'l Labor Relations Board*, 995 F.2d 257, 263 (D.C.App. 1993). The courts have even reviewed records from separate, but related agency investigations, where the agency relies upon the information in making its decision. *Floral Trade Council of Davis, CA. v. U.S.*, 709 F.Supp. 229, 230 (C.I.T. 1989)("[t]hose documents at the agency which become sufficiently intertwined with the relevant inquiry are part of the record, no matter how or when they arrive at the agency").

Like the ALJ in *Thompson*, the FAA regional investigator in this case received factual information that the Director did not review.⁶ These same facts are now before both the Director and Associate Administrator via Respondents' motion for reconsideration and appeal. These facts were before the FAA in its regional investigation, and it would be unjust for the FAA to refuse to consider them now. Like the courts in *Gold Coast* and *Floral Trade*, the FAA Associate Administrator and Director should consider the *entire* administrative record when doing their reviews, including the facts presented to the original investigator. This is particularly true where the Director has come to the opposite conclusion as the investigator below.

V. ADMISSION OF THE SUPPLEMENTAL EVIDENCE WILL NOT HARM COMPLAINANT.

Upon its eviction in November 2001, Complainant has continued to operate out of Nevada and California. Complainant has not expressed an interest in resuming operations at the airport – either in its Part 16 pleadings or otherwise. Since all current commercial tour operators have executed a commercial license and neither Complainant nor any other commercial tour operators currently are seeking a long-term lease at the airport, Complainant will not be prejudiced by any additional time required to evaluate the supplemental evidence submitted by Respondents. Respondents do not object to Complainant's request for a 30-day extension to evaluate the supplemental evidence.

⁶ In *Vincent DeSciose, Jr. and Omaha Airplane Supply, Inc. d/b/a AeroRealty Company v. City of Long Beach*, Docket No. 16-99-12, Director's Determination, 2001 WL 246873 (F.A.A.), additional information regarding the FAA's regional determination was admitted into the record after the FAA had formally closed the record. Although the Director ultimately concluded that the regional investigator's "*motives or conclusions*" were irrelevant to the Part 16 proceeding, *Id.* at FN 39 (emphasis added), the record was supplemented. Similarly, the FAA should consider the supplemental evidence, which in this case, is relevant as Respondents are seeking consideration of the *facts* available to the FAA Western-Pacific Region, not the investigator's motives or conclusion as supplemental evidence.

VI. THE SUPPLEMENTAL EXHIBITS CLARIFY AND ENHANCE THE EXISTING RECORD

The supplemental exhibits presented fall into six main categories: (a) evidence of the on-going noncompliance by commercial tour operators with airport policy and safety directives; (b) evidence of Skydance's noncompliance with airport policy and safety directives; (c) evidence of the Board's legal basis for imposing the commercial license requirement; (d) evidence that Skydance's operations were that of a commercial tour operator; (e) evidence of license agreements in existence at other airports with similar provisions; and (f) a copy of the current lease agreement between Yavapai County and SAA, presented in response to the FAA's *sua sponte* inquiry regarding revenue diversion. With the exception of the last two, the original record is also cited in Respondents' Motion as providing support for Respondents' argument.

A. Evidence of the on-going noncompliance by commercial tour operators with airport policy and safety directives

Supplemental Exhibits 1 through 44 provide additional evidence of SAA's constant battle to enforce compliance by commercial tour operators with its safety and policy directives. While the existing record provided some background on the potentially unsafe and unprofessional conditions at the airport as well as descriptions of some of the physical altercations at the airport, Respondents believe that the supplemental information provides a more accurate description of the overall operating environment that existed at the time.

Respondents acknowledge that some of the exhibits do not specifically relate to Complainant's noncompliance. This supplemental evidence related to other disputes between other commercial tour operators and is relevant because it demonstrates the overall operating environment at the airport and supports Respondents' decision to require a commercial license of

all tour operators, not just Complainant. It is in the context of this environment that the SAA Board voted unanimously to require all commercial tour operators, including Skydance, to execute a two-year commercial license to conduct commercial operations at the airport.

B. Evidence of Complainant's continuing noncompliance with safety directives.

Supplemental Exhibits 1-4, 12-17, 19-31, and 33-44 contain specific information related to Complainant's noncompliance with airport safety and policy directives and ongoing disputes between Complainant and other commercial tour operators at the airport. While the record generally references noncompliance by Complainant and includes information regarding the September 29, 2000 incident, the additional evidence provides a more comprehensive understanding of Complainant's noncompliance as well as SAA's efforts to address it using alternative means, before finally requiring the commercial license. Despite SAA's best efforts to informally resolve these issues, SAA was unable to compel Skydance to comply with its safety and policy requirements. SAA concluded that the commercial license was the only way that it could compel compliance by Complainant.⁷

C. Evidence of the Board's legal basis for imposing the commercial license requirement and the uniform application of the requirement to all commercial tour operators

Supplemental Exhibits 1, 3 and 4 provide additional support for Respondents' position that the commercial license requirement was essential to compel commercial tour operators in general, and Complainant in particular, to operate in a safe and professional manner at the airport. These exhibits also support Respondents' position that the commercial license requirement was applied uniformly to all commercial operators, and that the commercial license

⁷ As discussed in Respondents' Motion, given Complainant's history of noncompliance and safety violations, these supplemental exhibits demonstrate that Respondents were justified in imposing a short-term license requirement on Complainant in addition to a longer-term commercial lease.

has, in fact, greatly reduced incidents of noncompliance. This supplemental evidence clarifies and expands upon evidence that was originally presented in the record.

D. Evidence that SAA correctly characterized Skydance as a commercial tour operator tenant

The Supplemental Exhibits make clear that Complainant operated at the airport as a commercial tenant and was properly required by Respondents to execute a commercial license to conduct business as a commercial tour operator at the airport. In particular, the affidavit of Allan D. Pratt, attached as Supplemental Exhibit 3, provides evidence that Complainant would be operating as a commercial tour operator and a commercial hangar tenant and explains the Board's rationale for requiring a short term license to be executed concurrent with a long term lease.

E. Evidence of license agreements in existence at other airports with similar provisions

The license agreements attached as Supplemental Exhibits 46-48 are publicly available. The Director's Determination concludes that the license agreements, and in particular certain terms of the license agreements, were unreasonable. The Supplemental Exhibits were introduced to illustrate that the terms of Respondents' commercial license agreement were consistent with the industry standard for such agreements at airports – large and small – around the country. Because the provisions of Respondents' commercial license requirements are standard for such licenses, the Director's conclusion that the license provisions, as written, are unreasonable cannot be reconciled with the FAA's position that "[l]icenses, permits, or rules and regulations can be, and often are, used by airport sponsors to establish standards of conduct on the airport to ensure both good business practices and the safe and efficient operation." (DD at 27).

- F. Copy of the current lease agreement between Yavapai County and SAA, presented in response to the FAA's *sua sponte* inquiry regarding revenue diversion.

Supplemental Exhibit 45 is a copy of the current lease agreement between Respondents Yavapai County and SAA. It was included in direct response to the Director's *sua sponte* inquiry into the airport's use of revenue. Respondents had no reason to include this information in earlier filings, as the issue had not yet been raised.

VII. MATERIAL ERRORS IN THE DETERMINATION SUPPORT RESPONDENTS' MOTION FOR RECONSIDERATION.

- A. The FAA has the authority under Part 16 to consider Motions for Reconsideration

Part 16 does not specifically provide for a Motion for Reconsideration, but neither does it specifically preclude them.⁸ Section 16.19(a) provides that "an application for an order or ruling not otherwise specifically provided for in this part shall be by motion."

The regulatory history of Part 16 indicates that the provisions of Part 16 governing motions, are based on similar provisions of the Department of Transportation's Rules of Practice in Proceedings (14 CFR Part 302), FAA Rules of Practice in Civil Penalty Actions (14 CFR Part 13), and NTSB Rules of Practice in Air Safety Proceedings. 61 Fed. Reg. 53998-540111, 540000 (Oct. 16, 1996). All of these rules allow for motions for reconsideration, and require the party making the motion to describe the alleged errors in the administrative decision. Respondents' motion explained in detail the errors in the administrative decision.

⁸ While Part 16 does not specifically provide for a reply to Complainant's Opposition, Section 16.19(c) allows any party to file a motion in support or opposition to a motion within 10 days of a motion being served upon the person answering. Unlike the situation in *Ricks v. Millington Airport*, FAA Docket No. 16-98-19, Final Decision and Order, Dec. 30, 1999, where Respondent MAAA's reply on appeal was not considered under 14 C.F.R. § 16.33, here Respondents are submitting its reply pursuant to 14 C.F.R. § 16.19. Section 16.19(c) provides parties an opportunity to submit motions in opposition of or support of motions filed.

B. The Director's Determination Should Be Reconsidered Based on Material Errors of Fact

1. *The Determination's Conclusion That the 10-Year Lease Offer Was Discriminatory is Based On a Material Error*

Respondents' description of the material errors are detailed in Respondents' Motion for Reconsideration. Complainant acknowledges that the Director failed to consider that pursuant to the Respondents' offer for a 10-year lease, Respondent SAA would construct the hangar to Complainant's specifications, thus bearing the financial risk of the transaction. Complainant asserts that because the Director did not rely on this fact in his Determination, its omission is irrelevant. (Complainant' Opposition at 6). To the contrary, not only did the Director not consider this fact, the Determination states the opposite – that Complainant would be required to construct the hangar at its own expense. (DD at 31).

The Determination found that “the Authority’s willingness to offer Complainant only a 10-year lease with a five-year renewal option – when it had previously given other [private hangar tenants] building hangars 30-year leases – to be unjustly discriminatory.” (DD at 31). This finding is based on the assumption that Complainant would build the hangar under the terms of the 10-year lease offer. In fact, the offer of a 10-year lease with a five-year renewal option materially differed from the leases offered to private hangar tenants who were *building* hangars, because Complainant would not be required to build its own hangar. This error is material because it forms the basis for the Director’s conclusion that the offer was unjustly discriminatory.

Indeed, in *Vincent DeSciouse, Jr. and Omaha Airplane Supply, Inc. d/b/a AeroRealty Company v. City of Long Beach*, Docket No. 16-99-12, Director’s Determination, 2001 WL 246873 (F.A.A.), the FAA accepted that the City of Long Beach’s authority to unilaterally

terminate a 10-year lease by providing 180-days written notice justified differing capital investment requirements, even where the 10-year lease required a capital expenditure of \$100,000 on the part of the tenant. *Id.* at *27. If a unilateral termination provision of a 10-year lease where the tenant was obligated to invest at least \$100,000 was not unreasonable, Respondents' offer of a 10-year lease that required no capital investment should not be considered unreasonable notwithstanding the unilateral termination provisions of the commercial license.

Complainant assert that the 10-year lease would have resulted in increased rent, ignoring the fact that the Complainant never made any attempt to negotiate the rent. Increased rent would be a standard term in any such commercial arrangement where the landlord bore the risk of financing the costs of a facility for its tenant. In the event that the lease were terminated – by either party – Respondents would be left without a means to recover their capital investment while Complainant would not have lost anything. This was not an unreasonable term, nor it is relevant to Complainant's assertion that the error was not material.

2. *The Director's Categorization of Complainant As Analogous to a Private Hangar Tenant Was Erroneous*

It is undisputed that Complainant was operating at the airport as a commercial tour operator. While it is true that under the initial lease offer, Complainant would be constructing a hangar at the airport, it is also true that it would continue its operations as a commercial tour operator. As detailed in Respondents' Motion for Reconsideration, Respondents were reasonable in their requirement that Complainant execute a short-term commercial license in addition to any lease hangar lease (regardless of term).

Both parties have acknowledged the *National Airlift* factors to consider when evaluating whether tenants are “similarly situated.” (Complainant’s Opposition at 7, Motion for Reconsideration at 16). Specifically, similarities include “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 at 20, Sept. 20, 1999. Here, the only possible factor that could apply is the “level of investment” – but even examination of this factor reveals no similarity between Complainant and private hangar tenants. A large commercial hangar such as the one proposed by the Complainant differs significantly from those constructed by private hangar tenants for private aircraft. Additionally, Respondents’ offer to bear the cost and risk of constructing the hangar for Complainant distinguishes it from private hangar tenants, as the airport had not previously extended such an offer to any other tenants – private or commercial – at the airport.

In terms of job creation, business type and other relevant factors, Complainant’s status differed significantly from that of private hangar tenants. As discussed in detail in Respondents’ Motion for Reconsideration, the type of business are not in anyway similar. Private hangar tenants do not conduct commercial operations from their hangars. To the contrary, such leases prohibit commercial operations. In the event that a private hangar tenant sought to provide such operations, it would be required to execute a commercial license to do so. While Complainant may have created jobs at the airport, the private hangar tenants would not. Significantly, “other relevant factors” would include the compliance of private hangar tenants with airport safety and policy directives. Unlike commercial tour operators, private hangar tenants have had an excellent history of complying with airport safety and policy directives.

Respondent's decision to treat Complainant as both a commercial tour operator and a long-term lessee was justified based on the type of business that Complainant sought to conduct at the airport and its desire for a long-term hangar lease. The FAA's characterization of Complainant as a private hangar tenant for purposes of evaluating the reasonableness of the proposed transaction was erroneous and should be reconsidered.

3. *The Provisions of the Commercial License are Commercially Reasonable and Consistent with License*

Complainant raised specific concerns with the commercial license requirement, including the termination provisions, cure periods, and appeal provisions. As discussed above, the Director recognized that license agreements are appropriate means for airports to ensure compliance with safety and policy requirements. (DD at 27). At the same time, without providing analysis, the Director concluded that the terms of Complainant's license agreement were unreasonable. (DD at 27). Because license agreements are generally accepted as reasonable means for airport sponsors to ensure safe and efficient operations, the Director's conclusion that this license was unreasonable should have been supported by specific analysis.

The termination provisions and appeal provisions of the commercial license were commercially reasonable and typical of license agreements at airports across the country. Contrary to the findings of the Determination, cure periods were provided in the original license offered to Complainant, which would have limited Respondent's ability to terminate the license agreement without providing an opportunity for cure. Respondents have demonstrated not only that the specific provisions about which Complainants had concerns were reasonable but that the commercial license was similar to those imposed at airports across the country.

Complainant attempts to distinguish *Ashton v. City of Concord*, Docket No. 16-00-01, from the instant case by stating that Complainant was operating in its designated area while in *Ashton*, the complainant was trespassing in areas outside of its permit area.⁹ Complainant also attempts to distinguish *Ashton* based on the fact that Ashton was *convicted* of trespassing. These distinctions are without merit. As in *Ashton*, Complainant consistently and repeatedly operated in violation of airport safety and policy directives. The location of the violations on the airport is not relevant. As in *Ashton*, the police were called on numerous occasions to address such violations. In *Ashton*, the Acting Associate Administrator found that the Director did not rely “exclusively upon the fact that Mr. Ashton was arrested and convicted. In fact, the Director describes a pattern of conduct by [Mr. Ashton] occurring prior to the [incident] that was inconsistent with the airport’s rules and regulations.” *Ashton v. City of Concord*, Docket No. 16-00-01, Final Decision and Order, 2001 WL 865709,*16 (F.A.A.), April 17, 2001. While Complainant was not prosecuted or convicted of violations, Respondents were well within their authority to evict Complainant from the airport given Complainant’s pattern of conduct that was inconsistent with the airport’s rules and regulations. Finally, whether the complainant in *Ashton* had built a hangar is not relevant here as it would not have precluded the City of Concord from terminating Mr. Ashton’s permit agreement.

As the FAA in *Ashton* points out, even if the complainant were not in violation of state or local law, “he would still have to show that his use of the Airport as an airport was subject to unreasonable terms or restrictions, or that another similar aeronautical user was provided with a preference amounting to unjust economic discrimination.” *Ashton v. City of Concord*, Docket

⁹ Complainant’s Opposition suggests that Complainant only encountered problems with one other tour operator in its own operations area. Notwithstanding the evidence to the contrary, this admission by the Complainant illustrates its lack of remorse for its utter disregard of airport safety and policy requirements, regardless of the area in which its noncompliance occurred.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Respondent's Reply to Complainant's Opposition to Motion for Leave to Supplement the Record and For Reconsideration of the Director's Determination by fax and by U.S. Mail.

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Dated this 19th Day of May, 2003.


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