

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on AUG 15 2008, I placed in the United States mail (first class, postage paid) a true copy of the foregoing document addressed to:

For the Respondent


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Norwood Airport Commission
Norwood Memorial Airport
125 Access Road
Norwood, MA 02062

For the Complainant

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FAA Part 16 Airport Proceedings Docket
FAA Airport Compliance and Field Operations, ACO-100
FAA New England Region, ANE-600


Nikita Bright,
Office of Airport Compliance
and Field Operations



U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Associate
Administrator for Airports

800 Independence Ave., S.W.
Washington, D.C. 20591

AUG 15 2008

Mr. Michael C. Lehane, Esq.
Murphy, Hesse, Toomey & Lehane, LLP
300 Crown Colony Drive
Quincy, MA 02269

Mr. Matthew Watsky, Esq.
Eastbrook Executive Park
30 Eastbrook Road, Suite 301
Dedham, MA 02026

RE: Boston Air Charter v. Norwood Airport Commission, Norwood, Massachusetts
Docket No. 16-07-03

Dear Messrs. Lehane and Watsky:

Enclosed is a copy of the Final Decision and Order of the Federal Aviation Administration (FAA) with respect to the above-referenced matter.

Based on the record in this proceeding, FAA finds that the Determination made by the Director of Airport Safety and Standards is supported by a preponderance of reliable, probative, and substantial evidence. I affirm the Director's Determination that the Norwood Airport Commission is currently in violation of grant assurances 5, *Preserving Rights and Powers*; 22, *Economic Nondiscrimination*; and 23, *Exclusive Rights*.

The Town of Norwood is ordered to submit a corrective action plan to the Director, Office of Airport Compliance and Field Operations¹ within 30 days that explains how the Norwood Memorial Airport has or will correct the deficiencies identified in the Director's Determination and upheld in this Final Decision and Order.

¹ This office was formerly part of the Office of Safety and Standards; the Office of Airport Compliance and Field Operations is now a separate directorate responsible for adjudicating Part 16 formal complaints, among other matters.

The reasons for upholding the Director's Determination are set forth in the enclosed Final Decision and Order.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Kirk Shaffer", with a long horizontal flourish extending to the right.

D. Kirk Shaffer
Associate Administrator
for Airports

Enclosure

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

**Boston Air Charter,
Complainant / Appellee**

v.

**Norwood Airport Commission
Norwood, Massachusetts,**

Respondent / Appellant

Docket No. 16-07-03

FINAL DECISION AND ORDER

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal filed by Norwood Airport Commission (Appellant or the Town) from the Director's Determination of April 11, 2008, issued by the Acting Director of FAA Office of Airport Safety and Standards¹, pursuant to the *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* found in Title 14 Code of Federal Regulations (CFR) Part 16 (Rules of Practice).

Appellant argues on appeal to the Associate Administrator for Airports that the Director committed errors in conducting the investigation, interpreting the evidence, and applying law and policy, causing the FAA to find Norwood Airport Commission in violation of grant assurance 5, *Preserving Rights and Powers*; grant assurance 22, *Economic Nondiscrimination*; and grant assurance 23, *Exclusive Rights*, erroneously.

Appellant questions whether the Director properly concluded:

- (a) The Town violated grant assurance 5, *Preserving Rights and Powers*, by surrendering significant rights and powers when it entered into a

¹ At the time the Director's Determination was issued in this matter, the FAA Office of Airport Safety and Standards was in the process of selecting a new Director. As such, the Acting Director signed the determination. For purposes of this document, "Director" and "Acting Director" refer to the same authority.

leaseback agreement with Boston Metropolitan Airport, Inc. (BMA) for the "1100 Foot Strip."

- (b) The Town violated grant assurance 22, *Economic Nondiscrimination*, by denying Boston Air Charter access to conduct a commercial aeronautical activity and by restricting its ability to self-fuel.
- (c) The Town violated grant assurance 23, *Exclusive Rights*, by entering into lease agreements that gave control of the only power source to one tenant.

Appellant submits new evidence with the appeal that was not previously available during the initial pleadings. [See FAA Exhibit 1, Item 18, pages 6-7.]

In addition, Appellant requests the Associate Administrator conduct a hearing on this appeal. [FAA Exhibit 1, Item 18, page 16.]

The Associate Administrator affirms the Director's Determination. The appeal does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination. The Appellant is not entitled to a hearing.

II. SUMMARY OF THE DIRECTOR'S DETERMINATION

In its Complaint, Boston Air Charter (Complainant) alleged the Town of Norwood (Town) violated federal law and policy when the Town failed to provide the Complainant access to install electric service underground conduits to support an aviation fuel facility. The underground conduit had to go through the leasehold of the existing fixed-base operator² and competitor, Eastern Air Center, who opposed the Complainant's request to provide aircraft fueling services. The Complainant contended the Town of Norwood engaged in discriminatory practices and granted a constructive exclusive right to Eastern Air Center by failing to force Eastern Air Center to allow access through its leasehold for the underground conduit. Furthermore, Complainant also argued that failure to grant a right of access to install electric service underground conduits effectively prohibited it from performing self-service fueling.

The Town argued that it could not be expected to take sides in a private dispute between two tenants over rights of access, despite the Town's desire to encourage competition. The Town of Norwood said it did not have an exclusive agreement with Eastern Air Center to offer fixed-base operator services, but it could not force Eastern Air Center to provide access for utilities through its leasehold to further the Complainant's interest in establishing its own fuel service facility. Furthermore, since the Complainant did not have a lease at the time the Complaint was filed, the Town argued the issue was moot.

² A fixed-base operator (FBO) is a commercial entity providing aeronautical services such as fueling, maintenance, storage, ground and flight instruction, etc., to the public. [See FAA Order 5190.6A, *Airport Compliance Requirements*, October 2, 1989, Appendix 5.]

The Town contended it was under no obligation to enter into a lease with the Complainant.

Under the particular circumstances existing at the Airport and the evidence of record, as discussed in the Director's Determination, the FAA concluded:

- The Town violated grant assurance 5, *Preserving Rights and Powers*, when it signed a lease agreement with Boston Metropolitan Airport, Inc., a tenant, depriving the Town of certain rights and powers necessary to comply with its federal obligations under the FAA grant assurances.
- The Town violated 49 United States Code (U.S.C.) § 47107(a)(1), and related grant assurance 22, *Economic Nondiscrimination*, by denying the Complainant reasonable use and access to the Airport on reasonable terms for the purpose of conducting a commercial aeronautical activity; the Town's actions in this regard constituted an unreasonable denial of access and unjust economic discrimination.
- The Town violated 49 U.S.C. § 40103(e), and the related grant assurance 23, *Exclusive Rights*, by constructively granting an exclusive right to Eastern Air Center to operate a fueling facility on the Airport by entering into leases with Eastern Air Center and Boston Metropolitan Airport, Inc., enabling Eastern Air Center to control the only source of power to the Airport ramps to operate a fueling facility. By denying Complainant access to power to install a fueling facility, the Town effectively granted Eastern Air Center the exclusive right to operate a fueling facility on the Airport.

III. THE AIRPORT

Norwood Memorial Airport (Airport) is a general aviation airport. The Town of Norwood is the Airport owner and sponsor responsible for complying with all FAA grant assurances. The Town has delegated daily operation of the Airport to the Norwood Airport Commission.

The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.*

As of June 5, 2008, the Airport had 240-based aircraft and 99,800 annual operations.³ Since 1982, the Airport sponsor has received 27 grants totaling \$11,577,569 in federal

³ FAA Exhibit 1, Item 1, provides (a) a copy of the July 5, 2007 FAA Form 5010 for the Airport, which was referenced in the Director's Determination, and (b) the June 5, 2008 FAA Form 5010, which is referenced in this Final Decision and Order.

financial assistance for airfield improvements. The Airport received \$844,715 in grant funds for apron rehabilitation in fiscal year (FY) 2006.⁴

IV. BACKGROUND

In March 2004, Boston Air Charter (BAC), a Part 135 operator serving Norwood Municipal Airport, proposed to construct a commercial aircraft fueling facility on the Airport's 19,072 square foot DC-3 Ramp. Boston Air Charter planned to fuel its own Part 135 charter operation aircraft. Eventually, it also wanted to become a fixed-base operator offering aircraft fueling service to the public. The record indicates the Town offered only the DC-3 Ramp to Boston Air Charter for this fueling operation.

Boston Air Charter's aircraft fueling facility was expected to consist of two above-ground aviation fuel storage tanks with a capacity of 12,000 gallons each and a spill containment system. The fueling facility would require electric service; the DC-3 Ramp does not have access to an electric utility power source. The available power source is a transformer located on the Gate 3 taxilane side of a building in the leasehold known as the "1100 Foot Strip."⁵ An underground conduit between the "1100 Foot Strip" and the DC-3 Ramp would have to be installed to provide electrical service for Boston Air Charter's proposed fueling facility. The underground conduit would run from the DC-3 Ramp across the backside of the West Apron Ramp adjacent to and into the Gate 3 taxilane and penetrate the "1100 Foot Strip" leasehold by ten feet to connect to the transformer. *[See map on pages 11 and 12 of this document.]*

The record shows competitor Eastern Air Center holds the sublease on the "1100 Foot Strip." The Town controls the West Apron Ramp. Boston Air Charter is a month-to-month tenant at will on the DC-3 Ramp. *[See Table 1: Norwood Airport Lease Plan on page 5 of this document.]*

The Town owns the "1100 Foot Strip" and has leased it to Boston Metropolitan Airport, Inc. (BMA) for a term of up to 80 years. Boston Metropolitan Airport, Inc., in turn, subleased the "1100 Foot Strip" to Eastern Air Center, the Airport's only fixed-base operator. Eastern Air Center controls most of the ramp space on Norwood Memorial Airport under long-term leases. Eastern Air Center is also an opponent of Boston Air Charter's plan to self-fuel. Eastern Air Center believes it would be detrimental to Eastern Air Center's business if Boston Air Charter is able to self-fuel and if Boston Air Charter might eventually operate a fueling service to the public.

⁴ FAA Exhibit 1, Item 2, provides the Airport Sponsor's AIP grant history listing the federal airport improvement assistance provided by the FAA to the Airport sponsor from 1982 to the date of this decision.

⁵ The building is depicted as a bright orange strip in the "1100 Foot Strip" leasehold on the *Compiled Lease Area Plan* dated December 17, 2007, on page 11 of this document. *[See Exhibit 1, Item 12.]*

Table 1: NORWOOD AIRPORT LEASE PLAN⁶

<u>LOT</u>	<u>LESSEE</u>	<u>LEASE EXTENSION PERIOD</u>	<u>DIMENSIONS</u>
ABC	EASTERN AIR CENTER	1 NOVEMBER 2004 to 31 OCTOBER 2009	85,860 SQFT
WXY	EASTERN AIR CENTER	16 NOVEMBER 1988 to 30 NOVEMBER 2008 1 DECEMBER 2008 to 30 NOVEMBER 2028	111,292 SQFT
LOT 6	EASTERN AIR CENTER	1 JANUARY 2001 to 31 DECEMBER 2020 30 SEPTEMBER 2006 to 31 OCTOBER 2026	210,180 SQFT
LOT 7	EASTERN AIR CENTER	1 JANUARY 2001 to 31 DECEMBER 2020 30 SEPTEMBER 2006 to 31 OCTOBER 2026	135,360 SQFT
WEST APRON	TOWN CONTROLLED	N/A	95,381 SQFT
DC-3 RAMP	BOSTON AIR CHARTER (Tenant at will)	N/A/	19,072 SQFT
THE 1100 FOOT STRIP	BOSTON METROPOLITAN AIRPORT, INC (EASTERN AIR CENTER, sublessee)	1967 to 2047	330,000 sq ft

Eastern Air Center had leased the DC-3 Ramp until August 2003 when the Town reclaimed it over Eastern Air Center's objections. The Town then leased six tie-down positions to Boston Air Charter⁷ on a month-to-month basis. [FAA Exhibit 1, Item 11, exhibit 3.]

Summary of Boston Air Charter's Permit and Construction Sequence⁸

The Town and Boston Air Charter entered negotiations to lease the DC-3 Ramp and construct a fueling facility in 2004. By the close of 2004, Boston Air Charter had

⁶ AIP Project 3-25-0037-26-2005 authorized the expenditure of \$589,004 for the rehabilitation of airport aprons including two aprons (Lots 6 and 7) leased to Eastern Air Center. Over the past 20 years, the FAA has provided \$3,108,914 in federal financial assistance for rehabilitation and construction of all the aprons and ramps, excluding the "1100 Foot Strip."

⁷ Eastern Air Center asked the Town to convert its lease for the DC-3 Ramp to a long-term lease; the Town rejected this request and, instead, leased the DC-3 Ramp tie-downs to Boston Air Charter on a month-to-month basis. [FAA Exhibit 1, Item 11, exhibit 1.]

⁸ This is an approximation of the steps Boston Air Charter must pursue to begin operation. It does not include the time limit on some of the permits and approvals. Some permits are valid for one year, forcing Boston Air Charter to reapply or resubmit its application when the permits expire.

received approval or tentative approval for most of the permits required to construct the aircraft fuel facility.

- a. On May 5, 2004, the Town of Norwood Board of Selectman tentatively approved the Volatile Inflammable Fluids (VIF) License pending approved by the State Fire Marshal. This license was needed for the storage of flammables. [FAA Exhibit 1, Item 11, exhibit 119.]
- b. On May 5, 2004, Norwood Conservation Commission approved and issued its *Order of Conditions* required for the operation of the fuel facility. [FAA Exhibit 1, Item 11, exhibit 11.]
- c. On June 11, 2004, the State Fire Marshal approved the type of storage tanks and equipment Boston Air Charter proposed to use. [FAA Exhibit 1, Item 11, exhibit 9.]
- d. On June 15, 2004, Norwood Airport Commission issued a temporary 30-day fueling permit authorizing Boston Air Charter to self-fuel its aircraft. The permit is renewed monthly until December 2005. [FAA Exhibit 1, Item 11, exhibit 120.]
- e. On November 2, 2004, FAA issued Form 7460 aeronautical study for the proposed fuel facility. [FAA Exhibit 1, Item 11, exhibit 123.]
- f. On November 30, 2004, the Commonwealth of Massachusetts, State Department of Environmental Protection, issued its *Superseding Order of Conditions*. [FAA Exhibit 1, Item 11, exhibit 11.]
- g. On April 8, 2005, the Commonwealth of Massachusetts, Department of Environmental Protection, issued its decision on the *Appeal of Superseding Order of Conditions*. [FAA Exhibit 1, Item 11, exhibit 18.]
- h. During the summer of 2005, an apron rehabilitation project was begun with federal funding. Boston Air Charter elected not to participate financially in the project. At that time, Boston Air Charter could have paid to have the underground conduit and trench drains installed, but declined because the Town's quoted price was too high.⁹

⁹ The fueling facility requires electrical service and a spill containment system that includes concrete pads, trench drains, and catch basins to capture fuel spills. The work had to be coordinated with the federally funded apron construction project since both projects were being done on the same site. The Town's contractor working on the apron reconstruction project offered to construct the spill containment system for \$55,800. Another contractor selected by Boston Air Charter submitted a bid for \$29,185. Boston Air Charter concluded the Town contractor's price was too high. Boston Air Charter decided to wait until the apron reconstruction project was completed. However, once the apron project was completed, the Town engineer refused to allow Boston Air Charter's work to proceed because he didn't want the newly paved ramp surface to be cut. [See FAA Exhibit 1, Item 3, exhibit C.]

- i. During late 2005 and early 2006, Norwood Airport Commission reviewed construction plans for the fuel facility. There is no indication that the plans were approved.
- j. During late 2005, Boston Air Charter asked about the approval status of its pending lease agreement. [FAA Exhibit 1, Item 11, exhibit 39.]
- k. During February 2006, Norwood Fire Department advised that it needed an approved lease before it could issue a permit. (This step was not completed.) [FAA Exhibit 1, Item 11, exhibit 62.]
- l. On January 11, 2006, The Town of Norwood, Board of Selectmen, gave Boston Air Charter a 90-day extension to complete the necessary permits to install the fuel facility or face revocation of the Town-issued Volatile Inflammable Fluids (VIF) license.¹⁰ [FAA Exhibit 1, Item 11, exhibit 50.]

Issue of Leasehold Encroachment

During a Norwood Airport Commission (NAC) meeting on Boston Air Charter's proposal, competitor Eastern Air Center objected to the construction of an aircraft fueling operation on the DC-3 Ramp. Eastern Air Center stated:

Neither [the Norwood Airport Commission] nor [Boston Air Charter] has the right to dig, construct, or otherwise utilize the so-called Gate 3 access to the Airport, which is situated on land we control, in any manner other than to allow a vehicle, aircraft, and/or a pedestrian to pass through for the lawful purpose of gaining access to the Airport.

[FAA Exhibit 1, Item 11, exhibit 51.]

In a January 30, 2006, letter to the Town, Eastern Air Center stated it would not grant permission for anyone to dig, install, or construct utility lines through the "1100 Foot Strip" without Eastern Air Center's prior written consent. [FAA Exhibit 1, Item 3, exhibit C, exhibit 1.] Eastern Air Center subleased the "1100 Foot Strip" from Boston Metropolitan Airport, Inc. [See FAA Exhibit 1, Item 7, exhibit C; and Item 7, page 1.] Eastern Air Center indicated that it informed Boston Air Charter and its counsel as early as 2004 that Boston Air Charter did not have the authority to install conduit on land controlled by Eastern Air Center. [FAA Exhibit 1, Item 11, exhibit 65.]

¹⁰ The Town of Norwood had issued Boston Air Charter a Volatile Inflammable Fluids (VIF) license to operate an above-ground fuel facility pending approval of the State Fire Marshal. The State Fire Marshal approved plans for the aircraft fuel facility on June 11, 2004. [FAA Exhibit 1, Item 11, exhibit 9.]

Eastern Air Center opposed Boston Air Charter's request to self-fuel and refused to grant consent for an underground conduit to access Boston Air Charter's leasehold. Eastern Air Center expressed concern that a second fixed-base operator providing fuel would result in additional competition for Eastern Air Center. At the time, Eastern Air Center was the only aircraft fueling service on the Airport. Eastern Air Center argued that a competing fixed-base operator providing fuel sales – which is what Boston Air Charter indicated it wanted to do eventually – would threaten Eastern Air Center's investment at the Airport. [FAA Exhibit 1, Item 11, exhibits 1, 2, 5, 6, 7, 16, 18, 51, and 55.]

Boston Air Charter requested the Town of Norwood to install, either at its own cost or at cost to Boston Air Charter, underground conduit for electric service to its proposed fueling facility. [FAA Exhibit 1, Item 3, exhibit B.] Boston Air Charter contends that the Town has the responsibility as the airport operator and owner to undertake the installation.

The Town informed Boston Air Charter that it does not have a right to grant an easement or to enter the "1100 Foot Strip" leasehold under its 1967 lease with Boston Metropolitan Airport, Inc. (BMA). (BMA subleased this area to Eastern Air Center. Both BMA and Eastern Air Center declined to allow an easement for Boston Air Charter to install the necessary conduit.) In addition, the Town stated it will not "take sides" in a dispute between two tenants. The Town encouraged both parties to reach a mutually acceptable agreement regarding access across the "1100 Foot Strip." [FAA Exhibit 1, Item 7, page 2.]

The Town says Boston Air Charter was given the opportunity to install electrical service and trench drains during a federally funded project to reconstruct a runway and rehabilitate two public aircraft parking aprons leased by Eastern Air Center. Boston Air Charter chose not to act at that time because of the associated cost of using the Town's contractor. [See footnote # 9.]

On February 21, 2006, the Town imposed the additional requirement that Boston Air Charter must have an approved property lease from the Town before it could receive its Volatile Inflammable Fluids (VIF) license and operating permit for the aircraft fuel facility:

As a non-owner applicant of the property, you shall provide authorization from the owners that storage of each inflammable fluid is permitted under the terms of the lease. This authorization is required before any operation of the tank farm can occur.

[FAA Exhibit 1, Item 11, exhibit 62.]

Two days later, the Town advised Boston Air Charter that it was unable to approve the lease agreement for the DC-3 Ramp because: (1) the Volatile Inflammable Fluids (VIF) license would expire in less than 90 days, and (2) the proposed route of the underground

conduit for electrical service through the BMA/Eastern Air Center leasehold no longer made the project viable. The Town stated:

[Boston Air Charter's] electrical schematic, in its current draft, does not address what appears to be leasehold encroachment proposed by, but not effectively resolved by, the current plan... This conflict is further underscored and amplified by correspondence recently sent to the [Norwood Airport Commission] by Eastern Air Center, indicating that [Boston Air Charter] will not be issued a right of way onto said leasehold. Subsequent conversations with the [Eastern Air Center] official who stated in writing his company's position only appear to reaffirm [Eastern Air Center's] expected intransigence on this matter. It is therefore incumbent upon [Boston Air Charter] to explain how your company will reconcile this right-of-way matter.

In short, [Boston Air Charter] must demonstrate that it possesses the legal right, and ability, to bring this project to completion by providing electrical power to the proposed fuel farm without encroaching on the aforementioned leasehold.

[FAA Exhibit 1, Item 11, exhibit 63.]

In a separate letter to the Town Selectman, Eastern Air Center said it had told Boston Air Charter as early as 2004 that it would not authorize access to its leasehold for the purpose of installing underground conduit. Eastern Air Center further stated:

The undersigned [Eastern Air Center] further confirmed that neither [Boston Air Charter]; nor the Town of Norwood; or even Norwood Light-Electric, for that matter, had any right to arbitrarily encroach on land controlled by [Eastern Air Center] and/or its affiliates.

[FAA Exhibit 1, Item 11, exhibit 65.]

On May 4, 2006, the Town suspended all lease negotiations with Boston Air Charter, stating Boston Air Charter had failed to submit (1) documentation regarding its claim that trench drains were not required and (2) evidence that Boston Air Charter had obtained all required permits and licenses to operate the proposed above-ground aircraft fuel storage facility, including a plan to bring power to the DC-3 Ramp. [FAA Exhibit 1, Item 11, exhibit 75.]

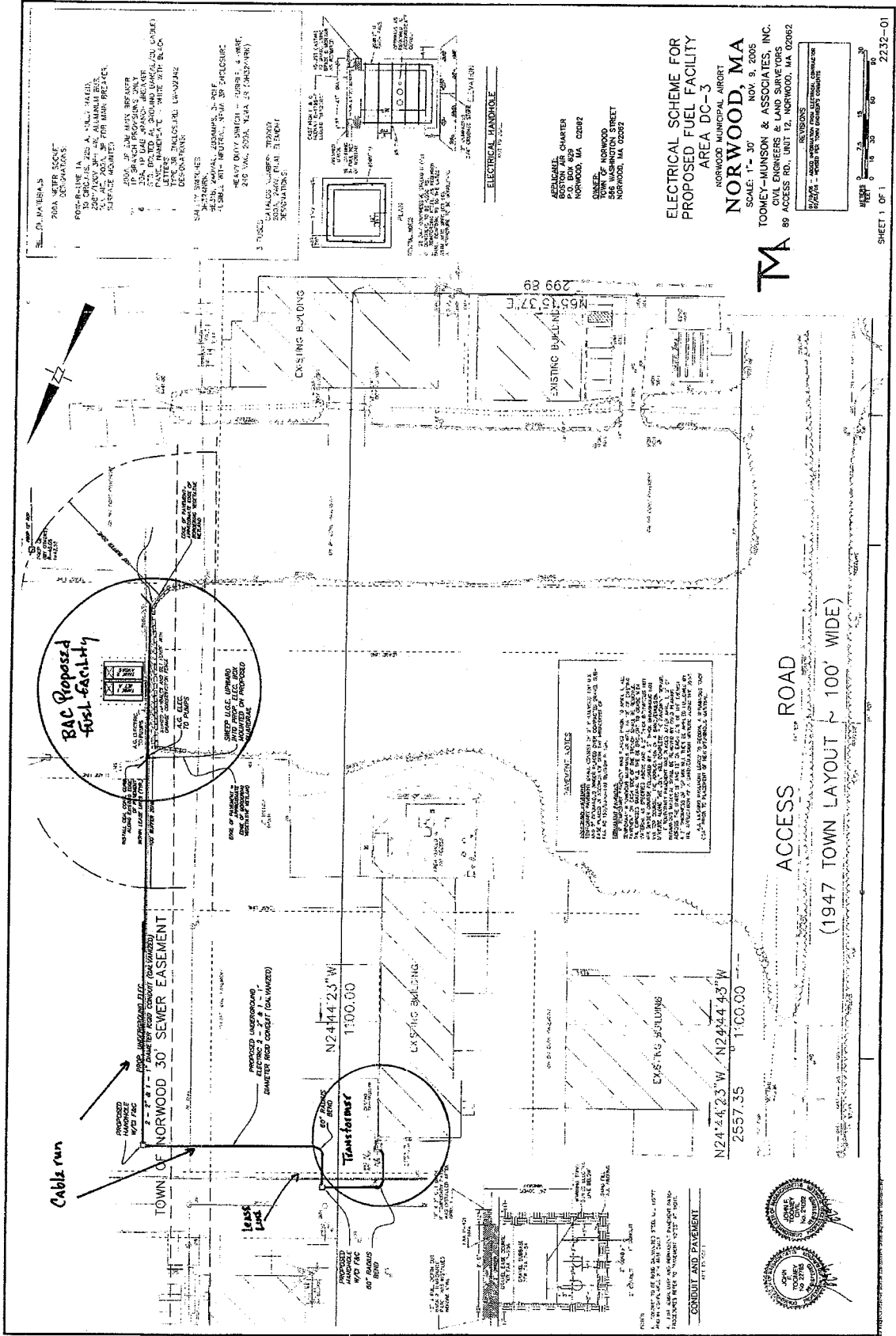
The Town argued that Boston Air Charter's complaint should be dismissed because there is no lease and no local approvals for the aircraft fuel storage facility. The Town argued that Boston Air Charter's need to construct utility access to the proposed aircraft fuel storage facility became moot when lease negotiations with Boston Air Charter were discontinued. [See FAA Exhibit 1, Item 8.]

Furthermore, the Town argued that Boston Air Charter (1) withdrew its application for a license to operate an aircraft fuel storage facility and (2) failed to secure the necessary local and state approvals.¹¹ [FAA Exhibit 1, Item 7, pages 2-3.] The Town stated that Boston Air Charter was an “at will” tenant with a month-to-month aircraft tie-down contract; no lease agreement for the DC-3 Ramp ever existed. [FAA Exhibit 1, Item 7, page 2.] Boston Air Charter could not get electrical service because Eastern Air Center, the Airport’s only fixed-base operator, refused to grant Boston Air Charter the right to install underground conduit on its leasehold to gain access to power. [See FAA Exhibit 1, Item 3, exhibit C,1.]

The Town states its actions do not violate grant assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*. The Town argues Boston Air Charter’s allegations are without merit and are merely a dispute among tenants at the Airport. The Town argues that it cannot be expected to take sides in a dispute between tenants over rights of access, despite its desire to encourage competition. [See FAA Exhibit 1, Item 7, pages 1-2.]

The Town contends that it has no exclusive agreement with any tenant on the Airport to provide fueling. It will allow Boston Air Charter to operate an aircraft fuel storage facility as soon as it demonstrates compliance with the applicable state laws and obtains permission from Eastern Air Center to construct an underground conduit for access to electrical service. The Town also contends that the Complaint filed by the Boston Air Charter is moot. [See FAA Exhibit 1, Items 7 and 8.]

¹¹ According to Boston Air Charter’s Counsel, it withdrew its Volatile Inflammable Fluids (VIF) license application rather than have the Board of Selectman vote on revocation. If Boston Air Charter can resolve the electric service issue, it can resubmit its application to the Board.



BAC PROPOSED FUEL FACILITY

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DESIGNATIONS

200B. SETBACK SCHEME
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200C. SETBACK SCHEME
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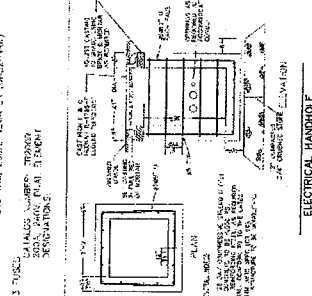
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**ELECTRICAL SCHEME FOR
PROPOSED FUEL FACILITY
AREA DC-3**

NORWOOD, MA

SCALE: 1" = 30'

NOV. 9, 2005

TOOMEY-MUNSON & ASSOCIATES, INC.
CIVIL ENGINEERS & LAND SURVEYORS
89 ACCESS RD., UNIT 12, NORWOOD, MA 02062

LEGEND

1. EXISTING

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7. FENCE

8. TREES

9. UTILITIES

10. EASEMENTS

11. SETBACKS

12. ZONING

13. PERMITS

14. REGULATIONS

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CONDUIT AND PAYMENT

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Temporary Self-fueling Permit

On April 13, 2004, Boston Air Charter requested the Town's approval to self-fuel its aircraft using a 5,100 gallon Jet A fuel truck until completion of its proposed aircraft fuel storage facility. On June 15, 2004, the Town gave Boston Air Charter permission to self-fuel for a 30-day period so long as they complied with local, state, and federal rules and regulations regarding the transportation of aviation fuel. The administrative record shows Boston Air Charter conducted aircraft fueling operations with the Town's consent and knowledge. The Town extended the permit on a monthly basis until October 5, 2005, when it threatened to terminate the permit due to Boston Air Charter's "housekeeping" practices.¹² After Boston Air Charter took action to correct the deficiencies, the permit was extended until the November 1, 2005, airport commission meeting. [See FAA Exhibit 1, Item 11.]

The Town originally consented to the temporary fueling arrangement because the Town believed construction and operation of the fuel facility was imminent. Eighteen months later, under concerns about the Town's liability, Boston Air Charter's temporary fueling operations were terminated. At the November 1, 2005, airport commission meeting, the Town terminated Boston Air Charter's temporary self-fueling operation upon 30-days notice, effective immediately. [See FAA Exhibit 1, Item 11.]

Even though its fueling rights had been termination, Boston Air Charter continued to fuel its aircraft. The Town issued a violation notice ordering Boston Air Charter to terminate its temporary fueling operation. The Town found the operation to be a violation of state fire prevention regulations and inconsistent with Boston Air Charter's Volatile Inflammable Fluids (VIF) license, which permitted the operation of an above-ground aircraft fuel storage facility. Boston Air Charter stopped fueling operations after the Town issued a second order with a threat of legal action. [See FAA Exhibit 1, Item 11.]

On August 4, 2006, Boston Air Charter informed the Town of its intention to start self-fueling again on or about September 1, 2006. The Town advised Boston Air Charter that it could not conduct self-fueling operations without a Volatile Inflammable Fluids (VIF) license and permit issued by the Town. [See FAA Exhibit 1, Item 11.]

Boston Air Charter contended that the Town – by denying it the right to self-fuel its aircraft and denying it the right to install underground conduit to gain electrical power from the "1100 Foot Strip" to its proposed aircraft fuel storage facility – had granted Eastern Air Center an effective exclusive right to operate a fueling facility and a monopoly on fuel sales at Norwood Municipal Airport. Furthermore, Boston Air Charter argued that Eastern Air Center refused permission to install underground conduit for electric service through its leasehold specifically to prevent Boston Air Charter from

¹² Airport staff found drip pans full of aviation fuel underneath the Boston Air Charter fuel truck; the contents of the pans should have been disposed of properly. Staff also found residual fuel stains on the pavement from Boston Air Charter's parked Citation Jet. [FAA Exhibit 1, Item 11, exhibit 122.]

servicing its own aircraft and from offering fueling services to the public in competition with Eastern Air Center. [See FAA Exhibit 1, Item 11.]

The Town contends Boston Air Charter (1) failed to comply with state licensing requirements regarding the use of fuel trucks at the Airport, (2) repeatedly refused to provide information requested by the Town, and (3) was cited for fueling violations.¹³ The Town contends it is under no obligation to enter into a lease with Boston Air Charter. [See FAA Exhibit 1, Item 18.]

The “1100 Foot Strip”

Eastern Air Center subleases an area called the “1100 Foot Strip” from Boston Metropolitan Airport, Inc. (BMA) who once owned the land and is now a lessee of the Town of Norwood. The “1100 Foot Strip” consists of 330,000 square feet. [See FAA Exhibit 1, Items 7 and 17.]

In 1967, the FAA directed the Town of Norwood to acquire this “1100 Foot Strip” as part of a grant agreement under the Federal Aid to Airports Program (FAAP). The requirement stated:

It is understood and agreed that the sponsor will acquire the following property interests: Parcel 2 as shown on Exhibit A – Fee simple title, free and clear of all liens and encumbrances determined objectionable by the FAA...

[FAA Exhibit 1, Item 10.]

The Town of Norwood acquired Parcel 2 (“1100 Foot Strip”) and Parcel 4 (aviation easement) from Boston Metropolitan Airport, Inc. (BMA).¹⁴ On December 28, 1967, the Town counsel signed a certificate affirming that the Town of Norwood holds interest in parcels 2 (“1100 Foot Strip”) and 4 (aviation easement). The certificate indicated that

¹³ Fueling violations are for drip pans and fuel stains on the pavement.

¹⁴ Title 49 U.S.C. Section 47106(b)(1) states that no project grant application for airport development may be approved by the Secretary until the Secretary is satisfied that the sponsor, a public agency, or the United States Government holds good title to the areas of the airport used or intended to be used for the landing, taking off, or surface maneuvering of aircraft, or gives assurance to the Secretary that good title will be acquired.

The *Airport Improvement Program (AIP) Handbook*, FAA Order 5100.38C, further clarifies title for landing and building areas: “Title with respect to lands to be used for landing area or building area purposes can be either fee simple title (free and clear of any and all encumbrances), or title with certain rights excepted or reserved. Any encumbered title must not deprive the sponsor of possession or control necessary to carry out all obligations under the grant. A deed containing a reversionary clause, for “so long as the property is being used for airport purposes,” does not negate good title provided the other conditions are satisfied. Where rights excepted or reserved would prevent the sponsor from carrying out its obligations under the grant, such rights must be extinguished or subordinated prior to approval of the project.”

the Town holds fee simple title, free and clear of all liens, encumbrances and adverse interests, subject to a reversionary interest held by Boston Metropolitan Airport, Inc. that would revert the property to Boston Metropolitan Airport, Inc. if the property is no longer needed for airport purposes. [FAA Exhibit 1, Item 10.]

Boston Metropolitan Airport, Inc. transferred title to the "1100 Foot Strip" to the Town of Norwood in return for a leaseback arrangement that gave Boston Metropolitan Airport, Inc. an executed lease with a 20-year term and three 20-year options to renew and a reversionary interest in the property should the Airport cease to exist.¹⁵ Boston Metropolitan Airport, Inc. has exercised the first renewal option. [FAA Exhibit 1, Item 7.]

According to the Town, this leaseback arrangement allowed the Town of Norwood to acquire the "1100 Foot Strip" without actually purchasing the land.¹⁶ The 1967 lease does not contain any provisions for utility easements and is silent on the Town's right of entry to maintain or install utilities. [FAA Exhibit 1, Item 7.]

FAA Investigation

On July 14, 2006, Boston Air Charter filed an informal complaint with the FAA New England Regional Headquarters. The result of FAA's investigation determined that the Town had not violated its federal obligations. According to the Regional Headquarters:

The review indicates that the Town of Norwood intended to allow [Boston Air Charter] to install and operate a fuel farm at Norwood Memorial Airport if [Boston Air Charter] could negotiate with [Eastern Air Center] to run electrical service across [Eastern Air Center's] leasehold. The Town's ability to force [Eastern Air Center] to permit the electrical line is outside FAA's purview.

[FAA Exhibit 1, Item 3, exhibit A.]

The FAA did direct the Town to ensure that any future Airport leases must provide the right to install utility lines across leased premises.

On April 2, 2007, Boston Air Charter filed a formal complaint under Title 14 Part 16 with the Federal Aviation Administration.

Boston Air Charter asked the FAA to direct the Town and Eastern Air Center to provide access to install electric utilities for Boston Air Charter's fueling operation and to grant a long-term lease on fair terms to operate its fueling facility. Boston Air Charter asked the FAA to issue a finding that the Town is obligated to:

¹⁵ The renewal options are at the sole discretion of Boston Metropolitan Airport, Inc.

¹⁶ FAA did not approve the lease back arrangement. FAA accepted the Town counsel's representation that the Town had acquired good title to the property.

- Enter into a lease on reasonable terms, as agreed;
- Either grant Boston Air Charter the right to install the necessary electrical conduits or for the Town to install those conduits itself; and
- To take any other action necessary to enable Boston Air Charter to exercise its rights under the grant assurances to fuel its aircraft, either from its own truck on a temporary basis, or through installation of the fueling facility, immediately.

On April 11, 2008, the FAA found the Town in violation of grant assurance 5, *Preserving Rights and Powers*; grant assurance 22, *Economic Nondiscrimination*; and grant assurance 23, *Exclusive Rights*. The Director's Determination ordered the Town to submit a corrective action plan within 30 days that explains how the Airport will (1) provide access for Boston Air Charter to conduct self-fueling operations consistent with state and local regulations; (2) end the practice of awarding long-term leases of federally funded ramps that have the effect of granting one party control over the majority of the ramps on the Airport; (3) put in place a short-term ramp leasing permit policy for the Airport to assert more control of the federally funded ramps, and (4) regain the Airport's rights and powers to access the "1100 Foot Strip" to provide power to the Airport ramps for Airport tenants.

On April 23, 2008, the FAA issued an Errata to the April 11, 2008, Director's Determination identifying the sections under the United States Code under which future grants may be withheld and extending the deadline for filing a corrective action plan or appeal of the Director's Determination. [See FAA Exhibit 1, Item 17A; and Item 18, page 3.]

On May 23, 2008, the Town submitted an appeal of the Director's Determination and a request for a hearing. The Town also submitted a corrective action plan, which is not part of this appeal record. The corrective action plan was held in abeyance pending the outcome of this appeal. [FAA Exhibit 1, Item 18, page 3.]

On June 12, 2008, Boston Air Charter submitted a reply to the Town's appeal of the Director's Determination.

On July 7, 2008, Norwood Airport Commission entered a Motion to Strike Boston Air Charter's reply, received July 15, 2008.

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The following is a discussion pertaining to the (a) FAA's enforcement responsibilities; (b) the FAA compliance program; (c) statutes, sponsor assurances, and relevant policies; and (d) the complaint and appeal process.

A. FAA Enforcement Responsibilities

The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The federal role in encouraging and developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation, and maintenance, as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their federal grant assurances.

B. FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their federal obligations through its Airport Compliance Program. Sponsor obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving federal grant funds or when accepting the transfer of federal property for airport purposes. The FAA incorporates these obligations in grant agreements and instruments of conveyance to protect the public's interest in civil aviation and to ensure compliance with federal laws.

The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe and properly maintained public-use airports which airport sponsors operate in a manner consistent with their federal obligations and the public's interest in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of valuable rights, which airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of federal property, to ensure that airport sponsors serve the public interest.

FAA Order 5190.6A, *Airport Compliance Requirements*, October 2, 1989, (hereinafter Order) sets forth policies and procedures for the FAA Airport Compliance Program. The

Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather, it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for the grant of federal funds or the conveyance of federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [See e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, (August 30, 2001) (Final Decision and Order).]

C. Statutes, Sponsor Assurances, and Relevant Policies

As a condition precedent to providing airport development assistance under the Airport and Airway Improvement Act of 1982 (AAIA), codified at Title 49 U.S.C. § 47101, et seq., the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 U.S.C. § 47101, et seq., sets forth assurances to which an airport sponsor receiving federal financial assistance must agree as a condition precedent to receipt of such assistance. These sponsorship requirements are included in every airport improvement program (AIP) grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the federal government.

Three federal grant assurances apply to the specific circumstances of this complaint: (1) assurance 5, *Preserving Rights and Powers*, (2) assurance 22, *Economic Nondiscrimination*, and (3) assurance 23, *Exclusive Rights*.

1. Assurance 5, Preserving Rights and Powers

Federal grant assurance 5, *Preserving Rights and Powers*, (Assurance 5) requires the airport owner or sponsor to retain all rights and powers necessary to ensure the continued operation of the airport consistent with its federal obligations. This assurance implements the provisions of the AAIA, 49 U.S.C. § 47107(a), et seq., and requires, in pertinent part, that the owner or sponsor of a federally obligated airport

“...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor.”

Assurance 5 states:

- a. [The airport owner or sponsor] will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.
- b. [The airport owner or sponsor] will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application or, for a noise compatibility program project, that portion of the property upon which federal funds have been expended, for the duration of the terms, conditions, and assurances in the grant agreement without approval by the Secretary. If the transferee is found by the Secretary to be eligible under Title 49, United States Code, to assume the obligations of the grant agreement and to have the power, authority, and financial resources to carry out all such obligations, the sponsor shall insert in the contract or document transferring or disposing of the sponsor's interest, and make binding upon the transferee all of the terms, conditions, and assurances contained in this grant agreement.
- c. For all noise compatibility program projects which are to be carried out by another unit of local government or are on property owned by a unit of local government other than the sponsor, it will enter into an agreement with that government. Except as otherwise specified by the Secretary, that agreement shall obligate that government to the same terms, conditions, and assurances that would be applicable to it if it applied directly to the FAA for a grant to undertake the noise compatibility program project. That agreement and changes thereto must be satisfactory to the Secretary. It will take steps to enforce this agreement against the local government if there is substantial noncompliance with the terms of the agreement.
- d. For noise compatibility program projects to be carried out on privately owned property, it will enter into an agreement with the owner of that property which includes provisions specified by the Secretary. It will take steps to enforce this agreement against the property owner whenever there is substantial noncompliance with the terms of the agreement.

- e. If the sponsor is a private sponsor, it will take steps satisfactory to the Secretary to ensure that the airport will continue to function as a public-use airport in accordance with these assurances for the duration of these assurances.
- f. If an arrangement is made for management and operation of the airport by any agency or person other than the sponsor or an employee of the sponsor, the sponsor will reserve sufficient rights and authority to ensure that the airport will be operated and maintained in accordance with Title 49, United States Code, the regulations and the terms, conditions and assurances in the grant agreement and shall ensure that such arrangement also requires compliance therewith.

FAA Order 5190.6A, *Airport Compliance Requirements*, October 2, 1989, describes the responsibilities under Assurance 5 assumed by the owners or sponsors of public-use airports developed with federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport. [See Order, Secs. 4-7 and 4-8.]

2. Assurance 22, Economic Nondiscrimination

Federal grant assurance 22, *Economic Nondiscrimination*, (Assurance 22) implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part, that the owner or sponsor of a federally-obligated airport:

...will make its 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. [Assurance 22(a).]

...each air carrier using such airport shall have the right to service itself or to use any fixed-base operator that is authorized or permitted by the airport to serve any air carrier at such airport. [Assurance 22(d).]

...will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees (including, but not limited to maintenance, repair and fueling) that it may choose to perform. [Assurance 22(f).]

...may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. [Assurance 22(h).]

...may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.” [Assurance 22(i).]

Subsection (h) qualifies subsection (a), and subsection (i) represents an exception to subsection (a) to permit the owner or sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions, which would be detrimental to the civil aviation needs of the public.

The FAA Order 5190.6A describes the responsibilities under Assurance 22 assumed by the owners or sponsor of public use airports developed with federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. [See Order, Secs. 4-14(a)(2) and 3-1.]

The owner or sponsor of any airport developed with federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds and classes of aeronautical activity on reasonable terms, and without unjust discrimination. [See Order, Sec. 4-13(a).]

The Order also provides “...an aircraft operator, otherwise entitled to use the landing area, may tie-down, adjust, repair, refuel, clean and otherwise services its own aircraft, provided it does so with its own employees in accordance with reasonable rules or standards of the sponsor relating to such work.” [See Order, Sec 4-15(a).]

FAA policy regarding the airport owner or sponsor’s responsibility for ensuring the availability of services on reasonable terms and without unjust discrimination provides that third-party leases contain language incorporating these principles. Assurance 22(b) states,

In any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport, the owner or sponsor will insert and enforce provisions requiring the contractor to –

- (a) furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and

- (b) charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

The FAA considers it inappropriate to provide federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions of aeronautical activities. [See Order, Sec. 3-8(a).]

3. Assurance 23, Exclusive Rights

Federal grant assurance 23, *Exclusive Rights*, (Assurance 23) implements the provisions of 49 U.S.C. §§ 40103(e) and 47107(a)(4), and requires, in pertinent part, that the owner or sponsor of a federally obligated airport:

...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public.

...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...

...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.

In the Order, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [See e.g. Pompano Beach v FAA, 774 F2d 1529 (11th Cir, 1985).] An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce onto the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [See Order, Sec.3-9 (e).] However, where no attempt has been made to perform such services for others, an aircraft owner should be permitted to fuel, wash, repair, paint and otherwise take care of their own aircraft. A restriction which has the effect of diverting such business [fueling, washing, repairing and taking care of one's own aircraft] to a commercial operator amounts to an exclusive monopoly of an aeronautical activity contrary to law. [See Order, Sec.3-9 (e) (1).]

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise will be construed as evidence of intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease. [See Order, Sec. 3-9(c).]

FAA Order 5190.6A provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. [See Order, Ch. 3.]

D. The Complaint and Appeal Process

1. Right to File the Formal Complaint

Pursuant to 14 CFR, Part 16, § 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint shall also describe how the complainant was directly and substantially affected by the things done or omitted by the respondents. [14 CFR, Part 16, § 16.23(b)(3,4).]

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [14 CFR, Part 16, § 16.29.]

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedure Act (APA) and federal case law. The APA provision states, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d). [See also, Director, Office of Worker’s Compensation Programs, Department of Labor v. Greenwich Collieries, 512 US 267, 272 (1994); Air Canada et al. v. Department of Transportation, 148 F3d 1142, 1155 (DC Cir, 1998).] Title 14 CFR § 16.229(b) is consistent with 14 CFR § 16.23, which requires the complainant to submit all documents then available to support his or her complaint. Similarly, 14 CFR § 16.29 states that “[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance.”

2. Right to Appeal the Director's Determination

A party to this decision adversely affected by the Director's Determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination. If no appeal is filed within the time period specified, the Director's Determination becomes the final decision and order of the FAA without further action. A Director's Determination that becomes final because there is no administrative appeal is not judicially reviewable. [14 CFR, Part 16, § 16.33.]

Part 16 requires all relevant facts to be presented in the complaint documents. [14 CFR, Part 16, § 16.23(b)(3).] New allegations or issues should not be presented on appeal. Review by the Associate Administrator is limited to an examination of the Director's Determination and the administrative record upon which such determination was based. Under Part 16, complainants are required to provide with the complaint and reply all supporting documentation upon which it relied to substantiate its claims. Failure to raise all issues and allegations in the original complaint documents may be cause for such issues and allegations to be deemed waived and not reviewable upon appeal. This is consistent with the Supreme Court's recognition that courts may require administrative issue exhaustion as a general rule because it is usually appropriate under an [administrative] agency's practice for contestants in an adversarial proceeding before it to develop fully all issues there. The Court concluded that where parties are expected to develop the issues in an adversarial administrative proceeding, the rationale for requiring issue exhaustion is at its greatest. [See Sims v. Apfel, 530 US 103, 108-110 (2000) citing Hormel v. Helvering, 312 US 552 (1941) and US v. LA Tucker Truck Lines, 344 US 33, (1952).]

3. FAA's Responsibility with Regard to an Appeal

Pursuant to 14 CFR, Part 16, § 16.33, the Associate Administrator will issue a final decision on appeal from the Director's Determination, without a hearing, where the complaint is dismissed after investigation.

In such cases, it is the Associate Administrator's responsibility to determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [See e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, (December 30, 1999) (Final Decision and Order) page 21, and 14 CFR, Part 16, § 16.227.]

VI. ANALYSIS AND DISCUSSION

On appeal from a Director's Determination, the appellant must demonstrate that the Director erred by (1) making findings of fact that were not supported by a preponderance of reliable, probative, and substantial evidence, or (2) by making conclusions of law that were not in accordance with applicable law, precedent, and public policy.

Appellant states, “the Acting Director made substantial errors in reviewing the evidence, and ... misapplied and misconstrued applicable law and FAA precedent.” [FAA Exhibit 1, Item 18, page 6.] Appellant questions whether the Director properly concluded:

- (a) The Town violated grant assurance 5, *Preserving Rights and Powers*, by surrendering significant rights and powers when it entered into a leaseback agreement with Boston Metropolitan Airport, Inc. (BMA) for the “1100 Foot Strip.”
- (b) The Town violated grant assurance 22, *Economic Nondiscrimination*, by denying Boston Air Charter access to conduct a commercial aeronautical activity and by restricting its ability to self-fuel.
- (c) The Town violated grant assurance 23, *Exclusive Rights*, by entering into lease agreements that gave control of the only power source to one tenant.

Appellant also requested the Associate Administrator to conduct a hearing on the matter.

A. Issue 1: Grant Assurance 5, *Preserving Rights and Powers*, and the Leaseback Provision

Appellant questions whether the Director properly concluded the Town violated grant assurance 5, *Preserving Rights and Powers*, by surrendering significant rights and powers when it entered into a leaseback agreement with Boston Metropolitan Airport, Inc. (BMA) for the “1100 Foot Strip.” Appellant argues the Town is in compliance with grant assurance 5, *Preserving Rights and Powers*, because the 1967 lease with BMA was executed pursuant to the express requirements of the FAA. [FAA Exhibit 1, Item 18, page 9.] Appellant also argues this finding exceeded the Director’s scope since the Complainant did not allege a violation of grant assurance 5. [FAA Exhibit 1, Item 18, page 9.]

The FAA directed the Town to acquire fee simple ownership of the “1100 Foot Strip,” – which was previously owned jointly by the Airport and Boston Metropolitan Airport, Inc (BMA) – as a prerequisite for funding future airport improvement projects. On December 28, 1967, the Town counsel signed a certificate affirming that the Town of Norwood holds fee simple title, free and clear of all liens, encumbrances and adverse interests, subject to a reversionary interest held by BMA that would revert the property to BMA, if the property is no longer needed for airport purposes. [FAA Exhibit 1, Item 10.]

Fee simple ownership represents absolute ownership of real property. Upon acquiring the title to the property, the Town became the property owner and had all rights associated with the property with the exception of the reversionary interest. At that

point, the Town had the right to access the property, the right to lease the property, the right to develop the property, and the right to grant easements. The right of access and the right to grant utility easements and maintain and install utilities are essential rights integral to the operation and development of any public use airport. A sponsor must have control of its land in order to support development and growth of the airport.

The Town, however, relinquished some of those rights when it entered into a leaseback arrangement with Boston Metropolitan Airport, Inc. (BMA), and BMA entered into a sublease with Eastern Air Center. The leaseback agreement does not contain provisions for utility easements, and it is silent on the Airport's right of entry to the property or a right to maintain and install utilities on the property. [FAA Exhibit 1, Item 7.]

The Town argues it was within its rights to lease the property back to Boston Metropolitan Airport, Inc. [FAA Exhibit 1, Item 18, page 9.] The FAA does not dispute this. Leasing the property is not the issue nor is it the basis for the Director's finding under grant assurance 5, *Preserving Rights and Powers*. The issue under review, and the basis for the Director's finding, is the Town's failure to retain the absolute right of access and the right to grant utility easements and to maintain and install utilities. These are essential rights integral to the operation and development of any public use airport.

The Town acquired the "1100 Foot Strip" property at the FAA's direction. The Town's decision to enter into the leaseback agreement – and the terms of that agreement – were wholly the responsibility of the Town. The FAA was not a party to the leaseback agreement, nor did it require the Town to enter into such an agreement. [FAA Exhibit 1, Item 18, page 10.]

Assurance 5 states that the airport sponsor "will not take or permit any action that would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement...." For whatever reason, and by whatever form, the Town relinquished these rights as evidenced by the Town's inability to broker a utility easement necessary to enable Boston Air Charter to establish a fueling facility.¹⁷ The details of how that happened do not alter the fact that it did happen. The Associate Administrator affirms the Director's finding that the Town of Norwood is in violation of grant assurance 5, *Preserving Rights and Powers*, by giving up the rights and powers necessary to ensure access for a prospective aeronautical activity.

The Associate Administrator also wants to clarify for the Town that the FAA is responsible for enforcing the grant assurances. Any action that is contrary to the

¹⁷ The Town's right to grant Boston Air Charter access for the purpose of receiving electric service to the DC-3 Ramp was effectively blocked by the Town's 1967 lease agreement with Boston Metropolitan Airport, Inc. and their subsequent sublease with Eastern Air Center. The Town put Boston Air Charter on notice that it was unable to approve the long-term lease agreement for the DC-3 Ramp and that Boston Air Charter must find another way get electric service without encroaching on the Eastern Air Center leasehold. [See FAA Exhibit 1, Item 17, page 23.]

sponsor's grant assurances is within the scope of the FAA to review and address. When information contained in the administrative record to a Part 16 complaint leads the agency to review areas of noncompliance – whether or not they are alleged by the complainant – the agency will, nonetheless, make a finding on those areas. [See for example, M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board, FAA Docket No. 16-06-06, (January 19, 2007) (Director's Determination), Issue 7.] All potential grant assurance violations are within the scope of the FAA to review and address, whether alleged in a Part 16 complaint or identified through any other means.

The Director did not err in finding the Town in violation of grant assurance 5, *Preserving Rights and Powers*. The Town clearly did not have the legal control necessary to resolve an access issue protected under the grant assurances.

The Town seeks to supplement the record on appeal. In support of its request, the Town contends that the additional documentary evidence pertaining to FlightLevel Norwood (FLN) was not in existence at the time of the parties' respective pleadings and written submissions, nor were the matters relating to FLN even contemplated during the pendency of the present matter. [FAA Exhibit 1, Item 18, page 7.]

It is well established that in an agency's appeal process new evidence need not be admitted unless the new evidence was not available and could not have been discovered or presented at the prior proceeding. Charles H. Koch, Jr. Administrative Law and Practice, Vol. 1, § 6.76. (1997). The new evidence will not be considered if the party could reasonably have known of its availability. Koch, supra, § 6.76. A party may not correct a mistake in its original selection of evidence by then compelling the agency to consider it on appeal. Koch, supra, § 6.76.

Part 16 requires all relevant facts to be presented in the complaint documents. [See Sims v. Apfel, 530 U.S. 103, 108-110 (2000)] The FAA may, under 14 CFR § 16.29(b)(1), rely entirely on the complaint and responsive pleadings provided by the parties in reaching its initial determination. If the parties could supplement the Director's Determination after it is issued, the administrative process would be endless and contrary to the expedited procedures provided under Part 16. [See Preamble, Rules of Practice for Federally Assisted Airport Proceedings, Summary, 61 Fed. Reg. 53998 (Oct. 16, 1996)]

Pursuant to 14 CFR § 16.23, the parties are required to submit all of their pleadings and other documentation in support of their case so that in rendering the Director's Determination, the FAA would have the entire record before it. Review by the Associate Administrator is limited to an examination of the Director's Determination and the Record upon which such determination was based.

FLN's actions occurred during the time the matter was under consideration by the Director. While the Town could have submitted a motion seeking to supplement the

record during its pendency before the Director, the Associate Administrator has elected to consider the seven supplemental exhibits submitted on appeal by the Town.¹⁸

In reliance on its new exhibits, the Town argues on appeal that Eastern Air Center is no longer a lessee or sublessee at the Airport and its successor has not overridden the Airport's ability to respond to new business. [FAA Exhibit 1, Item 18, page 8.] Having considered the new exhibits, the Associate Administrator notes that Eastern Air Center is no longer a lessee or sublessee at the Airport. The record is not clear whether the Town had to approve the assignment from Eastern Air Center to FLN. If the Town did have to approve the assignment, this would have been an opportune time for the Town to negotiate its right of access and right to grant utility easements, including the right to maintain and install utilities.

Nonetheless, there is no indication in the Appellant's submissions that any easement right has been granted or recaptured to enable Boston Air Charter to obtain electrical service so it can establish a fueling facility on its own leasehold. If the Town has, indeed, taken appropriate action to regain its rights and powers to access the "1100 Foot Strip" to provide power to the Airport ramps and Airport tenants, the Town needs to address this in a corrective action plan as ordered in the Director's Determination. The FAA will then evaluate whether the Town's actions are sufficient to address the issues of noncompliance identified in the Director's Determination.

Without this fix, the substitution of FLN for Eastern Air Center does not cure the noncompliance or render the matter moot.

B. Issue 2: Grant Assurance 22, *Economic Nondiscrimination*, and Access for Aeronautical Activity and Self-fueling

Appellant questions on appeal whether the Director properly concluded the Town violated grant assurance 22, *Economic Nondiscrimination*, by denying Boston Air Charter access to conduct a commercial aeronautical activity and by restricting its ability to self-fuel. The Director found the Town failed to provide a means for Boston Air Charter to obtain the necessary electrical service to establish a fuel facility so it could self-fuel its own aircraft and so it could potentially provide fueling services to the public.

The Town argues that even though the Town was unable to assist Boston Air Charter with an easement through the "1100 Foot Strip" (over Eastern Air Center's objections) to install a conduit for electrical service, it did offer a reasonable alternative. In addition, the Town argues Boston Air Charter is currently able to self-fuel.

Electrical Service

The record shows the Town was willing to enter into a lease agreement with Boston Air Charter on the DC-3 Ramp and to allow Boston Air Charter to engage in fueling

¹⁸ Boston Air Charter did not formally object to the record being supplemented on Appeal.

services. [FAA Exhibit 1, Item 18, page 12.] The fueling activity required electrical service, which had to be run through the “1100 Foot Strip” leasehold of Eastern Air Center. The only transformer providing power to the airfield ramps is located on the “1100 Foot Strip.” The transformer is owned by the Town of Norwood Municipal Light Department. Eastern Air Center declined to allow the necessary easement. As a result, Boston Air Charter was not able to obtain electrical service and was not able to establish fueling services on the DC-3 Ramp.

Appellant argues the Town provided a reasonable alternative to the easement through the Eastern Air Center leasehold when it offered to allow Boston Air Charter to dig trench drains and install electrical access during the apron reconstruction project in 2005. [FAA Exhibit 1, Item 18, page 13.] Boston Air Charter declined that offer because its costs would have been substantially higher with the Town’s contractor over what Boston Air Charter would have to pay its own contractor.¹⁹ Boston Air Charter states it was advised it could “choose to wait until the [Town’s] contractor was done, and then hire [its own] contractor to install conduits later.” [FAA Exhibit 1, Item 19, pages 1-2.] After the apron reconstruction was completed, however, the Town would not permit the newly paved area to be cut in order to install the trench drains for three years following the repaving. [FAA Exhibit 1, Item 9, page 4.]

While the record evidence shows Boston Air Charter was given the opportunity to participate in the apron reconstruction, it does not show this activity would have assured Boston Air Charter electrical service. The Director noted that even if Boston Air Charter had installed underground conduits, it would still have needed approval from Eastern Air Center to access the “1100 Foot Strip.” Since Eastern Air Center successfully opposed any such easement, the Director reasoned that participating – or failing to participate – in the apron reconstruction was not the means by which Boston Air Charter could have obtained reasonable access to engage in a commercial aeronautical activity.²⁰ [See FAA Exhibit 1, Item 17, page 26.]

As stated previously, there is no indication in the Appellant’s submissions that any easement right has been granted or recaptured to enable Boston Air Charter to obtain electrical service so it can establish a fueling facility on its own leasehold.

Access to electrical service is a requirement of any commercial aeronautical tenant operating an aircraft fuel facility. The Director noted the Town is not required to provide electrical service to Boston Air Charter directly, but it does have an obligation to

¹⁹ The record shows Boston Air Charter’s costs would have been 91% higher using the Town’s contractor. The Town’s contractor would have charged \$55,800. Another contractor submitted an offer of \$29,185. The difference of \$26,615 (\$55,800 minus \$29,185) divided by the \$29,185 quoted from its own contractor is 91.19%.

²⁰ In its reply to this appeal, Boston Air Charter confirms its own understanding that installing conduits under the ramp did not ensure actual connection of the electric service across the section of the “1100 Foot Strip” to the transformer. [FAA Exhibit 1, Item 19, page 2.]

provide suitable area and space on the Airport where Boston Air Charter (or another potential aeronautical service provider) can obtain access to utilities.

Self-Fueling

In 2004, Boston Air Charter received a temporary self-fueling permit to fuel its aircraft using a 5,100 gallon Jet A fuel tank while it completed the necessary steps to install a permanent fuel facility. The Town terminated Boston Air Charter's temporary self-fueling permit for cause when Boston Air Charter violated the Town's rules and regulations regarding fueling. [See FAA Exhibit 1, Item 18, page 4.]

In addressing the issue of self-fueling, the Director acknowledged the Town's safety and public welfare concerns and noted "the Town was within its rights to terminate the temporary fueling operations" given the circumstances and the Town's concern over liability issues. Nonetheless, the Director advised that the Town has an obligation to provide access for self-fueling subject to reasonable rules and standards. [FAA Exhibit 1, Item 17, page 27.]

At the time this appeal was filed, Appellant reports that Eastern Air Center is no longer operating on the Airport. Eastern Air Center assigned its interest to FlightLevel Norwood, LLC (NLF) on January 9, 2008. [FAA Exhibit 1, Item 18, attachment A.] Appellant argues that FlightLevel Norwood entered into an agreement with Boston Air Charter February 15, 2008, to permit Boston Air Charter to self-fuel its own aircraft from FlightLevel Norwood's location. [FAA Exhibit 1, Item 18, attachment C.]

Appellant argues the Director's "conclusions are displaced and undermined by the introduction of [FlightLevel Norwood] as successor-in-interest at the Airport." [FAA Exhibit 1, Item 18, page 7.] Appellant states, "[FlightLevel Norwood's] agreement to provide [Boston Air Charter] with certain access to its fuel farm renders the Acting Director's Determination moot." [FAA Exhibit 1, Item 18, page 6.]

Boston Air Charter disputes the Town's claim that it is now able to self-fuel. The record evidence confirms the Complainant's position that it is not permitted to self-fuel. Although the agreement with FlightLevel Norwood is called a "Self-Fueler Operations Agreement" [FAA Exhibit 1, Item 18, attachment C], it merely permits an employee from Boston Air Charter to pump fuel from FlightLevel Norwood's pumps during the hours of 9:30 p.m. and 5:30 a.m. when FlightLevel Norwood personnel are not on the premises. Essentially, this "self-fueling" option is provided only to allow quick response for late night medical flights. [See FAA Exhibit 1, Item 18, page 8; and Item 18, attachments B and D.] Boston Air Charter may dispense the fuel into its own aircraft during these hours, but it must pay FlightLevel Norwood's standard fuel rates just as if FlightLevel Norwood personnel were pumping the fuel. [FAA Exhibit 1, Item 19, attachment A.] This is not the definition of self-fueling.

Self-fueling or self-servicing means the fueling or servicing of an aircraft by the owner of the aircraft or the owner's employee using fuel obtained by the aircraft owner from the source of his/her preference. Self-service includes activities such as adjusting, repairing, cleaning, and otherwise providing service to an aircraft, provided the service is performed by the aircraft owner or his/her employees with resources supplied by the aircraft owner. Title 14 CFR Part 43 permits the holder of a pilot certificate to perform specific types of preventative maintenance on any aircraft owned or operated by the pilot. Aircraft owners have the right to self-service their own aircraft, including fueling. They have the right to furnish their own supplies, including fuel. [See FAA Order 5190.6A, *Airport Compliance Requirements*, October 2, 1989, section 3-9(e)(1) and (2).] The agreement with FlightLevel Norwood does not meet the definition of self-fueling for Boston Air Charter.

Associate Administrator's Review of Issue 2, Economic Nondiscrimination

On appeal, the Associate Administrator will consider whether (a) findings of fact were supported by a preponderance of reliable, probative, and substantial evidence; and (b) conclusions of law were in accordance with applicable law, precedent, and public policy.

While Appellant states in general, "...the Acting Director made substantial errors in reviewing the evidence and he misapplied and misconstrued applicable law and FAA precedent" [FAA Exhibit 1, Item 18, page 6], the appeal does not identify errors of fact or law pertaining to the lack of electrical service for Boston Air Charter or its inability to self-fuel. Rather, Appellant argues the Director's Determination is moot as a result of the new agreement with FlightLevel Norwood that permits Boston Air Charter to self-fuel. [FAA Exhibit 1, Item 18, pages 6-7.]

The record does not support Appellant's assertions that the Town provided Boston Air Charter a reasonable alternative for securing electrical service or that Boston Air Charter is currently self-fueling. Nor does the record support the Town's assertion that its actions "were neither unreasonable nor unjustly discriminatory" or that the Town was simply requiring "[Boston Air Charter] to adhere to the same rules and regulations as all other carriers and businesses at the Airport." [FAA Exhibit 1, Item 8, page 12.]

There is no indication in the Appellant's submissions that any easement right or viable alternative option has been granted to enable Boston Air Charter to obtain electrical service in order to establish a fueling facility on its own leasehold, which was at the heart of the initial Complaint. The substitution of FlightLevel Norwood for Eastern Air Center has not resulted in Boston Air Charter being permitted to access the electrical power source through the "1100 Foot Strip" now occupied by FlightLevel Norwood. Likewise, the fuel service agreement with FlightLevel Norwood, which allows Boston Air Charter to pump fuel into its own aircraft during the night-time hours when FlightLevel Norwood personnel are not on the premises, is not "self-fueling" as defined by the FAA. Boston Air Charter is still unable to install a fueling facility, is still unable

to self-fuel, and is still unable to establish itself as a fixed-base operator providing fuel service to the public.

The Director did not err in finding the Town in violation of grant assurance 22, *Economic Nondiscrimination*, by denying Boston Air Charter access to conduct a commercial aeronautical activity and by restricting its ability to self-fuel.

**C. Issue 3: Grant Assurance 23, Exclusive Rights,
and the Power Source**

Appellant questions on appeal whether the Director properly concluded the Town violated grant assurance 23, *Exclusive Rights*, by entering into lease agreements that gave control of the only power source to one tenant, effectively restricting commercial fuel sales to that one enterprise.

The Town argues it demonstrated no intent, either express or implied, that Eastern Air Center had the exclusive right to provide fuel services at the Airport. The Town argues that having only one enterprise on the Airport offering fueling services is not a violation of the exclusive rights prohibition if there is no understanding or express agreement or intent to exclude other reasonably qualified enterprises. [FAA Exhibit 1, Item 18, page 14.]

The FAA recognizes the Town did not grant an explicit exclusive right to Eastern Air Center to conduct fueling operations. The Town attempted to assist Boston Air Charter in obtaining space to construct its own fuel facility. Unfortunately, Boston Air Charter was unable to gain access to the electrical power source through the “1100 Foot Strip” on Eastern Air Center’s leasehold. [See Issue 1 above.] Access to electrical service is a requirement of any commercial aeronautical tenant operating an aircraft fuel facility. As the Director noted, the Town is not required to provide electrical service to Boston Air Charter directly, but it does have an obligation to provide suitable area and space on the Airport where Boston Air Charter (or another potential aeronautical service provider) can obtain access to utilities. [FAA Exhibit 1, Item 17, page 28.] The Town did not do this.

The Town fails to appreciate the constructive nature of the exclusive right conferred upon Eastern Air Center then – and upon FlightLevel Norwood now – when the Town failed to provide a viable means for competitor Boston Air Charter to obtain electrical service necessary to conduct fueling operations. Without electrical service, Boston Air Charter could not install its fuel facility. Without installing the fuel facility, Boston Air Charter could not compete with Eastern Air Center for fuel sales and could not conduct its own self-fueling. The result is that Eastern Air Center remained the only entity on the Airport with the ability to dispense fuel to the public. FlightLevel Norwood took over the lease from Eastern Air Center and is now the only entity on the Airport offering fuel sales to the public.

Appellant quotes the FAA stating, “[T]he providing of services at an airport by a single fixed-base operator shall not be construed as an exclusive right if it is would be unreasonably costly, burdensome, or impractical for more than one fixed-base operator to provide such services...” [FAA Exhibit 1, Item 18, page 14.] Yet the Town does not argue that is it unreasonably costly, burdensome, or impractical to accommodate Boston Air Charter. Appellant continues the quote, “...and if allowing more than one fixed-base operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-base operator and such airport....” The Town points out that it terminated its lease with Eastern Air Center for the DC-3 Ramp in order to lease it to Boston Air Charter; the Town does not, however, state that leased space was, in any way, an impediment to Boston Air Charter’s desire to engage in fueling operations on the Airport.

Appellant again quotes the FAA stating, “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 Exhibit 1, Item 18, page 14.] In this case, however, there is not just one enterprise that wants to take advantage of the opportunity to engage in an aeronautical activity. Eastern Air Center had (and now FlightLevel Norwood has) the only fuel service on the Airport. Boston Air Charter wants to engage is the same aeronautical activity.

The Appellant is correct in quoting the FAA that, “The exclusive rights prohibition does not guarantee an airport user the right to acquire a specific piece of private property, or access to a specific location on the airport.” [FAA Exhibit 1, Item 18, page 16.] However, Boston Air Charter is not arguing that it should have a specific piece of property on the Airport; nor did the Director advise the Town that it had to provide a specific piece of property. The Director ordered the Town to “regain the Airport’s rights and powers to access the ‘1100 Foot Strip’ to provide power to the Airport ramps for Airport tenants.” [FAA Exhibit 1, Item 17, page 30.] The Town may, in fact, offer an alternate location and/or an alternate power source option so long as it meets the requirements of making electrical power available to aeronautical tenants.

The grant of an exclusive right to conduct an aeronautical activity at an airport on which federal funds have been expended is considered a violation of Section 308(a) of the Federal Aviation Act (49 U.S.C. § 40103(e)), whether such exclusive right results from an express agreement, from the imposition of unreasonable standards or requirements, or by any other means. [FAA Order 5190.6A, *Airport Compliance Requirements*, October 2, 1989, section 3-8(b).] In this case, the Town effectively gave Eastern Air Center (and then FlightLevel Norwood) the exclusive right to operate a fueling facility when it enabled that enterprise to control the only electrical power source and failed to provide an alternate option for electrical service to competitors.

In addition, an airport proprietor has the responsibility to permit self-fueling under reasonable standards that enhance the safety and efficiency of an airport operation.

Aircraft owners have the right to self-service their own aircraft using their own personnel, including fueling, washing, repairing, painting, and otherwise taking care of their own aircraft. A restriction that has the effect of diverting such business to a commercial operator amounts to an exclusive monopoly of an aeronautical activity contrary to law. [See FAA Order 5190.6A, *Airport Compliance Requirements*, October 2, 1989, section 3-9(e)(1).] The Town touts the “Self-Fueler Operations Agreement” with FlightLevel Norwood as the solution to Boston Air Charter’s desire to self-fuel its own aircraft. In fact, that agreement merely serves to divert Boston Air Charter’s fuel needs to FlightLevel Norwood. It is a means of boosting FlightLevel Norwood’s commercial fuel sales; it is not a self-fueling solution.

The Associate Administrator finds the Director did not err in finding the Town in violation of grant assurance 23, *Exclusive Rights*, by entering into lease agreements that gave control of the only power source to one tenant, effectively restricting commercial fuel sales to that one enterprise.

D. Request for Hearing

On Appeal, the Town requested the Associate Administrator to conduct a hearing in this matter. Pursuant to 14 CFR, Part 16, § 16.33, the Associate Administrator will issue a final decision on appeal from the Director's Determination, without a hearing, where a hearing is not required by statute and is not otherwise made available by the FAA.

In accordance with 14 CFR § 16.109, if the Director in his determination proposes to issue an order withholding approval of an application for a grant apportioned under 49 U.S.C. § 47114(c) and (e), or a cease and desist order, or any other compliance order issued by the Administrator to carry out the provisions of a statute listed in 14 CFR § 16.1, and required to be issued after notice and opportunity for a hearing, then a respondent will have the opportunity for a hearing. [See 49 U.S.C. § 47106(d).] The Courts of Appeals that have examined the issue have held that the Part 16 hearing rules are consistent with 49 USC § 46101(a). [See e.g., Penobscot Air Services LTD v FAA, 164 F 3d 713, 720 (1st Cir., 1999); Lange v FAA, 208 F3d, 389, 391 (2nd Cir., 2000); Wilson Air Center v FAA, 372 F3d 807 (6th Cir., 2004).]

This is not the case here. Norwood Memorial Airport is a non-primary general aviation airport covered under 49 U.S.C. § 47114(d) and thus is not entitled to a hearing. The Associate Administrator denies the request for a hearing.

VII. CONCLUSION

The FAA’s role in this appeal is to determine only the narrow issue of whether the Director erred in findings of fact or conclusions of law in issuing the Director’s Determination of April 11, 2008.

Upon an appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (a) findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [See e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19 (December 30, 1999) (Final Decision and Order), page 21, and 14 CFR § 16.227.]

In arriving at a final decision on this appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, and the appeal and reply submitted by the parties in light of applicable law and policy. Based on this reexamination, the Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy. The appeal does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination.

The Associate Administrator affirms the Director's Determination. The Appellant is not entitled to a hearing. This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR § 16.33(a).

ORDER

ACCORDINGLY, it is hereby ORDERED that (1) the Director's Determination is affirmed, and (2) the appeal is dismissed, pursuant to 14 CFR § 16.33.

Consistent with the Director's Determination, the Town is ordered to submit a corrective action plan to the Director, Office of Airport Compliance and Field Operations²¹ within 30 days that explains how the Airport (1) has provided or will provide access to aeronautical service providers, including Boston Air Charter, to establish a fuel facility and conduct self-fueling operations consistent with state and local regulations; (2) has ended or will end the practice of awarding long-term leases of federally funded ramps that have the effect of granting one party control over the majority of the ramps on the Airport; (3) put in place a short-term ramp leasing permit policy for the Airport to assert more control of the federally funded ramps, and (4) has regained or will regain the Airport's rights and powers to access the "1100 Foot Strip" to provide power to the Airport ramps for Airport tenants.

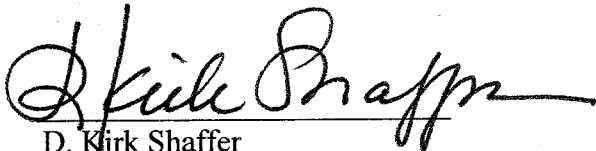
Failure to submit a corrective action plan acceptable to the FAA within the time provided, unless extended by the FAA for good cause, will lead to suspension of future grant applications for AIP discretionary grants under 49 U.S.C. § 47115 and general aviation airport grants under 49 U.S.C. § 47114(d).

²¹ This office was formerly part of the Office of Safety and Standards; the Office of Airport Compliance and Field Operations is now a separate directorate responsible for adjudicating Part 16 formal complaints, among other matters.

All motions not expressly granted in this Final Decision and Order are denied.

RIGHT OF APPEAL

A party to this decision disclosing a substantial interest in the final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. § 46110, in the United States Court of Appeals for the District of Columbia Circuit 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. The petition must be filed not later than 60 days after a Final Decision and Order has been served on the party. [14 CFR, Part 16, § 16.247(a).]



D. Kirk Shaffer
Associate Administrator
for Airports

AUG 14 2008

Date

Final Decision and Order
INDEX OF ADMINISTRATIVE RECORD
Docket No. 16-07-03

Boston Air Charter,
Complainant / Appellee
v.
Norwood Airport Commission
Norwood, Massachusetts,
Respondent / Appellant

The following documents (items) constitute the administrative record in this proceeding:
Items 1-16 make up the administrative record for the Director's Determination.
Items 1 and 17-20 represent the additional items received as part of the appeal.

- Item 1** FAA Form 5010 for the Airport inspection March 14, 2007; and FAA Form 5010 for the Airport last inspected March 27, 2008. (The FAA Form 5010 for Norwood Memorial Airport was updated between the time the Complaint was filed and the Appeal was filed.)
- Item 2** Airport Sponsor AIP Grant History listing the federal airport improvement assistance provided by the FAA to the Airport Sponsor since fiscal year 1982, report date July 25, 2007.
- Item 3** Formal Complaint and cover letter docketed 10 April 2007. List of Exhibits includes:
- A. Letter from Manager, FAA New England Region, Airports Division to Complainant's Attorney, dated February 28, 2007. (Complainant's Exhibit 1)
 - B. Letter from Complainant's attorney to Respondent's attorney with Sponsor's Assurances attached dated April 5, 2006. (Complainant's Exhibit 2)
 - C. Letter from Complainant's attorney to Airport Compliance Officer, FAA New England Region dated July 14, 2006. (Complainant's Exhibit 3)

1. Letter from Manager of Eastern Air Center to Manager of Norwood Airport regarding construction of underground utilities dated January 30, 2006.
 2. *Scott M. Niswonger, etc., Plaintiff v. American Aviation, Inc.* 411F.Supp.769; 1975 U.S. Dist. LEXIS 11722; 14 Av. Cas.
 3. Apron Reconstruction AIP 3-25-0037-26-2005 meeting notes and sign-in sheet dated July 14, 2005.
 4. Boston Air Charter Spill Containment System proposal and contract dated August 18, 2005.
 5. Letter from the president of RLR Excavation, Inc. to Boston Air Charter regarding proposed fuel facility dated January 13, 2005.
 6. Electronic mail between Complainant's attorney and Massachusetts Department of Environmental Protection dated November 18 and 21, 2005.
 7. February 3, 2006, Letter of Transmittal from Civil Engineering Firm to Complainant and four attachments regarding trench drain capacity dated February 1, 2006.
 8. Draft lease agreement between Norwood Airport Commission and Boston Air Charter
- D. Letter and attached diagram from Complainant's attorney to Airport Compliance Officer, FAA New England Region dated October 13, 2006.
(Complainant's Exhibit 4)

Item 4 Docket Notice dated April 17, 2007.

Item 5 Letter from Respondent's attorney to FAA Chief Counsel dated April 17, 2007.

Item 6 (A) Letter from FAA Counsel to Respondent's Counsel granting an extension of time to file an Answer, Certificate of Service both dated May 4, 2007, and extension request from Respondent's Counsel dated May 3, 2007.

(B) Letter from FAA Counsel to Complainant's Counsel granting an extension of time to file a Reply, Certificate of Service dated May 29, 2007, and extension request from Complainant's Counsel dated May 25, 2007.

Item 7 Respondent's Answer dated May 17, 2007. List of Exhibits includes:

- A. Letter from Respondent's Attorney to FAA New England Region Airports Division Manager dated June 5, 2006, includes attachment of two letters dated December 16, 2005, and January 30, 2006, from Manager of Eastern Air Center to the Manager, Norwood Memorial Airport. (Answer Exhibit 1)
- B. Letter from Respondent's attorney to Airport Compliance Officer, FAA New England Region dated June 19, 2006. (Answer Exhibit 2)
- C. Letter from Respondent's attorney to Airport Compliance Officer, FAA New England Region dated September 27, 2006. (Answer Exhibit 3)
- D. Letter from Respondent's attorney to Airport Compliance Officer, FAA New England Region dated November 2, 2006. (Answer Exhibit 4) includes exhibits:
 1. Massachusetts Department of Environmental Protection, *Superseding Order of Conditions* dated November 30, 2004. Massachusetts Department of Environmental Protection, Recommended Final Decision dated April 8, 2005. (Answer Exhibit 4-A)
 2. Norwood Airport Commission Agenda and minutes for December 6, 2005. (Answer Exhibit 4-B)
 3. Electronic mail between Complainant's attorney and Massachusetts Department of Environmental Protection dated November 18 and 21, 2005. (Answer Exhibit 4-C)
 4. Letter to the Norwood Airport Commission from Toomey-Munson & Associates, Inc. dated January 24, 2006. (Answer Exhibit 4-D)
 5. Norwood Airport Commission Meeting, January 10, 2006 minutes (Answer Exhibit 4-E)

6. Letter from Town of Norwood Conservation Agent to FAA Airport Compliance Officer, New England Region Headquarters, dated November 2, 2006. (Answer Exhibit 4-F)
 7. Notes of telephone conservation between Boston Air Charter and Edwards and Kelcey dated February 1, 2006. (Answer Exhibit 4-G)
 8. Letter from the Town of Norwood to Boston Air Charter dated May 10, 2006. (Answer Exhibit 4-H)
 9. Letter from Eastern Air Center to Town of Norwood Memorial Airport dated January 30, 2006. (Answer Exhibit 4-I)
- E. Lease Agreement between the Town of Norwood and the Boston Metropolitan Airport, Inc. (Answer Exhibit 5)
- F. BLANK ON FILING (Answer Exhibit 6)
- G. Letter to Complainant's Counsel from the Town of Norwood Fire Department dated August 24, 2006. (Answer Exhibit 7)
- H. Norwood Memorial Airport Apron Reconstruction Project. (Answer Exhibit 8)
- I.
1. FAA pre-construction conference dated July 14, 2005.
 2. Edwards and Kelcey preconstruction meeting notes for July 14, 2005.
 3. Edwards and Kelcey preconstruction meeting notes for August 25, 2005.
 4. Duplicate-Notes of telephone conservation between Boston Air Charter and Edwards and Kelcey dated February 1, 2006.
 5. Edwards and Kelcey preconstruction meeting notes for September 1, 2005 and schedule of construction events during September 2005.
 6. Transmittal cover letter from Airport Manager to Boston Air Charter dated September 8, 2005.

7. Edwards and Kelcey preconstruction meeting notes for September 8, 2005 and schedule of construction events during September 2005.
 8. Edwards and Kelcey preconstruction meeting notes for September 22, 2005 and schedule of construction events during September and October 2005.
 9. Edwards and Kelcey preconstruction meeting notes for September 29, 2005 and schedule of construction events during September and October 2005.
 10. Edwards and Kelcey preconstruction meeting notes for October 6, 2005 and schedule of construction events during October 2005.
 11. Edwards and Kelcey preconstruction meeting notes for October 13, 2005 and schedule of construction events during October 2005.
 12. Edwards and Kelcey preconstruction meeting notes for October 20, 2005 and schedule of construction events during October 2005.
 13. Edwards and Kelcey preconstruction meeting notes for October 27, 2005 and schedule of construction events during October and November 2005.
 14. Edwards and Kelcey preconstruction meeting notes for November 3, 2005.
 15. Edwards and Kelcey preconstruction meeting notes for November 10, 2005.
- J. Norwood Memorial Airport Accident/Incident Report of March 31, 2007. Answer Exhibit 9)
- K. Letter from Commonwealth of Massachusetts Department of Environmental Protection to Complainant's Counsel dated January 17, 2007. (Answer Exhibit 10)
- L. Letter from Complainant's Counsel to Norwood Airport Commission dated August 4, 2006. (Answer Exhibit 11)

M. Letter from Norwood Airport Commission to Boston Air Charter dated May 7, 2007. (Answer Exhibit 12)

Item 8 Respondent's Motion to Dismiss docketed May 17, 2007. List of Exhibits includes:

- A. Letter from Respondent's Attorney to FAA New England Region Airports Division Manager dated June 5, 2006, includes attachment of two letters dated December 16, 2005, and January 30, 2006, from Manager of Eastern Air Center to the Manager, Norwood Memorial Airport. (Answer Exhibit 1)
- B. Letter from Respondent's attorney to Airport Compliance Officer, FAA New England Region dated June 19, 2006. (Answer Exhibit 2)
- C. Letter from Respondent's attorney to Airport Compliance Officer, FAA New England Region dated September 27, 2006. (Answer Exhibit 3)
- D. Letter from Respondent's attorney to Airport Compliance Officer, FAA New England Region dated November 2, 2006. (Answer Exhibit 4)
 - 1. Massachusetts Department of Environmental Protection, *Superseding Order of Conditions* dated November 30, 2004. Massachusetts Department of Environmental Protection, Recommended Final Decision dated April 8, 2005. (Answer Exhibit 4-A)
 - 2. Norwood Airport Commission Agenda and minutes for December 6, 2005. (Answer Exhibit 4-B)
 - 3. Electronic mail between Complainant's attorney and Massachusetts Department of Environmental Protection dated November 18 and 21, 2005. (Answer Exhibit 4-C)
 - 4. Letter to the Norwood Airport Commission from Toomey-Munson & Associates, Inc. dated January 24, 2006. (Answer Exhibit 4-D)
 - 5. Norwood Airport Commission Meeting, January 10, 2006 minutes (Answer Exhibit 4-E)

6. Letter from Town of Norwood Conservation Agent to FAA Airport Compliance Officer, New England Region Headquarters, dated November 2, 2006. (Answer Exhibit 4-F)
 7. Notes of telephone conversation between Boston Air Charter and Edwards and Kelcey dated February 1, 2006. (Answer Exhibit 4-G)
 8. Letter from the Town of Norwood to Boston Air Charter dated May 10, 2006. (Answer Exhibit 4-H)
 9. Letter from Eastern Air Center to Town of Norwood Memorial Airport dated January 30, 2006. (Answer Exhibit 4-I)
- E. Lease Agreement between the Town of Norwood and the Boston Metropolitan Airport, Inc. (Answer Exhibit 5)
- F. BLANK ON FILING (Answer Exhibit 6)
- G. Letter to Complainant's Counsel from the Town of Norwood Fire Department dated August 24, 2006. (Answer Exhibit 7)
- H. Norwood Memorial Airport Apron Reconstruction Project. (Answer Exhibit 8)
1. FAA pre-construction conference dated July 14, 2005.
 2. Edwards and Kelcey preconstruction meeting notes for July 14, 2005.
 3. Edwards and Kelcey preconstruction meeting notes for August 25, 2005.
 4. Duplicate-Notes of telephone conversation between Boston Air Charter and Edwards and Kelcey dated February 1, 2006.
 5. Edwards and Kelcey preconstruction meeting notes for September 1, 2005 and schedule of construction events during September 2005.
 6. Transmittal cover letter from Airport Manager to Boston Air Charter dated September 8, 2005.

7. Edwards and Kelcey preconstruction meeting notes for September 8, 2005 and schedule of construction events during September 2005.
 8. Edwards and Kelcey preconstruction meeting notes for September 22, 2005 and schedule of construction events during September and October 2005.
 9. Edwards and Kelcey preconstruction meeting notes for September 29, 2005 and schedule of construction events during September and October 2005.
 10. Edwards and Kelcey preconstruction meeting notes for October 6, 2005 and schedule of construction events during October 2005.
 11. Edwards and Kelcey preconstruction meeting notes for October 13, 2005 and schedule of construction events during October 2005.
 12. Edwards and Kelcey preconstruction meeting notes for October 20, 2005 and schedule of construction events during October 2005.
 13. Edwards and Kelcey preconstruction meeting notes for October 27, 2005 and schedule of construction events during October and November 2005.
 14. Edwards and Kelcey preconstruction meeting notes for November 3, 2005.
 15. Edwards and Kelcey preconstruction meeting notes for November 10, 2005
- I. Norwood Memorial Airport Accident/Incident Report of March 31, 2007. (Answer Exhibit 9)
 - J. Letter from Commonwealth of Massachusetts Department of Environmental Protection to Complainant's Counsel dated January 17, 2007. (Answer Exhibit 10)
 - K. Letter from Complainant's Counsel to Norwood Airport Commission dated August 4, 2006. (Answer Exhibit 11)

- L. Letter from Norwood Airport Commission to Boston Air Charter dated May 7, 2007. (Answer Exhibit 12)

- Item 9** Complainant's Reply and Opposition to Motion to Dismiss docketed June 12, 2007.
- Item 10** Federal Aviation Agency Grant Agreement dated June 29, 1967 and Amendment One dated August 15, 1967 for Project 9-10-019-0803. Town Counsel's Certificate of Affirmation of Ownership of Property dated December 28, 1967.
- Item 11** File records of FAA New England Regional Airport Compliance Officer regarding Boston Air Charter's Informal Complaint against the Norwood Airport Commission
- (1.) Letters from Eastern Air Center to Chairman, Norwood Airport Commission (A) opposing BAC leasing DC-3 Ramp, dated June 17, 2003 (B) opposing BAC self-fueling dated June 23, 2004.
 - (2.) Letter from Eastern Air Center to Chairman, Norwood Airport Commission opposing BAC leasing DC-3 Ramp, dated July 3, 2003.
 - (3.) Norwood Airport Aircraft Tie-down Contract for the DC-3 Ramp – dated August 1, 2003.
 - (4.) Letter from Boston Air Charter to Chairman, Norwood Airport Commission requesting permission to install a fuel farm dated October 29, 2003.
 - (5.) Norwood Airport Commission minutes on Boston Air Charter's proposal to install a fuel farm dated November 4, 2003.
 - (6.) Letter from Boston Air Charter to Chairman, Norwood Airport Commission regarding status of fuel farm project dated April 13, 2004.
 - (7.) Letter from Massachusetts Aeronautics Commission to Eastern Air Center regarding concerns about BAC's proposed fuel farm dated May 5, 2004.

- (8.) Letter from the Town of Norwood to Boston Air Charter approving the issuance of a license for the storage of flammables dated May 10, 2004.
- (9.) Massachusetts Department of Fire Service to Boston Air Charter regarding approval of plans for installation of a fuel farm dated June 11, 2004.
- (10.) Certificate of the Commonwealth of Massachusetts Secretary of Environmental Affairs on the Environmental Notification Form, October 8, 2004.
- (11.) Massachusetts Department of Environmental Protection – *Superseding Order of Conditions* issued November 30, 2004.
- (12.) Norwood Airport Commission Agenda, January 4, 2005
- (13.) RLR Excavation proposal for Boston Air Charter Fuel facility dated January 13, 2005.
- (14.) Norwood Airport Commission Agenda, February 1, 2005
- (15.) Norwood Airport Commission Agenda, March 1, 2005.
- (16.) Letter from Boston Air Charter to Chairman, Norwood Airport Commission regarding delay in fuel farm installation due to numerous environmental appeals filed by Eastern Air Center dated March 10, 2005.
- (17.) Norwood Airport Commission Agenda, April 4, 2005
- (18.) Massachusetts Department of Environmental Protection Recommended Final Decision dated April 8, 2005.
- (19.) Norwood Airport Commission Agenda, June 7, 2005
- (20.) Norwood Airport Commission Agenda, July 12, 2005
- (21.) Norwood Airport Commission Agenda, August 2, 2005
- (22.) Letter from Airport Manager to Boston Air Charter dated August 3, 2005
- (23.) Letter from Edwards and Kelcey to Northeast Reclamation Corporation dated August 3, 2005

- (24.) Letter from Edwards and Kelcey to Northeast Reclamation Corporation dated August 8, 2005
- (25.) ANDO PAULL Contractor's proposal for Boston Air Charter's Spill Containment System dated August 18, 2005.
- (26.) Edwards and Kelcey meeting notes on Apron Reconstruction project dated August 25, 2005
- (27.) Edwards and Kelcey meeting notes on Apron Reconstruction project dated September 1, 2005
- (28.) Norwood Airport Commission Agenda, September 6, 2005
- (29.) Edwards and Kelcey meeting notes on Apron Reconstruction project dated September 8, 2005
- (30.) Edwards and Kelcey meeting notes on Apron Reconstruction project dated September 22, 2005
- (31.) Edwards and Kelcey meeting notes on Apron Reconstruction project dated September 29, 2005
- (32.) Norwood Airport Commission Agenda, October 4, 2005
- (33.) Edwards and Kelcey meeting notes on Apron Reconstruction project dated October 6, 2005
- (34.) Letter from Airport Manager to Boston Air Charter terminating 30 day fueling permit on October 15, 2005 dated October 5, 2005 with attachments: October 3 Memorandum regarding overfilled drip pans and October 5 Letter from Eastern Air Center regarding availability of fuel.
- (35.) Memorandum from Chairman, Norwood Airport Commission to Airport Manager extending Boston Air Charter's self-fueling permit to November 1, 2005 dated October 15, 2005.
- (36.) Norwood Airport Commission Agenda and Minutes for November 1, 2005.

- (37.) Electronic mail from Department of Environmental Protection to Complainant's attorney dated November 23, 2005.
- (38.) Norwood Airport Commission Agenda, December 6, 2005
- (39.) Norwood Airport Commission minutes, December 6, 2005
- (40.) Letter from Eastern Air Center to Airport Manager dated December 16, 2005.
- (41.) Memorandum from Airport Manager to Norwood Airport Commission regarding BAC Electrical Plan/West Apron dated December 29, 2005.
- (42.) Norwood Airport Commission Agenda, January 3, 2006.
- (43.) Town of Norwood Fire Department Violation Notice to Boston Air Charter dated January 4, 2006
- (44.) Letter from Airport Manager to Boston Air Charter dated January 4, 2006.
- (45.) Boston Air Charter's response to the Town of Norwood Fire Department Violation Notice dated January 6, 2006
- (46.) Avfuel Corporation notice regarding Boston Air Charter's fuel storage system dated January 9, 2006.
- (47.) Internal Memorandum of the Town of Norwood Fire Department regarding construction of Boston Air Charter proposed fuel facility dated January 9, 2006.
- (48.) Norwood Airport Commission minutes, January 10, 2006.
- (49.) Letter from the Town of Norwood Fire Chief to the Chairman of the Town Board of Selectman dated January 10, 2006.
- (50.) Letter from the Town Board of Selectman to Boston Air Charter dated January 11, 2006.
- (51.) Letter from Eastern Air Center to Airport Manager dated January 12, 2006.

- (52.) Letter from Town of Norwood Fire Department to Boston Air Charter dated January 19, 2006.
- (53.) Letter from Town of Norwood Fire Department to Norwood Airport Commission dated January 23, 2006.
- (54.) Letter from Toomey-Munson & Associates to Norwood Airport Commission dated January 24, 2006.
- (55.) Letter from Eastern Air Center to Norwood Airport Commission dated January 30, 2006
- (56.) Norwood Memorial Airport Memorandum regarding February Commission meeting dated January 31, 2006.
- (57.) Edwards and Kelcey telephone memorandum dated February 1, 2006.
- (58.) Toomey-Munson Electrical Scheme for proposed fuel farm and capacity calculation sheets dated February 3, 2006.
- (59.) Draft Lease Agreement for Boston Air Charter at Norwood Memorial Airport undated and not executed.
- (60.) Norwood Airport Commission agenda and minutes dated February 7, 2006.
- (61.) Letter from Norwood conservation Commission to Norwood Airport Commission dated February 14, 2006.
- (62.) Letter from Town of Norwood Fire Department to Boston Air Charter dated February 21, 2006.
- (63.) Letter from Norwood Airport Commission to Boston Air Charter dated February 23, 2006.
- (64.) Letter from Norwood Airport Commission to Eastern Air Center dated February 23, 2006.
- (65.) Letter from Eastern Air Center to numerous parties regarding Boston Air Charter's Electrical Scheme dated February 23, 2006.
- (66.) Letter from Counsel for Boston Air Charter to Town Counsel dated February 27, 2006.

- (67.) Letter from Complainant's Counsel to Town Counsel dated April 5, 2006.
- (68.) Letter from the Town of Norwood Board of Selectman to Boston Air Charter dated April 26, 2006
- (69.) Letter from Boston Air Charter's Counsel to Town Counsel dated April 26, 2006.
- (70.) Letter from Boston Air Charter's Counsel to Norwood Airport Commission dated April 26, 2006.
- (71.) Letter from Town Counsel to Boston Air Charter's Counsel dated April 27, 2006
- (72.) Letter from Town of Norwood Fire Department to Board of Selectman dated April 27, 2006
- (73.) Letter from Boston Air Charter's Counsel to Town Counsel dated May 1, 2006
- (74.) Norwood Airport Commission Agenda dated May 3, 2006
- (75.) Letter from Town Counsel to Boston Air Charter's Counsel dated May 4, 2006.
- (76.) Letter from Manager, Airports Division, FAA New England Region Headquarters to Chairman, Norwood Airport Commission dated May 5, 2006.
- (77.) Letter from Boston Air Charter's Counsel to Town Counsel dated May 9, 2006.
- (78.) Letter from Town of Norwood Board of Selectman to Boston Air Charter dated May 10, 2006.
- (79.) Daily Transcript, *Boston Air Withdraws its bid for fuel tank farm at Norwood Airport*, dated May 10, 2006.
- (80.) Letter from Town Counsel to Manager, Airports Division, FAA New England Region Headquarters dated May 16, 2006.

- (81.) Letter from Town Counsel to Airport Compliance Officer, Airports Division, FAA New England Region Headquarters dated May 25, 2006.
- (82.) Letter from Town Counsel to Manager, Airports Division, FAA New England Region Headquarters dated June 5, 2006.
- (83.) Norwood Airport Commission Agenda dated June 6, 2006.
- (84.) Lease Agreement between Town of Norwood and Boston Metropolitan Airport, Inc dated December 1967.
- (85.) Electronic mail string between Airport Compliance Officer, Airports Division, FAA New England Region Headquarters and Boston Air Charter's Counsel dated June 9 and 13, 2006.
- (86.) Letter from Town Counsel to Airport Compliance Officer, Airports Division, FAA New England Region Headquarters dated June 19, 2006.
- (87.) Letter from Airport Manager to Boston Air Charter dated July 7, 2006.
- (88.) Letter from Airport Manager to Bryant Simpson dated July 7, 2006.
- (89.) Letter from Airport Manager to Harold Averbuck dated July 7, 2006.
- (90.) Norwood Airport Commission Agenda dated July 11, 2006.
- (91.) Letter from Boston Air Charter's Counsel to Airport Compliance Officer, Airports Division, FAA New England Region Headquarters dated July 14, 2006.
- (92.) Letter from Boston Air Charter's Counsel to Airport Manager dated July 17, 2006.
- (93.) Norwood Airport Aircraft Tie-down Contract –2006 dated January 1, 2006.
- (94.) Norwood Memorial Airport Minimum Standards as of July 31, 2006.

- (95.) Norwood Airport Commission General Rules and Regulations for Norwood Memorial Airport effective April 1, 1983 as of July 31, 2006.
- (96.) Letter from Boston Air Charter's Counsel to Norwood Airport Commission dated August 4, 2006.
- (97.) Letter from Town of Norwood Fire Department to Chairman, Norwood Airport Commission dated August 9, 2006.
- (98.) Norwood Airport Commission Agenda dated August 23, 2006.
- (99.) Norwood Airport Commission Special Meeting minutes dated August 23, 2006.
- (100.) Letter from Counsel for Boston Air Charter to Airport Manager dated August 24, 2006.
- (101.) Letter from Airport Manager to Boston Air Charter dated August 24, 2006.
- (102.) Letter from Town of Norwood Fire Department to Counsel for Boston Air Charter dated August 24, 2006.
- (103.) Letter from Norwood Airport Commission to Boston Air Charter regarding termination of aircraft tie-down contract dated August 25, 2006.
- (104.) Letter from Norwood Airport Commission to Boston Air Charter dated August 25, 2006.
- (105.) Electronic mail from Counsel for Boston Air Charter to FAA Airport Compliance Officer dated August 28, 2006.
- (106.) Norwood Airport Commission Agenda dated September 11, 2006.
- (107.) Letter from Eastern Air Charter to Norwood Airport Commission et al dated September 19, 2006.
- (108.) Letter from Counsel for Boston Air Charter to FAA Airport Compliance Officer dated September 21, 2006.
- (109.) Letter from Town Counsel to FAA Airport Compliance Officer dated September 27, 2006.

- (110.) Letter from Airport Manager to FAA Airport Compliance Officer dated October 6, 2006.
- (111.) Letter from Counsel for Boston Air Charter to FAA Airport Compliance Officer dated October 13, 2006.
- (112.) Letter from Town Counsel to FAA Airport Compliance Officer dated November 2, 2006, and attachments.
- (113.) Electronic mail between Counsel for Boston Air Charter and
FAA Airport Compliance Officer dated December 20, 2006.
- (114.) Letter from Massachusetts Department of Environmental Protection to Boston Air Charters dated January 17, 2007
- (115.) Norwood Airport Commission Agenda and Minutes for March, May (Agenda only), July, September, October (Agenda only), November (Agenda only), December (Agenda only) 2004.
- (116.) Letter from Town of Norwood Acting Deputy Chief, Fire Department to Assistant Airport Manager dated March 12, 2004.
- (117.) Letter from Town of Norwood Acting Deputy Chief, Fire Department to President, Boston Air Charter dated March 30, 2004
- (118.) Letter from Town of Norwood Acting Deputy Chief, Fire Department to Board of Selectman dated April 19, 2004
- (119.) Aboveground Fuel Tank license for Boston Air Charter approved May 5, 2004.
- (120.) Town of Norwood Airport Commission self-service/self-fuel permit for 30 days dated June 15, 2004.
- (121.) A 30-day extension of Self-fueling Permit until September 15, 2004 dated August 10, 2004.
- (122.) Correspondence regarding Boston Air Charter's housekeeping practices dated (A) October 13, 2005 –

drip pans, (B) October 17, 2005 – fuel safety concerns,
(C) November 23, 2005 – vehicle parking.

(123.) FAA Aeronautical Study Case # 2004-ANE-31-NRA –
Aboveground Fuel Farm on Norwood Municipal Airport
dated November 2, 2004.

- Item 12** Letter from Airport Manager, Norwood Memorial Airport to FAA
New England Regional Airport Compliance Officer dated January 18,
2008, and attached map of Compiled Lease Area Plan for Norwood
Memorial Airport, dated December 17, 2007.
- Item 13** Notice of Extension of Time. FAA, Director of Office of Airport
Safety and Standards, extended to February 4, 2008.
- Item 14** Notice of Extension of Time. FAA, Director of Office of Airport
Safety and Standards, extended to April 15, 2008.
- Item 15** FAA AIP Grant Agreement 3-25-0037-26-2005, dated June 28, 2005.
Apron reconstruction (approximately 520ft x 150ft)
- Item 16** FAA AIP Grant Agreement 3-25-0037-27-2006, dated June 22, 2006.
Gate 3 Apron reconstruction (approximately 325ft x 260ft) and
taxilane reconstruction (approximately 600ft x 35ft)
- Item 17** **Director's Determination**, issued April 11, 2008
- Item 17A** **Errata** to the Director's Determination, April 23, 2008.
- Item 17B** Letter from Town Counsel to FAA requesting extension of time to
submit corrective action plan, dated April 15, 2008.
- Item 18** Respondents' **Appeal** of the Director's Determination, received
May 27, 2008.
- attachment A* EAC Realty Trust; Assignment of Beneficial Interest,
dated January 9, 2008.
- attachment B* Norwood Airport Commission meeting minutes, February 13 [2008].
- Attachment C* Self-fueling Operations Agreement, dated February 18, 2008.
- attachment D* Norwood Airport Commission, Monthly Business
Meeting, March 12, 2008.

attachment E Application for Registration as a Foreign Limited Liability Company, filed January 9, 2008.

attachment F Quitclaim Deed, dated December 13, 1967.

attachment G March 6, 2006. letter from Michael Pendergast, President, Boston Metropolitan Airport, Inc., to Thomas Judge, Norwood Airport Commission, granting right-of-way construction access.

Item 19 Complainant's **Reply** to Respondent's appeal, received June 19, 2008.

attachment A Affidavit of Al Bishop in support of Boston Air Charter's Reply to Norwood Airport Commission's Appeal, dated June 12, 2008.

Item 20 Norwood Airport Commission's Motion to Strike Boston Air Charter's Reply, received July 15, 2008.