No. 09-4810-ag

In the
UNITED STATES COURT OF APPEALS
for the Second Circuit

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41 North 73 West, Inc., doing business as AVITAT Westchester and Jet Systems,

Petitioner,

v.

United States Department of Transportation; Ray LaHood, Secretary of Transportation; Federal Aviation Administration; J. Randolph Babbitt, Administrator, Federal Aviation Administration,

Respondents,

County of Westchester, New York,

Intervenor.

On Petition for Review of an Order of the Federal Aviation Administration

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PETITIONER'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner 41 North 73 West, Inc. dba AVITAT Westchester and Jet Systems does not have a parent corporation, and no publically-held company has a 10% or greater ownership interest in 41 North 73 West, Inc.

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PRELIMINARY STATEMENT

[*Local Rule* 28.2]

The Petition in this case seeks review of the September 18, 2009 Final Decision and Order, Docket No. 16-07-13, issued by the Acting Associate Administrator for Airports, Federal Aviation Administration for Airports, Catherine M. Lang. [App. pp. A-153-202].

JURISDICTIONAL STATEMENT

[*Fed. R. App. Proc*. 28(a)(4)]

A. Statutory Basis for Federal Aviation Administration Subject Matter Jurisdiction.

The Federal Aviation Administration (FAA) had subject matter jurisdiction over the Complaint and Request for Investigation originally filed with the FAA under 49 U.S.C. § 47107, *et seq*., and Title 14, C.F.R. Part 16.1, *et seq*.

B. Basis For Claim of Final Order and Statutory Basis for This Court's Jurisdiction.

The Petition herein seeks review of the FAA's September 18, 2009 Final Decision and Order, which expressly states "[t]his decision constitutes the final decision of the Associate Administrator for Airports pursuant to Title 14, C.F.R. Part 16.33(a)." This Court has jurisdiction over this matter under 49 U.S.C. § 46110, which states, in pertinent parts:

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or . . . the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this Part [or] Part B . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. 49 U.S.C. § 46110(a).

The court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the . . . Administrator to conduct further proceedings. 49 U.S.C. § 46110(c).

C. Filing Dates Establishing the Timeliness of this Petition for Review.

The Final Decision and Order to be reviewed was issued on September 18, 2009 and served on the parties on September 21, 2009. The Petition for Review of the Final Decision and Order was timely filed on November 19, 2009.

STATEMENT OF ISSUES

1. Whether FAA erred, in applying (a) the "standard of proof" set forth in Title 14, C.F.R. Part 16.227 as the "standard of review" in an action under Title 14, C.F.R. Part 16; and (b) the standard of review applicable to judicial, not administrative, review under the Administrative Procedures Act, 5 U.S.C. § 706, rather than the standard based on *de novo* review pursuant to 5 U.S.C. § 557(b).

2. Whether FAA's determination was contrary to law, and, therefore, arbitrary and capricious where it applied the "similarly situated" standard in denying a claim for unjust discrimination under Grant Assurance 22, subsection (a), even though Grant Assurance 22, subsection (a), does not call for or even refer to, the "similarly situated" standard.

3. Whether even if, for argument's sake, the "similarly situated" standard did apply, Avitat and the LGA FBOs are similarly situated.

3. Whether FAA failed to base its determination on substantial evidence where it assumed that Avitat had knowledge of the County's subsidies and the privilege of selling jet fuel granted to the LGA FBOs when Avitat negotiated its 2005 and 2006 leases, and that such knowledge could have influenced the County's actions in granting those subsidies and privileges, or in granting the same to Avitat.

4. Whether FAA erred in determining that the grant of subsidies to the Light General Aviation ("LGA") FBOs, not available to Avitat and the other Jet FBOs, while at the same time allowing the LGA FBOs to incur on the only function that differentiates the two classes of FBOs, the sale of jet fuel, did not constitute the improper grant of an exclusive right pursuant to Grant Assurance 23.

5. Whether FAA erred in concluding that subsidizing LGA FBOs and allowing them to sell jet fuel as a means to allocate costs of their support to other aeronautical users and away from the County, does not violate Grant Assurance 24.

STATEMENT OF THE CASE

[*Fed. R. App. Proc*. 28(a)(6)]

This case arises out of a Complaint and Request for Investigation ("Complaint") filed with the FAA (Respondent herein) by 41 North 73 West, Inc. DBA Avitat Westchester ("Avitat") (Complainant below; Petitioner herein), pursuant to Title 14, C.F.R. Part 16 on October 22, 2007, against County of Westchester ("County") (Respondent below; Intervenor herein), alleging, among other things, that the County violated its Federal Grant Assurances under the Airport and Airway Improvement Act (1982), as amended, codified at 49 U.S.C. §§ 40101, *et seq*., and 49 U.S.C. §§ 47101, *et seq*.

The Complaint was docketed by the FAA Office of the Chief Counsel as Docket No. 16-07-13. On December 28, 2007, County filed its Answer. Avitat filed its Reply on January 15, 2008, and County filed its Rebuttal on or about February 1, 2008.

On June 12, 2008, the FAA Director of the Office of Airport Safety and Standards ("Director") issued the Director's Determination, finding that the County was not, at that time, in violation of its Grant Assurances. On August 15, 2008, Avitat filed an Appeal from the Director's Determination. The County filed a Reply to Avitat's Appeal on or about September 26, 2008. On September 18, 2009, the FAA Acting Associate Administrator for Airports, Catherine M. Lang, issued the FAA's Final Decision and Order, affirming the Director's Determination and dismissing Avitat's Appeal. On November 19, 2009, Avitat filed a timely Petition For Review of Agency Order. On November 23, 2009, the Court docketed the Petition as Docket No. 09-4810-ag. On February 4, 2010, the Court issued an Order granting Avitat's scheduling request for an April 22, 2010 due date for filing its brief.

STATEMENT OF FACTS

A. The Parties.

Avitat operates as a "Fixed Base Operator" (FBO) at Westchester County Airport ("HPN" or "Airport"), located in White Plains, New York pursuant to a lease with the County. The Airport is owned by Intervenor County of Westchester ("County") and operated through an agreement with MacQuarie Aviation North America, Inc.

The Airport receives funding from the FAA, the Respondent in this matter, under the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq*. As a condition of receiving Airport Improvement Program ("AIP") funds, the County is subject to AIP Sponsor Assurances ("Grant Assurances"), as incorporated into the County's grant agreements [AR, Item 1, Ex. 2] [App. pp. A-1-16]. At all times relevant to this action, the County has been subject to its grant agreements and corresponding statutory and regulatory requirements, and therefore subject to review by FAA pursuant to Title 14, C.F.R. Part 16.

The Airport currently has five FBOs: Avitat, Landmark Aviation, Signature Flight Support,(Jet FBOs), Panorama and Westair ("Light General Aviation FBOs" or "LGA FBOs"). All FBOs service and sell jet fuel to aircraft between 12,500 and 50,000 pounds.

B. The County Constructed Light General Aviation Infrastructure at the Airport for the Use of Panorama and Westair and Pays for it From Passenger Facilities Charges.

Since 1985, the County has had a policy of support for light general aviation. The County reaffirmed its position in the February, 1987, Master Plan Update, stating:

> It is the County's desire that, to the greatest extent possible, the present mix of based aircraft and transient commercial aircraft remain the same, so as to maintain

> the character of a general aviation airport. It may therefore be necessary to provide economic protection for the light general aviation sector, as a matter of County policy, in order to maintain that mix.

AR Item 6, Ex. V, p.7-7 [App. p. A-18].

In 1992, the County began to provide that economic assistance when it applied to the FAA for authority to impose a Passenger Facility Charge ("PFC") to cover the expense of a project to "develop the light general aviation facilities as called for in the Master Plan at Echo Tie Down adjacent to Hangar E and a second area (Hotel) southeast of the Tower. The project includes tiedown paving, lighting, access road and parking lot." AR Item 1, Ex. 7 [App. p. A-32]. The County initially estimated the cost to be $10,100,000. *Id.*

Although the project met with substantial resistance from the Airlines, the project was approved by the FAA on November 9, 1992. In the end, the County, through use of its own funds and the PFC funds expended $13,150,745 on the Light General Aviation project. *See*, AR Item 1, Ex. 11 [App. p. A-43]. All funds were expended to increase access to Panorama and Westair's Light General Aviation facilities, including aprons, lighting, and access roads for the new light general aviation facilities. The other Jet FBOs did not receive any benefit, economic or otherwise, to their facilities from the PFCs or from the County.

Pursuant to their leases, at the time neither Panorama and Westair sold jet fuel or engaged in any service to jet or turboprop aircraft.

C. The December 9, 1997 Request For Proposals.

On December 8, 1997, the County issued a Request for Proposals for the Operation and Management of a Light General Aviation Fixed Based Operation at Westchester County Airport ("RFP"). AR Item 1, Ex. 12 [App. pp. A-44-72]. The cover letter from the County states that the it is seeking two firms "with experience and the ability to complete construction of, operate and manage two first class, full service FBO facilities which will provide fuel *(AvGas only)* and aircraft sales, flight training, tiedown space, t-hangars, maintenance, charter, etc., which will be offered at reasonable prices, for the convenience and use of *noncommercial aircraft operators*." [App. p. A-44] (emphasis added). The RFP's restriction continued in the body of the RFP. In the "Goal" section , the County states that it "seeks to provide the Light General Aviation Fixed Base Operation services to the owners and operators of light general aviation aircraft *under 12,500 pounds*." *Id.* at 3 [App. p. A-51] (emphasis added). In addition, the RFP was very specific about the operations that would be prohibited by the successful proposers:

Services that are prohibited include:

- Jet grade fuel sales
- Accommodation of aircraft over 12,500 lbs. MGTOW with the exception of aircraft managed by successful respondent. All exceptions are subject to the prior approval of the Airport Manager.
- Accommodation of aircraft over 12,500 lbs., MGTOW, without the prior consent of the Airport Manager.

Id. at p.6 [App. p. A-54]. In addition, the Jet FBOs were told by the County that they were "precluded from entering the [12/08/97] RFP." AR Item 1, Ex. 13, p.2 [App. p. A-74]. As the evidence cited above demonstrates, the RFP clearly limited the meaning of "light general aviation" to those fueling and servicing aircraft under 12,500 pounds, expressly precluded jet fuel sales, with or without the authorization of the Airport Manager, and barred the Jet FBOs from participating in the making proposals pursuant to the RFP.

D. Lease of The Sites to Panorama and Westair.

In the early part of 1998, the County accepted the response to the RFP by Panorama and Westair. However, even from the beginning it was apparent that Panorama and Westair would need special assistance not available to the Jet FBOs. The County determined that the LGA FBOs could not afford to pay rent by the square foot as the Jet FBOs did. As Joel Russell, then the Airport Manager

explained in a June 11, 1998, letter to Eric Langeloh, the Commissioner of Transportation:

> Utilizing a traditional rental based on square footage would be difficult.
>
> Typical land rental for Hotel site (1,017,134 sf):
>
> a. Airport Rate (unimproved) @ .83/sf = $844,221/yr.
> b. Airport Rate (improved) @ .92/sf = $935,763/yr.
> c. RFP Lt. GA Rate @ .25/sf = $254,283/yr.
>
> The RFP process has confirmed that the Lt. GA FBO will not generate excessive revenues. Even the .25/sf rate would seriously challenge the health of the FBO or the price to the public.

AR Item 1, Ex. 14 [App. p. A-75]. The County opted for charging a percentage of the gross revenues for the LGA FBOs. *Id*. [App. p. A-76]. The percentage of gross revenues formula produces only a nominal rent.

In July, 1999, the leases with the LGA FBOs were signed. Although the RFP was incorporated by reference into the leases, the leases still emphasized the fact that they were to be light general aviation FBOs only. For example, Section 3.0 of each lease provides:

> (c) The Tenant agrees, as a condition of this Agreement, that it shall not base (including managed and leased) any aircraft having a maximum take-off weight over 12,500 lbs. at the Airport, without the prior consent of the

> Airport Manager. The Airport Manager hereby expressly consents that the Tenant, as part of its managed or leased aircraft fleet, may base, upon prior written notification to the Airport Manager, up to twelve (12) aircraft having a maximum gross take-off weight over 12,500 lbs. and less than 50,000 lbs.

AR Item 1, Ex. 5 [App. p. A-80]; AR Item 1, Ex. 6 [App. p. A-85]. These provision clearly indicates that the LGA FBOs were not permitted to sell jet fuel to aircraft in excess of 12,500 pounds, except for up to 12 based aircraft. That view is reinforced by the fact that the form of lease included in the RFP itself did not even allow for the exception for the 12 based aircraft or contain Section 3.6. See pp. 9-10 of form of Lease included with RFP, Exhibit 12 [AR Item 1, Ex. 7 [App. pp. A-41-42].

The LGA FBOs leases, therefore, leave no doubt that the County did not intend for the LGA FBOs to service any aircraft above 12,500 pounds. In his statement announcing the proposed approval of the Panorama and Westair leases, Westchester Commissioner of Transportation Marvin Church stated that "Light General Aviation is a term that we have adopted at this airport to designate that segment of the non-commercial aviation community that is characterized by small airplanes, usually propeller driven and usually owned by private citizens for recreational private business use." Statement by Commissioner Church, 04/30/99,

AR Item, Ex. 33 [App. p. A-88]. Although not included in the final draft, Commissioner Church also made the comment that "these contracts define those aircraft by weight and limit them to 12,500 pounds." *Id.*

E. LGA FBOs Obtain Right to Sell Jet Fuel.

Section 3.6 of the LGA FBOs' leases also provide that: "If the percentage of Tenant based aircraft *under 12,500 lbs.* that utilize jet fuel exceeds 10%, the parties agree to meet to discuss the possibility of the County granting Tenant the right to sell jet fuel." [App. pp. A-81, A-86] (emphasis added). Nevertheless, soon after the ink dried on the leases the LGA FBOs began campaigning for the right to sell jet fuel. In an October 26, 2000, meeting between the Airport and Westair, Westair asked for the right to sell jet fuel, telling the Airport that they are getting transient jets, but not getting any fuel income from them. AR Item 1, Ex. 16 [App. pp. A-91-97]. On May 1, 2001, Westair requested a meeting with the County to discuss the possibility of selling jet fuel. AR Item 1, Ex. 17 [App. p. A-98]. On May 15, 2001, that meeting was held, though no resolution was reached. AR Item 1, Ex. 18 [App. pp. A-99-103]. Throughout June, 2001, Westair continued to plead its case, supplying the County with additional information regarding Westair's operation in an effort to show why Westair should be allowed to sell jet fuel. *See,* AR Item 1, Ex. 34 [App. pp. A-104-116]; AR Item 1, Ex. 35

[App. p. A-117]; and AR Item 1, Ex. 36 [App. pp. A-118-123]. Joel Russell in a July 30, 2001, letter, explained the situation to Sal Carrera, the County's Director Of Real Estate:

> The required list [of services by the LGA FBOs] provides a full menu of light general aviation services, but, on balance, does not produce a substantial profit. Conversely, restrictions were placed in the lease and infrastructure to reduce corporate jet activity, which could be expected to produce profit.
>
> Proformas from both Westair and Panorama produced annual profits of approximately $200,000, if all went well.
>
> Recognizing this, the lease fee schedule was changed to a percentage of gross, which would equate to a *typical fee to the County of $60,000*. Please note lend [*sic*] rental ($0.83/sf) would produce a *minimum annual rental of $757,100*.

AR Item 1, Ex. 37 [App. p. A-124] (emphasis added). Thus, it became obvious to the LGA FBOs and the County that, despite substantial subsidies in the form of construction grants, the LGA FBOs could not hold their own, and, in light of that fact, the County cut the rent by almost $700,000 per year for each of the LGA FBOs.

On August 1, 2001, the County started to waffle. Joel Russell sent a draft proposal regarding jet fueling operations for Westair. *See*, AR Item 1, Ex. 19

[App. pp. A-126-127]. In that letter Joel Russell proposes that Westair will be "granted limited jet fuel ability. Westair will be allowed to provide jet fuel to: Based aircraft with a written tiedown, hangar or t-hangar agreement with Westair; Aircraft owned or leased by Westair; and Aircraft managed by Westair." [App. p. A-127]. Not satisfied with that proposal, on August 21, 2001, Westair responded that it wanted permission "to fuel not only based aircraft but also transit aircraft." AR Item 1, Ex. 20 [App. p. A-128]. On September 5, 2001, Panorama submitted its request for a meeting pursuant to § 3.6 of the lease to give Panorama the right to sell jet fuel. AR Item 1, Ex. 21 [App. p. A-129].

Finally, on September 20, 2001, the Airport Manager granted the LGA FBOs permission to do what the RFP prohibited what the leases did not allow, and what the application for and approval of PFC funds did not contemplate: sell jet fuel not only to based, owned and managed aircraft, but transient jets as well. AR Item 1, Ex. 22 [App. p. A-130]; AR Item 1, Ex. 23 [App. p. A-131].

Once they had authority from the Airport Manager to sell jet fuel, both Panorama and Westair set about changing their focus from light general aviation to jets and turboprops. *See, e.g.*, AR Item 1, Ex. 24 [App. pp. A-132-136] ("Westair is now entering jet aircraft management at HPN") [App. p. A-132], and AR Item 1, Ex. 25 [App. pp. A-137-138] ("Increased growth in Jet fuel sales to

HPN's transient market base is an area to which Panorama's future success is most critical and dependent") [App. p. A-137].

It is also clear that Panorama and Westair considered themselves to be in competition not with each other, but with the Jet FBOs. In a 09/12/05 letter to Joel Russell, Westair complained that "our transit business segment must be competitive with other FBOs as well. Avitat, Skyport and Signature can accommodate any and all transits. We currently can not [*sic*]. This causes an imbalance that needs adjustment in this business segment rates." AR Item 1, Ex. 27 [App. p. A-139].

The LGA FBOs have also begun to market themselves as jet FBOs. In an article entitled "HPN's Westair throws its lot in with Million Air," both Westair and Panorama made statements that they are no longer solely LGA FBOs, but jet FBOs as well. Bill Weaver, Westair's President, mentioned in the article that its facility would need to be upgraded because "we originally built our office and hangar to be a light GA facility, but then after September 11, we got more into the jets." AR Item 1, Ex. 38 [App. p. A-140]. Likewise, Panorama is profiled in the article, "[i]n 2002, Panorama opened a new $14 million facility at the southwest corner of the airport, catering to both general aviation pilots and business jets." *Id.* These changes have been borne out by physical changes at the LGA FBOs,

where they have built hangars with 30 ft. doors, allowing for larger jets instead of light general aviation.

Despite the view of airport management that:

> The County believes that if development at HPN were left to market forces, general aviation services that focus on small GA aircraft would be squeezed out of the Airport. This is because GA services that focus on larger corporate and private jets generally yield higher profit margins than small GA services. AR Item 7, ¶ 5 [App. p. A-142]; *see also*, ¶ 9 [App. p. A-144].

The facts clearly demonstrate that the generous subsidies provided by the County, coupled with the permission given by the Airport Manager to sell jet fuel have allowed the LGA FBOs to thrive at the expense of the Jet FBOs by "focus[ing] on larger corporate and private jets." For example, growth in general aviation jet fuel sales for all the FBOs has been dramatic. Comparing 2004 (the earliest year for which Avitat has been able to obtain data) to 2006, Landmark's sales declined by 1.7%, Avitat's sales increased by 0.9%, and Signature's sales increased by 5.8%. In comparison, as for the LGA FBOs, Westair's increased by 7.8% and Panorama's increased by 32%. AR Item 9, Ex. 12, ¶ 13 [App. p. A-148]. In raw numbers, starting from no general aviation jet fuel sales prior to September, 2001, the LGA FBOs have steadily and dramatically grown so that, by 2006, the LGA FBOs' general aviation jet fuel sales were more than 51% of Avitat's. *Id.*

In short, the LGA FBOs have acknowledged and demonstrated that their ability to sell jet fuel has allowed them to move away from their originally intended and exclusive function of servicing LGA to what the County has called "the more lucrative larger GA customers." AR Item 6, p. 12 [App. p. A-152]. Both Westair and Panorama are able to gain market share by selling their jet fuel below the price of the Jet FBOs because they received subsidies for construction which allow them to escape repayment of construction loans and because they are paying substantially less in rent to the County. Thus, the facility and rent subsidies to the LGA FBOs allow them to substantially undercut the price for services in which they are in direct competition with the Jet FBOs: the fueling and servicing of jet aircraft.

SUMMARY OF ARGUMENT

The fundamental issue in this case is whether FAA acted in a manner that was arbitrary and capricious and not supported by the law or by substantial evidence where it determined that the County, proprietor of Westchester Airport, did not violate 49 U.S.C. § 47107, *et seq.*, and the sponsor Grant Assurances 22, 23 and 24, where the County subsidized the construction of infrastructure for a single sector of the aeronautical community, the LGA FBOs, to the exclusion of the remaining FBOs, and subsequently allowed the same LGA FBOs to incur on

the only area distinguishing the two categories of FBO, the right to sell jet fuel. The answer is manifestly in the affirmative where: (1) FAA relied almost entirely on the finding that the Jet FBOs and LGA FBOs are not "similarly situated" even though the limitation in Grant Assurance 22(c) to aeronautical users "making the same or similar use of the airport" applies only to a challenge to "rates, fees and other charges" under Grant Assurance 22, subsection (c), not to a challenge under Grant Assurance 22, subsection (a), which prohibits unjust discrimination; and (2) even if the FAA had properly applied the "similarly situated" standard, it erred by failing to take into account instructive case law providing that "similarly situated" does not require identity of use. *BMI Salvage Corp. v. FAA*, 272 Fed.Appx. 842, 2008 WL 927900 (11th Cir. 2008).

Moreover, FAA's determination lacks evidentiary support where it concludes that: (1) Avitat, a Jet FBO, could have, but did not, negotiate better (or "similar") terms in its 2005 and 2006 lease negotiations to balance the inequities Avitat now claims arose out of the County's preferential treatment of the LGA FBOs; and (2) the LGA FBO leases gave them the "unqualified right" to sell jet fuel, where those documents merely set thresholds for the possibility of meeting to discuss the potential for the sale of jet fuel, hardly a definitive, or "unqualified" grant of such a right.

FAA also erred on the law in its determination that: (1) aeronautical users of an airport must be effectively barred from use of the airport to give rise to a violation of Grant Assurance 23, as applicable case law holds that an exclusive right may be granted where, as here, a significant burden is placed on one or more competitors that is not placed on others, *see*, *Pompano Beach v. FAA*, 774 F.2d 1529, 1542 (11th Cir. 1985); and (2) that the inequity must rise to the level of a violation of Grant Assurance 22 to be cognizable under Grant Assurance 23, where an intentional exclusion of other users can be shown to effectuate an anti-competitive environment.

Finally, FAA erred in determining that the LGA FBO subsidies, coupled with the right to sell jet fuel ". . . did not impose a fee and rental structure that disparately shifted the burden of making the airport as self-sustainable as possible," AR Item 24, p. 41 [App. p. A-193], where the grant of subsidies to LGA FBOs coupled with the subsequent right to sell jet fuel shifted the burden of supporting the LGA FBOs properly belonging to the County, to the Jet FBOs.

As a result of these collective errors of fact and law, the case should be remanded to the FAA for decision in accordance with the appropriate standard of review, and based on the evidence in the Record and applicable case law.

ARGUMENT

I. STANDARD OF REVIEW.

When reviewing a final decision of the FAA dismissing a complaint filed under Part 16, "[w]e must apply the standard of review articulated in the Federal Aviation Act, 49 U.S.C. § 46110(c) . . . , and by default, the Administrative Procedure Act, 5 U.S.C. § 706," *BMI Salvage Corp. v. FAA*, 272 Fed. Appx. 842, 845 (11th Cir. 2008) [Unpublished] "Under the APA, we must set aside any agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 324 (2d Cir. 2003), *citing* 5 U.S.C. § 706(2)(A).

On review of an FAA disposition of complaint brought under Part 16 of FAA regulations, alleging noncompliance with aviation statutes or regulations, a Court of Appeals may overturn the FAA's factual findings if they are not supported by substantial evidence, and may overturn nonfactual aspects of FAA's decision if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Boca Airport, Inc. v. F.A.A.*, 389 F.3d 185, 189 (D.C. Cir. 2004).

"In reviewing administrative fact-findings to determine whether they are supported by substantial evidence, this court must look at the record in its entirety,

including body of evidence opposed to FAA's view." *Greater Orlando Aviation Authority v. F.A.A.*, 939 F.2d 954, 958 (11th Cir. 1991), citing *City of Pompano Beach v. FAA*, 774 F.2d 1529, 1539 (11th Cir. 1985). "Not only must the agency's factual findings be supported by substantial evidence, but the agency's interpretation of governing statute, application of statute to facts, and the conclusion must be reasonable and not arbitrary or capricious. *Id., citing City of Pompano Beach* at 1540.

Under the standard of review established by the APA, an administrative agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *LaFleur v. Whitman*, 300 F.3d 256, 267 (2d Cir. 2002), citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). "In evaluating the agency's explanation, we cannot substitute our preferences for that of the agency, but must limit our review 'to examining the administrative record to determine whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment.'" *Id*., citing *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 97 (2d Cir.2001). "We may set aside an agency determination as arbitrary and capricious if we conclude that the agency 'relied on factors which Congress has

not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id*, quoting *State Farm*, 463 U.S. at 43.

II. FAA ERRED IN APPLYING AN INCORRECT STANDARD IN ITS REVIEW OF THE DIRECTOR'S DETERMINATION.

The FAA's determination here is fatally tainted by the application of an incorrect "standard of proof" rather than the correct "standard of review."

Title 14, C.F.R. Part 16 does not contain an explicit standard of review for the Associate Administrator to rely upon in deciding an appeal of a Director's Determination. *See,* Title 14, C.F.R. Part 16.33. FAA has in this case, as in other recent Part 16 Final Decisions, relied on *Ricks v. Millington Municipal Airport*, FAA Docket No. 16-98-19, Final Decision and Order, p.21 (Dec. 20, 1999) for the "supported by a preponderance of reliable, probative, and substantial evidence" standard of review. AR Item 24, p. 23 [App. p. A-175]. However, FAA here makes the same mistake as in the past, *i.e.*, instead of citing statutory or regulatory support for its use of that standard of review, it cites to the "standard of proof" found in Title 14, C.F.R. Part 16.227 (entitled "standard of proof"), which

states that a "hearing officer shall issue an initial decision or shall rule in a party's favor only if the decision or ruling is supported by, and in accordance with, reliable, probative, and substantial evidence contained in the record and is in accordance with law." Title 14, C.F.R. Part 16.227.

However, as Justice Sandra Day O'Connor pointed out in her concurring opinion in *Concrete Pipe and Products of California, Inc. v. Construction Laborers*, 508 U.S. 602, 650-651 (1993), "[s]tandards of proof and standards of review are entirely unrelated concepts." Black's Law Dictionary defines "standard of proof" as "[t]he degree or level of proof demanded in a specific case . . ." and "standard of review" as "[t]he criterion by which an appellate court exercising appellate jurisdiction measures the constitutionality of a statute or the propriety of an order, finding, or judgment entered by a lower court." Black's Law Dictionary (8th ed. 2004). Thus, the threshold mechanism for FAA to employ in review of a Director's Determination is a standard of *review*, not a standard of *proof.* FAA erred to the extent that it relies upon 16 C.F.R. § 16.227 as its standard of review.

FAA cites *Flamingo Express, Inc. v. FAA*, 536 F.3d 561 (6th Cir. 2008) for the proposition that the Associate Administrator's standard of review should be the same as the "federal courts of appeal in their review of FAA final agency decisions." AR Item 24, p. 23 [App. p. A-175]. Although *Flamingo Express*

acknowledges that the Administrative Procedures Act is the statute that gives the federal Courts of Appeal its standard of review for petitions for review of final agency actions, it does not make the distinction in the APA relevant here, the distinction between the sections applicable to "Judicial Review" and "Administrative Actions." All of the citations to the Administrative Procedures Act contained in *Flamingo* refer to Chapter 7 of the APA, which is entitled "Judicial Review." Since the Associate Administrator is not a "reviewing court," Chapter 7 of the APA is not applicable to her review of the Director's Determination. *See, also,* 5 U.S.C. § 706 ("the reviewing court shall decide . . . ").

On the other hand, Chapter 5, entitled "Administrative Procedure," contains the provisions for federal agencies and their review of their actions as they decide final agency actions. Thus, FAA's analogizing the Associate Administrator's review of the Director's Determination to a federal Court of Appeals' review of a final agency action is inappropriate.

Since the Part 16 process is an "agency action" within the definition of 5 U.S.C. § 551(13), Chapter 5 is the applicable Chapter under which one should search for an applicable standard of review. APA § 557(b) states that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by

rule." 5 U.S.C. § 557(b). The Second Circuit has determined this to mean that, unless the regulations specify otherwise, the agency must take a *de novo* review of the matter upon intraagency appeal and make its own finding of facts. *Mr. Sprout, Inc. v. U.S.*, 8 F.3d 118, 123 (2d Cir. 1993) ("[U]nder the APA, all issues raised by a party's administrative appeal of an [ ] initial decision are considered *de novo* by the [agency]"); *see, Nash v. Bowen*, 869 F. 2d 675, 680 (2d Cir. 1989), *citing* 5 U.S.C. § 557(b) ("[a]n agency reviewing an initial decision "retains 'all the powers it would have in making the initial decision'"); *see also*, *Moore v. Ross*, 687 F.2d 604, 608 (2d Cir. 1982) *citing* 5 U.S.C. § 557(b) ("Under the APA, an agency reviewing an initial decision "has all the powers which it would have in making the initial decision . . . The agency is "the ultimate finder of fact").[1]

Under the APA standard, FAA erred when it simply "reviewed the entire record to determine whether the Director's findings are supported by a preponderance of reliable, probative, and substantial evidence, and was consistent with applicable law, precedent, and FAA policy," AR Item 24, p. 24 [App. p. A-176], since the Associate Administrator is not a court sitting in review of a final

[1] Other circuits have more recently come to the same conclusion that the Second Circuit did. *See, e.g., Ahne & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1056 (D.C. Cir. 2007); *Exxon Chemicals America v. Chao*, 298 F.3d 464, 467 (5th Cir. 2004); *Elliott v. CFTC*, 202 F.3d 926, 934 fn.9 (7th Cir. 2000); *see also, Seaquist v. Blakey*, 210 Fed. Appx. 423, 425 (5th Cir. 2006); and *Janka v. Department of Transportation*, 925 F.2d 1147, 1149 (9th Cir. 1991).

agency action. The appropriate standard of review for the Associate Administrator's review of Director's Determinations require that the Associate Administrator make her own findings of fact and law.

III. FAA ERRED ON THE LAW IN APPLYING THE "SIMILARLY SITUATED" STANDARD IN REVIEWING AVITAT'S CLAIM UNDER GRANT ASSURANCE 22.

A. The "Similarly Situated" Requirement Does Not Apply to Issues of Unjust Discrimination Under Grant Assurance 22(a).

At the core of both the Director's and the Associate Administrator's responses to Avitat's challenge is the proposition that, in order to prevail in a challenge under any part of Grant Assurance 22, the Petitioner bears the burden of showing that it is "similarly situated" to other providers of aeronautical services. FAA's Final Determination specifically states that Avitat's arguments are viewed "in the context of similarly situated parties." AR Item 24, p. 24, fn. 14 [App. p. A-176] ("The Director's Determination analyzed Avitat's allegation of non-discrimination in the context of similarly situated parties and equitable treatment"). This analysis, however, is an error of law, rendering the Final Determination arbitrary and capricious.

Every one of the conclusions of both the Director and the Associate Administrator are predicated on the conclusion that Avitat and the LGA FBOs are

not similarly situated. *See*, *e.g.*, AR Item 24, pp. 26, 28, 29, and 30 [App. pp. A-178, A-180, A-181, A-182]. The problem with the FAA's "similarly situated" argument, is that it does not apply to Part 16 cases involving purely "unjust discrimination." There are two subsections of Grant Assurance 22 that are relevant to this argument: 22(a) and 22(c). Grant Assurance 22(a) states:

> [The airport owner or sponsor] will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.

As is the case with all of the Grant Assurances, it has its basis in the Federal Aviation Administration Act. In the case of 22(a), 49 U.S.C. § 47107(a)(1) states that the Secretary of Transportation must assure that the Airport Sponsor will ensure that "the airport will be available for public use on reasonable conditions and without unjust discrimination." Neither the Grant Assurance nor the statute mentions a requirement that in order to establish "unjust discrimination," the parties must be "similarly situated."

On the other hand, Grant Assurance 22(c) states that: "[e]ach fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators *making the*

same or similar uses of such airport and utilizing the *same or similar facilities*." This assurance has its basis in 49 U.S.C. § 47107(a)(5): "fixed-base operators *similarly using* the airport will be subject to the same charges." It is here that the Grant Assurance and the statutory predicate mentions "same or similar uses." But this subsection only applies to disputes between FBOs regarding "rates, fees, and other charges," not to claims of unjust discrimination.

This distinction is not only present in the Grant Assurances and the FAA governing statutes, but also in FAA Order 5190.6B: "First, the sponsor must make the airport and its facilities available for public use. Next, the sponsor must ensure that the terms imposed on aeronautical users of the airport, including rates and charges, are reasonable for the facilities and services provided. Finally the *terms must be applied without unjust discrimination*." FAA Order 5190.6B, § 9.1.a. The FAA Order does not mention anything about "similarly situated" or "making same or similar use of the airport.

In this case, Avitat does not allege that the "rates, fees, and other charges" contained in its leases are discriminatory *vis á vis* the "rates, fees, and other charges" contained in the LGA FBOs' leases, a fact which the FAA acknowledges. *See,* AR Item 24, p. 29 [App. p. A-181] ("Avitat has not and is not requesting similar treatment to the LGA FBOs . . ."). Rather, Avitat alleges that the County's

initial grant of subsidies to LGA FBOs, coupled with the Airport Manager's subsequent grant of the right to sell jet fuel, gives the LGA FBOs a competitive advantage not available to Avitat and, thus, unjustly discriminates against Avitat and the other Jet FBOs. No matter how hard the County and the FAA try to characterize this case as about "rates, fees and other charges" that Westchester County charges to the LGA FBOs as opposed to Avitat, this case challenges only the way in which Westchester County unjustly discriminates against Avitat through the execution of its LGA Policy which allows LGA FBOs to sell jet fuel, while at the same time receiving subsidies for their rent and for the construction of portions of their facilities.

Thus, there is no rational connection between the facts found and the FAA's decision because cases cited by the County in its brief are inapposite, in that they focus solely on disputes over "rates, fees, and other charges" pursuant to Grant Assurance 22(c),[2] not on the discrimination inherent in granting subsidies and

[2] *See*, *Aerodynamics of Reading, Inc. v. Reading Regional Airport Authority,* (FAA Docket No. 16-00-03) (alleged that airport proprietor charged Aerodynamics higher rents than competing FBOs); *Adventure Aviation v. City of Las Cruces, NM,* (FAA Docket No. 16-04-14) (alleged that the Las Cruces allowed disparate lease rates); *Penobscot Air Service, Ltd, v. County of Knox Board of Commissioners,* (FAA Docket No. 16-97-04) (alleged that Knox County engaged in economic discrimination due to gross percentage rent disparity); *Santa Monica Airport Association v. City of Santa Monica,* (FAA Docket No. 16-99-21) (alleged that the City of Santa Monica unjustly discriminated by entering into leases on terms that were not uniformly applicable to other FBOs).

privileges to one class of FBOs and not to another.

B. Even if the "Similarly Situated" Requirement Did Apply to Avitat's Challenge, FAA's Application Was Contrary to Law and Fact and Therefore Arbitrary and Capricious.

1. "Similarly Situated" Does Not Imply Provision of Identical Services.

Even if the "similarly situated" requirement did apply to challenges based on Grant Assurance 22(a), which it does not, Avitat's services fall squarely within the definition of "similar" as defined by relevant case law. In *BMI Salvage Corp. v. FAA,* 272 Fed.Appx. 842, 2008 WL 927900 (11th Cir. 2008) (unpublished),[3] an aircraft demolition company had been seeking to obtain a long-term lease at Opa-Locka Airport in Miami-Dade County, Florida. The County, the airport proprietor, while repeatedly denying the demolition company's request, allowed another tenant, Clero Aviation, an FBO involved in aircraft repair, to lease an abandoned building and paid for various infrastructure upgrades to the property. The FAA determined that BMI Salvage and Clero Aviation were not "similarly situated," calling BMI Salvage's demolition business partial "non-aeronautical use" of the property, thus justifying the County's disparate treatment of the two FBOs. Upon review, the Eleventh Circuit held that there was no apparent reason

[3] Although *BMI Salvage* is an unpublished case, it can provide guidance to the court, even if it is not authority. *See*, Fed.R.App.Pro. 32.1.

> why the non-aeronautical element, if there is one, is a reasonable justification to distinguish between BMI Salvage and Clero Aviation. It is our understanding that presence at the airport is a pre-requisite for BMI's demolition business. Aircraft must be flown to the site of BMI's business for demolition to begin. Therefore, the natural, perhaps only logistically feasible, place for such a business to operate is within the designated aeronautical area of the airport. The non-aeronautical element of BMI's business is at most *de minimis* in light of the need to locate an aircraft demolition business in proximity to aeronautical areas in the airport.

BMI Salvage at 6. The critical point is that the Court viewed even activities as different as aircraft demolition and aircraft repair as "similarly situated" because their salient common feature was their need to locate in proximity to aeronautical activity.

The same definition of "similarly situated" is appropriate here. Even if, for argument's sake, the LGA and Jet FBOs mandated services were as markedly different as those between BMI Salvage and Clero Aviation, which they are not, they share the overriding common need to be located in proximity to aeronautical uses, and, thus, fit the definition of "similarly situated" for the purpose of reviewing a claim of unjust discrimination.

2. Avitat and the LGA FBOs are "Similarly Situated" Even Using the FAA's Erroneous Standard.

Moreover, even if it were appropriate under the law to compare all of the services and "rights and responsibilities" that Avitat and the LGA FBOs are permitted to offer at the Airport, the FAA erred as matter of fact. All of services that the LGA FBOs offer, Avitat is permitted to offer as well. Both Avitat and the LGA FBOs can, pursuant to the terms of their leases, provide the following services: tie-down accommodations for based & transient aircraft; hangaring accommodations for based & transient aircraft; T-hangar Accommodations; maintenance (airframe, engine & avionics); flight school (including ground training); aircraft rental, charter & management; AvGas and lubricant sales; aircraft parts sales; pilot shop sales and aircraft sales; all but 12 based aircraft must weigh under 12,500 lbs.; and may not accommodate any aircraft weighing over 50,000 lbs. In addition, after the Airport Manager granted permission to the LGA FBOs, both Avitat and the LGA FBOs sell jet fuel to based or transient aircraft under 50,000 lbs on own premises.

In the past, the only meaningful difference was Avitat's ability to sell jet fuel which, under their leases, was a right not granted to the LGA FBOs. However, over time, this difference has eroded substantially. The LGA FBOs, by

virtue of the "permission" granted by the Airport Manager, are now selling jet fuel to based or transient aircraft under 50,000 pounds on its own premises. Avitat may sell to based or transient aircraft over 50,000 pounds throughout the airport. That is the only remaining formal difference between the LGA and Jet FBOs. Clearly, that single restriction has not impeded the LGA FBOs incursion into the jet fuel market.

In short, while court cases are few and far between on this issue, *BMI Salvage* is instructive as to the trend that courts are taking in adjudicating the "similarly situated" issue. That trend is clearly away from a comparison of the specific services offered by FBOs toward a predicate assumption that all aeronautical activities that must be located in an airport environment to do business are, *de facto*, similarly situated, in the absence of evidence to the contrary which does not exist here.

IV. FAA LACKED SUBSTANTIAL EVIDENCE IN DECIDING THAT WESTCHESTER COUNTY DID NOT VIOLATE GRANT ASSURANCE 22.

In addition to its misapprehension of current, governing law, in arriving at its determination that Avitat and the LGA FBOs are not similarly situated and do not make similar uses of the Airport, the FAA makes several factual errors and assumptions that are entirely unsupported by the evidence.

A. There Is No Evidence that Avitat Could Have Changed the County's Discriminatory Activities Through Negotiation of its 2005 and 2006 Leases.

There is no evidence in the record supporting FAA's argument that Avitat could somehow have affected the County's treatment of the LGA FBOs through the negotiation of Avitat's own leases. The FAA assumes that Avitat knew about the provisions in the LGA FBOs leases, and had the leverage to use that information to obtain better terms for its leases, but did not. The facts, however, are very different.

First, there is no evidence in the Record that Avitat had formal knowledge of the County's concessions to the LGA FBOs. Second, even if, for argument's sake, the Record reflected any such knowledge, which it did not, there is absolutely no evidence in the Record that Avitat had the leverage to do anything about the disparate treatment through its own lease negotiations.

FAA's argument is a conclusion (based on speculation by the Director) and not addressed by either party prior to the Director's Determination. Moreover, the precedent the Director cites does not support his conclusion. Instead, it is comprised of cases in which a party complains after the fact about its own lease, not about privileges given to a third party, or about use of lease negotiations to affect a third party's aeronautical privileges. *See, supra*, p. 29, fn. 3.

Finally, the Director's baseless assumption permeates FAA's Determination. "The Director also cites a quote from Avitat that went into detail on the rents paid by Avitat and the LGA FBOs, permit fees and the amount of percentage of gross sales that each entity was required to pay the County. The detail provided by Avitat was sufficient for the Director to make a logical assumption that Avitat had in depth information about the LGA FBOs lease." FD, p.29.

The Director's assumption was in error, since the information that Avitat provided in its documents was derived from a N.Y. State Freedom of Information Law request after Avitat had begun its Part 16 proceedings, not what it knew from before receiving that information. In short, the FAA's error in speculating as to Avitat's knowledge of the County's intentions with respect to the LGA FBOs, and potential to influence that intention through its own lease negotiations, rather than basing its Final Determination on fact, renders the FAA's Determination the very definition of arbitrary and capricious.

B. The FAA's Factual Finding that the LGA FBO leases gave them the right sell jet fuel is without Substantial Evidence and therefore Arbitrary and Capricious.

The FAA holds in several places that the LGA FBO leases grant them the right to sell jet fuel once they meet certain conditions. "Section 3.6 of each lease

contemplated that each LGA FBO could be granted an unqualified 'right to sell jet fuel' if their percentage of based, small GA aircraft that used jet fuel exceeded 10 percent . . . the contemplated right to sell jet fuel existed in each lease and was not qualified in any manner, whether with regard to transient aircraft, weight of aircraft or otherwise." AR Item 24, p. 30 [App. p. A-182] [emphasis added]. Nothing could be farther removed from the evidence in the Record.

Section 3.6 of both the LGA FBOs' leases states (in its entirety): "If the percentage of Tenant based aircraft under 12,500 lbs that utilize jet fuel exceeds 10%, the parties *agree to meet* to discuss *the possibility* of the County granting Tenant the right to sell jet fuel." LGA FBO Leases, § 3.6. Contrary to the County's and the FAA's statements, this does not give the LGA FBOs the right, unqualified or otherwise, to sell jet fuel if they meet the 10% threshold[4] - it only gives them a right to a meeting on the subject. Thus, FAA's conclusion flies in the face of the extant evidence and is per se arbitrary and capricious.

C. The FAA's Factual Finding that the RFPs Should Not Be Considered Lacks Substantial Evidence in the Record.

FAA erred in finding the RFPs immaterial. They are material because the LGA FBO leases incorporate the RFPs and the proposals submitted by the LGA

[4] Avitat has contended neither of the LGA FBOs reached the 10% threshold, a fact that the FAA has ignored. *See,* Avitat Reply, pp. 19-21.

FBOs by reference. The LGA FBO Leases, at ¶ 10 state that "Both parties acknowledge that this agreement is the result of a Request for Proposals dated December 8, 1997, and is intended to reflect such proposal, and Tenant's response to such proposal, to the extent consistent therewith." Thus, where the lease does not specifically provide, the RFP may be used to elucidate the understanding between the parties. *See,* LGA FBO Leases, Recitals, ¶ 10. The RFP states in section II.F, "Operation":

> Services that are *prohibited* include:
>
> - Jet grade fuel sales
> - Accommodation of aircraft over 12,500 lbs. MGTOW with the exception of aircraft managed by the successful respondent. All exceptions are subjects to the prior approval of the Airport Manager.
> - Accommodation of aircraft over 12, 500 lbs., MGTOW, without the prior consent of the Airport Manager.

RFP, § II.F., Complaint Exhibit 12 (emphasis added), all later granted by the County.

Finally, the FAA failed to take into account that the RFP is, among other things, in the nature of a Statement of Intent, and that in this case, the LGA FBOs knew that the intent of the parties, including their own, was that sale of jet fuel would be prohibited. *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 397 (2d

Cir.2009) (When "the contract language creates ambiguity, extrinsic evidence as to the parties' intent may properly be considered"). Thus, the RFP was relevant to proper interpretation of the LGA FBO leases and their prohibition of the sale of jet fuel by the LGA FBOs.

In summary, the County wanted to support LGA FBOs, so it subsidized them by (1) allowing them to pay well below market rates for rent; and (2) by providing them with infrastructure improvements that were paid by PFCs instead of by the LGA FBOs. But that was not enough. The LGA FBOs, because they took on more debt than they could handle and wanted the County to bail them out, asked for the privilege of selling jet fuel. The Airport Manager obliged, and gave his permission to the LGA FBOs to sell jet fuel. This arrangement, however, gives rise to manifest discriminatory impacts. The original subsidies granted to LGA FBOs for construction of ramps and other airfield infrastructure allows them to escape the fixed costs to which Jet FBOs are subject. By subsequently allowing them to add to revenues by selling jet fuel, the LGA FBOs were able to underprice other jet fuel outlets that did not benefit from subsidies. The LGA FBOs benefit as does the County[5] from the sale of jet fuel at the Jet FBOs' expense.

[5] Since the LGA FBOs' rent to the County is based on a percentage of the LGA FBOs' gross revenues, the County receives a direct benefit for every gallon of jet fuel the LGA FBOs sell.

The net effect of the original subsidy that was not given to Jet FBOs coupled with grant of jet fuel sales rights gives a patently discriminatory advantage to LGA FBOs. In the face of the overwhelming evidence supporting Avitat's claim, the dearth of evidence supporting FAA's conclusory findings, and the clear law contradicting its decision, the Final Determination is arbitrary and capricious.

V. FAA ERRED IN DETERMINING THAT COUNTY HAD NOT GRANTED AN EXCLUSIVE RIGHT TO LGA FBOs.

The prohibition against the grant of an exclusive right is found in 49 U.S.C. § 40103(e). Grant Assurance 23, *Exclusive Rights* (derived from 49 U.S.C. § 47107(a)(4)), incorporates the statutory requirement.[6]

Where an airport places a significant burden on one or more competitors, but not on others, courts have found the effective grant of an exclusive right. *See,*

[6] Grant Assurance 23 states, in pertinent part, that there can be "no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. . . . It further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities, including, but not limited to . . . air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity, and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49, United States Code."

e.g., City of Pompano Beach v. FAA, 774 F.2d 1529, 1542 (11th Cir. 1985). The County granted an exclusive right to LGA FBOs where it gave LGA FBOs subsidies not awarded to Jet FBOs while allowing LGA FBOs to compete with the Jet FBO in the sale of jet fuel. The FAA erred in fact and law when it determined that this grant does not constitute an exclusive right.

FAA claims that there must be a finding that an FBO was barred or was effectively barred from performing "an aeronautical activity" before an exclusive right violation can be found. The FAA cites *The City of Pompano Beach v. FAA*, 774 F.2d 1529 (11th Cir. 1985) for this proposition.[7] The most complete analysis of what is required under Grant Assurance 23 can be found in *The City of Pompano Beach v. FAA*, 774 F.2d 1529 (11th Cir. 1985):

> In 1941, the Attorney General of the United States advised that the term "exclusive right," as used in section 303 of the Civil Aeronautics Act of 1938, the predecessor of section 1349(a), "was intended to

[7] In the Final Decision, the FAA claims that "Here, Avitat mistakenly applies the logic of *Pompano Beach*. Avitat needs to understand 'it is well established that in order to show the constructive grant of an exclusive right, a claimant must show that it actually has been barred from conducting a "particular aeronautical activity" at the airport', through the imposition of unreasonable standards. *[Pompano Beach] at 1541*." AR Item 24, p. 37 [App. p. A-189]. However, that is not a quote from *Pompano Beach.* Rather that is a quote from the Director's Determination in *Northwest Airlines, Inc. et al v. Indianapolis Airport Authority*, FAA Docket 16-07-04 (Aug. 19, 2008). Moreover, it is not even the holding of the Director's Determination, but a statement of what the Indianapolis Airport Authority was arguing in that Part 16 matter.

describe a power, privilege, or other right excluding or debarring another or others from enjoying or exercising a like power, privilege, or right." 40 Op. Att'y Gen. 71, 72 (1941). Construing the legislative history of the predecessor act, the Attorney General opined that "the purpose of the provision is to prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics ..." at federally subsidized airports. *Id.* The term "exclusive right for the use of any landing area" does not apply broadly to the total of aeronautical uses to which an airport may be devoted; that would frustrate the purpose of the statute's limitation upon the use of federal funds by permitting mini-monopolies in the various airport activities. *Id.* Rather, "[t]he provision is clearly applicable to any right for the use of a landing area or an airport ... which is exclusive in character," prohibiting the grant of an exclusive right to *each* "particular aeronautical activity." *Id.* at 73. *See Hill Aircraft,* 561 F.Supp. at 673; *City of Dallas,* 371 F.Supp. at 1032; *Niswonger v. American Aviation, Inc.,* 411 F.Supp. 763, 766 (E.D.Tenn.1975), *aff'd,*529 F.2d 526 (6th Cir.1976). The type of exclusive right prohibited by section 1349(a) has been described as "one of the sort noxious to the anti-trust laws." *Aircraft Owners and Pilots Association v. Port Authority of New York,* 305 F.Supp. 93, 105 (E.D.N.Y.1969). In a nonregulatory circular to public airport owners, the FAA defined "exclusive right" as follows: A power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right. An exclusive right may be conferred either by express agreement, *by imposition of unreasonable standards or requirements,* or by any other means. Such a right conferred on one or more parties but excluding others from enjoying or exercising a similar right or rights would be an exclusive right.

Pompano Beach, 774 F.2d at 1541-1542. Using this analysis as a basis, an examination of the Final Determination reveals that the FAA made errors of fact and law in deciding that the County had not violated Grant Assurance 23, "Exclusive Rights."

First, FAA misapplies Grant Assurance 23 where it claims in order for an exclusive right to exist, the parties must be similarly situated. AR Item 24, p. 37 [App. p. A-189]. ("The two LGA FBOs, Westair and Panorama, do not provide the same services as Avitat and are not similarly situated."). In fact, neither the statute nor the Grant Assurance requires that parties be "similarly situated" when discussing the grant of an exclusive right.

Second, grant assurance 23 does not require the FAA to determine "that the County had established such inequity in its leases, standards and/or practices as to violate a provision of Grant Assurance 22." Instead, the only qualification to the grant of an exclusive right comes in FAA Advisory Circular 150/5190-2A at 4-5

> The presence on an airport of only one enterprise conducting aeronautical activities does not necessarily mean that an exclusive right has been granted. If there is no intent by express agreement, by imposition of unreasonable standards, or by other means to exclude others, the absence of a competing activity is not a violation of this policy. This sort of situation frequently arises where the market potential is insufficient to attract additional aeronautical activities. So long as the

> opportunity to engage in an aeronautical activity is available to those who meet reasonable and relevant standards, the fact that only one enterprise takes advantage of the opportunity does not constitute a grant of an exclusive right.

FAA Advisory Circular No. 150/5190-2A at p.4-5.

In this case, there was a palpable intent to exclude others from competing in the LGA market where: (1) the Jet FBOs were specifically barred from making proposals on the RFP; and (2) Jet FBOs were barred from receiving the infrastructure subsidies which ultimately allowed LGA FBOs to out-compete Jet FBOs in the jet fuel market.

On the other hand, the County allowed the LGA FBOs to compete directly with the Jet FBOs in selling jet fuel. In *City of Dallas v. Southwest Airlines Co*., 371 F.Supp. 1015 (N.D. Tex. 1973) *aff'd* 494 F.2d 773 (5th Cir.) The district court concluded that a city ordinance governing the phase-out provisions of Love Field near Dallas that would have allowed continued service at Love Field by certain types of aircraft but required Southwest and other aircraft in Southwest's classification to move to the new Regional Airport constituted unjust discrimination and a grant of an exclusive right of access to some carriers and not to others. The city's explanation for prohibiting Southwest from continuing its operation at Love Field was that it wanted to avoid the potential competitive effect

on the regional airport, the district court said this was an insufficient justification. *Dallas*, 371 F.Supp. At 1030.

Here, the County has stated that the Jet FBOs were "precluded from entering the RFP," AR Item 1, Ex. 13, p. 2 [App. p. A-74], effectively squelching any competition for the LGA FBOs. Thus, Avitat (and the other Jet FBOs) are being denied support from the County that is being provided to the LGA FBOs in the form of subsidized infrastructure. In light of the clear law and evidence demonstrating the grant to the LGA FBOs of a "privilege, or other right excluding or debarring another or others from enjoying or exercising a like power, privilege or right," the FAA's determination is patently arbitrary and capricious.

VIII. THE FAA ERRED IN DETERMINING THAT SUBSIDIZING LGA FBOs AND ALLOWING THEM TO SELL JET FUEL AS A MEANS TO ALLOCATE COSTS TO OTHER AERONAUTICAL USERS AND AWAY FROM THE COUNTY DID NOT VIOLATE THE FAA'S POLICY REGARDING AIRPORT RATES AND CHARGES AND GRANT ASSURANCE 24.

The Associate Administrator (and the Director) erred where they concluded that the County ". . . did not impose a fee and rental structure that disparately shifted the burden of making the Airport as self-sustainable as possible to the Jet

FBOs in violation of grant assurance 24." AR Item 24, p. 41 [App. p. A-193]. The County's actions violated both the FAA's Policy Regarding Airport Rates and Charges[8] ***and*** Grant Assurance 24.

A. FAA Policy Regarding Airport Rates and Charges.

The FAA's Policy Regarding Airport Rates and Charges states that,

> Common costs (costs not directly attributable to a specific user group or cost center) must be allocated according to a reasonable, transparent and not unjustly discriminatory cost allocation methodology that is applied consistently, and does not require any aeronautical user or user group to pay costs properly allocable to other users or user groups. 61 *Fed.Reg*. 31994, 32021 (June 21, 1996), § 3.4.1.

In *Jet One Center, Inc. v. Naples Airport Authority*, FAA Docket No. 16-04-03, Director's Determination (January 4, 2005), the airport sponsor charged one FBO 16 cents a gallon as a Fuel Flowage Fee, and charged another FBOs 40 cents a gallon. The Director stated that, if the airport sponsor was making up lost revenue by spreading the associated cost among the remaining tenants, it could be in violation of the FAA's Policy Regarding Airport Rates and Charges. *Jet One Center*, at 26.

Here, the County has done exactly what the Director in *Jet One* was referring to, and what the FAA's Policy Regarding Airport Rates and Charges

[8] 61 *Fed.Reg*. 31994 (June 21, 1996).

expressly prohibits. By allowing LGA FBOs to sell jet fuel based on the Airport Manager's permission, the County is, in effect, transferring profits which Jet FBOs would have realized to LGA FBOs, to pay the cost of the County's policy of supporting LGA FBOs. The County has forced Jet FBOs, including Avitat, to bear the costs of its subsidies to LGA FBOs. Moreover, by allowing LGA FBOs to sell jet fuel, the County is prorating the cost of its policy across other airport tenants, in clear violation of the FAA's Policy Regarding Airport Rates and Charges.

Although "an airport proprietor's decision to charge rates that are below those needed to achieve self-sustainability in order to assure that services are provided to the public is not inherently inconsistent with the obligation to make the airport as self-sustaining as possible" [*See*, Director's Determination, pp. 40-41], "[i]n allocating common costs, airport sponsors must use a system that does not require any aeronautical user or user group to pay costs properly allocable to other users or user groups." FAA Policy Regarding Airport Rates and Charges, 62 *Fed. Reg.* 31994, 32021 (June 21, 1996). Here, the County is, in effect, requiring Jet FBOs to pay costs properly allocable to LGA FBOs.

B. Grant Assurance 24.

Grant Assurance 24, *Fee and Rental Structure*, requires the airport sponsor to maintain a fee and rental structure for the facilities and services at the airport that will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection.

In *Jet One Center*, the Director stated that, if the airport sponsor was losing potential revenue by not collecting the allowable Fuel Flowage Fee from the FBO that paid only 16 cents a gallon, it could be in violation of Grant Assurance 24. *Jet One Center*, at 26.

Here, the County subsidized LGA FBOs, thus losing PFC revenues for other purposes. As a result, the County realized only nominal revenue, which, as the record shows, was not sufficient to make the Airport self-sustaining. AR Item 1, Ex. 37 [App. p. A-124]. Thus, the County violated Grant Assurance 24 by losing potential airport revenue because of the way it structured the LGA FBO leases, making it necessary for the County to find another way to increase airport revenue. This, in turn, led to the County's violation of the FAA's Policy Regarding Airport Rates and Charges, as set forth in Section VIII.A above.

CONCLUSION

In light of the FAA's arbitrary and capricious Final Decision and Order, this Court should remand the action to the FAA to apply the appropriate standard of review, and base its decision not on speculation and unsupported conclusions, but on facts in the Record and applicable law.

Dated: April 22, 2010

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to *Fed.R.App.P.* 32(a)(7)(C), that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 11,166 words.

Dated: April 22, 2010

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CERTIFICATE OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 695 Town Center Drive, Suite 700, Costa Mesa, California 92626.

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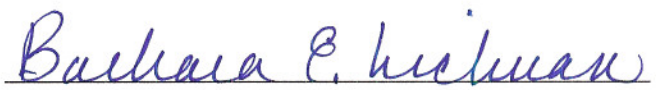

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