

February 6, 2022

VIA Email
US Mail

Gail Lattrell
Director, New England Region Airports Division
Federal Aviation Administration
1200 District Avenue
Burlington, MA 01803

RE: Part 13 complaint regarding the Norwood Airport.

Dear Ms. Lattrell,

Pursuant to 14 CFR Part 13.1, this is an informal complaint against the Norwood Airport Commission (NAC) for violation of its obligation to provide reasonable and not unjustly discriminatory access by aeronautical service providers at Norwood Memorial Airport, Massachusetts and for effective establishment of an exclusive right at that airport.

Parties: Boston Executive Helicopters (BEH) is a tenant of Norwood Airport (OWD) maintaining a Part 135 helicopter service and a start-up FBO operation at the airport. BEH first applied for authorization to conduct FBO services in 2010. Ten years later and following an FAA Part 16 determination finding NAC in noncompliance with grant assurances 22, 23 and 29, NAC leased a small ramp area to BEH and authorized BEH to conduct fuel sales and other FBO services.

NAC is delegated responsibility for management and operation of Norwood Airport by the Town of Norwood. The Town of Norwood has accepted Airport Improvement Program (AIP) grants and is obligated under the terms of its grant agreements with the FAA, including standard AIP grant assurances 22 and 23. As the FAA made clear in its December 2017 Q&A's on FBO pricing practices, a sponsor not only has an obligation to afford not unjustly discriminatory terms to its FBOs, but also to maintain control of the terms imposed by FBOs on airport users:

Federally obligated airport sponsors have a responsibility to ensure that FBO services and pricing practices are reasonable and applied in a non-unjustly discriminatory manner (Grant Assurance 22, Economic Nondiscrimination). In any agreement, contract, lease, or other arrangement that grant a right to conduct aeronautical services to the public at the airport, the sponsor must insert and enforce provisions requiring the contractor to (1) furnish services on a reasonable, and not unjustly discriminatory, basis to all users and (2) charge reasonable, and not unjustly discriminatory, prices for services. See the FAA's Policy Regarding Airport Rates and Charges for additional information about the requirement that rates, and fees imposed on aeronautical uses of the airport must be fair

and reasonable and pricing methodologies with regards to setting fees, rates, and charges imposed.

Summary of the complaint: While BEH is technically authorized to sell aviation fuel as the second FBO, NAC has allowed the established FBO, Flight Level Norwood (FLN), to effectively require virtually all based operators at Norwood Airport to buy fuel from FLN, and to penalize any tenant buying fuel from BEH. As a result, BEH sales of fuel to based operators at the airport, other than the few owners of aircraft stored in the BEH hangar, have declined to zero notwithstanding BEH's lower fuel prices in comparison to FLN.

FLN has achieved a boycott of fuel sales by BEH to based operators, and a monopoly on its own sales of fuel to these operators, through a sublease provision linking rent and hangar service fees to the purchase of fuel from FLN. NAC has leased most of the hangars and ramp areas at Norwood Airport to FLN, so that most other airport tenants have no option but to sublease space from FLN. A condition of the FLN subleases is that rent or fees will be an unspecified higher amount if the subtenant buys its fuel from any operator other than FLN. This is not a typical arrangement in the FBO industry, and may even be unique to OWD, because of FLN's dominant control of airport facilities.

The Federal Trade Commission (FTC) web site notes, in a summary of "tied products" as a potential antitrust violation:

Typically, the "tied" product may be a less desirable one that the buyer might not purchase unless required to do so or may prefer to get from a different seller. If the seller offering the tied products has sufficient market power in the "tying" product, these arrangements can violate the antitrust laws.

(<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/tying-sale-two-products>)

At OWD, leasable space is the "tying" product and fuel is the "tied" product. FLN charges more for aviation fuel than BEH, and it is reasonable to assume that some based operators at OWD would choose to buy fuel from BEH for that reason alone. However, these operators need to lease hangar space or ramp tiedowns, which are available only through sublease from FLN. Based operators, therefore, pay more for fuel than necessary because of FLN's market power over leasable space at the airport.

For the same reasons that tied products can be an antitrust violation—unfair competition with other providers in the industry, and higher prices and restricted choices for consumers—FLN's use of its control of leased space to obtain a monopoly on fuel sales to based operators is unjustly discriminatory to BEH, and results in an unreasonable restriction on airport access for BEH and other aeronautical tenants of the airport. Both effects are violations of grant assurance 22. NAC's allocation of most airport space to FLN, and its tolerance of a sublease provision effectively requiring other aeronautical tenants to purchase all their fuel from FLN, establishes and maintains an exclusive right for FLN, in violation of grant assurance 23.

Supporting information.

1. The FLN sublease

FLN subleases of ramp space, hangar space, and office facilities to other aeronautical tenants contain variants of the following clause. This example is from the Blue Hill Helicopters sublease, but other tenants have informed BEH that the same clause is included in their FLN sublease:

20. Aviation Fuel. Tenant acknowledges, understands and agrees that its election to purchase its requirements of fuel at the Airport from Landlord is an element of the consideration to be exchanged hereunder, and a material inducement to Landlord in establishing Tenant's Rent, *and in entering into this Agreement*. In further consideration of Tenant's election to purchase its requirement of aviation fuels at the Airport from Landlord, Landlord shall make the same available to Tenant at the rate set forth on the Fuel Pricing Schedule attached hereto as Schedule B. Purchasing aviation fuel from providers at the Airport other than Landlord shall serve as grounds to renegotiate Rent. *(Emphasis added)*

See Exhibit 1, Sublease Agreement between Flight Level Norwood, LLC, and Blue Hill Helicopters, LLC, dated May 5, 2021. at p. 9.

FLN sub-leases for 6 hangars on Lots 5 and 6, which are partially located on AIP ramp, have a similar clause. These subleases in force until 2050 require all aviation fuel be purchased from FLN or the Lessee will face an unknown adjustment in their service fee.

"20. Aviation fuel. Lessee acknowledges, understands, and agrees that its election and promise to purchase its requirements of fuel at the Airport from FlightLevel Norwood, LLC or its successor in interest, is an element of the consideration to be exchanged hereunder, and a material inducement to Lessor in establishing Lessee's service fee, and in entering into this agreement. If Lessee chooses to purchase its aviation fuel at the Airport from one or more vendors other than FlightLevel Norwood, LLC or its successor in interest. Then Lessor shall have the right to adjust Lessee's service fee upon written notice to Lessee"

See Exhibit 2, Sublease agreement for 6 hangars on lots 5 and 6 (Hangar #4 is provided) between FLN and various tenants until 2050. ¶ 20 p. 9.

The practice of tying an obligation to buy fuel to rent is not a common or accepted FBO pricing methodology, probably at least in part due to the antitrust implications. We know of no FBO location where it is used, even at airports where the FBO does not have the control of lease space that FLN has at OWD.

The FLN lease does not specify what rent would be charged if the sublessee does not agree to purchase all fuel from FLN. The sub leases for the 6 hangars also leaves the service fee adjustment unknown. However, sublessees can reasonably assume that rent and service fee would be very high, and apparently actually have made that assumption since all FLN sublessees to date have made the choice to commit to buying all fuel from FLN. While the subleases appear to present sublessees the choice of higher rents or higher service fees as an option, the need for access to the airport makes the Aviation Fuel clause “an offer they can’t refuse.” BEH knows of no tenant at OWD that has considered it as a practical option. Moreover, the sublease provisions explicitly state that buying fuel from FLN is a consideration in even entering into a sublease. This language, which NAC has taken no steps to remove or cancel, strongly suggests to tenants that they would be denied access to a sublease at the airport, at least on any reasonable market terms, if the tenant did not agree to buy all fuel from FLN.

2. FLN control of leasable space at OWD.

While the FLN “Aviation Fuel” clause purports to give tenants a choice to rent from FLN or not, this is not a real choice because almost all airport space is available only from FLN. Under lease from NAC or NAC prime tenant Boston Metropolitan Airport, Inc. (BMA), FLN controls through its leases and sub leases 85 to 90% of the ramp and hangar space at the Norwood Airport, approximately (761,648 sq.ft. of ground space at the Norwood Airport, including approximately 95,700 sq.ft. of hangar space). FAA found that FLN’s predecessor (EAC) controlled 88% of the ramp space at the Airport. Director’s Determination, FAA Part 16 No. 16-07-03, pages 5, 11. More recently, FAA found that evidence clearly showed the NAC has continued to bestow greater control of airport ramp space to FLN. Directors Determination, FAA Part 16 No. 16-15-05, page 23.

FLN ramp and hangar leases include:¹

- A. Lots W, X, Y and Z contain approximately 223,762 sq.ft.
Rent is .32 per sq.ft.
- B. Lot 5 contains approximately 57,600 sq.ft.
On February 15, 2017, the NAC extended the lease to 2050
Rent is .29 cents per sq.ft.
- C. Lot 6 (AIP-funded Ramp) contains approximately 210,180 sq.ft.
On February 15, 2017, the NAC extended this lease to 2050.
This area includes portions of AIP project 3-25-0037-26-2005.
Rent is .32 per sq.ft.
- D. Lot 7 (AIP-funded Ramp) contains approximately 135,360 sq.ft.
On February 15, 2017, the NAC extended this lease to 2050

¹ There are numerous plans, documents, leases, and subleases which show different square footage space. This analysis is the best approximation.

Lot 7 was improved with AIP funding in part under AIP projects AIP 3-25-00372005 and AIP 3-25-0037-14-1998. The lease on this AIP-improved spaces was to expire in 2020 and 2026. The NAC extended this lease to 2050. This lease extension is not based on any known need to amortize any investment on lot 7. To our knowledge Flight Level has never presented plans for any investment on this federally funded ramp. Rent is .08 cents per sq.ft.

- E. Lots A, B, C (AIP-funded ramp) contains approximately 95,446 sq.ft. In 2020 the NAC gave FLN a 20-year lease on ramp that had been improved by AIP 3-25-0037-23-2004 and 3-25-0037-30-2010. The NAC put out an RFP for this ramp, although the RFP had a condition which only FLN could meet. The RFP also included a hangar approval, although the hangar was not on the ABC ramp, and there was no other infrastructure on the ramp that would justify the 20-year term, which extends until 2040. The Town and Airport Manager confirmed the hangar was not located within the ABC AIP ramp area thus negating any justification for the 20-year lease.
- F. Lot G contains approximately 24,000 sq ft.
- G. The Tank farm sub lease contains approximately 15,300 sq ft.

Through leases and Sublease FLN controls approximately **761,648** sq ft of ground space, including AIP ramps.

Within the ground space they lease and control approximately **95,700** sq ft of hangar space.

See Exhibits 2 through 7.

By comparison, BEH has approximately 15,000 sq.ft. of hangar space and approximately 60,000 sq.ft. of ramp space @ .50 cents per sq ft. BEH cannot sublease any part of its ramp because the small area is needed for handling and fueling transient customers, and because of easements and other impediments on use of the property disclosed to BEH after it leased the area. BEH was also forced to pay 200% of the fuel flowage fee that FLN pays as a condition of leasing Lot F for our hangar. (Like most OWD tenants, BEH leases not from NAC directly but from BMA, a non-aviation real estate firm that has a master lease at OWD through 2049. NAC allows BMA to set the terms of leases for OWD aeronautical tenants.). See Exhibit 8.

Nor is alternate space available by direct lease from NAC. NAC currently controls only the airport helicopter parking pads, which are not available for lease. There is no ramp space available from the NAC. A sublease from FLN is the only practical option for leasing space at OWD for an aeronautical business.

While the manner in which NAC extended all of the FLN leases, including AIP-funded ramp, could be the subject of another complaint, it is sufficient for the purposes of this complaint to note that NAC approved FLN's control of virtually all airport property available for sublease for the next three decades.

3. OWD is the relevant market.

U.S.C Title 49 § 40103(e) protects fair competition in airport services by prohibiting the granting of an exclusive right to conduct aeronautical services at a federally obligated airport. Both § 40103(e) and AIP grant assurance 22 refer to the airport at which the services are provided. As noted in FAA Advisory Circular 150/5190-6, *Exclusive Rights at Federally Obligated Airports*, at paragraph 1.2:

The purpose of the exclusive rights provisions as applied to civil aeronautics is to prevent monopolies and combinations in restraint of trade and to promote competition at federally obligated airports.

There is a clear federal policy against the availability of aviation services at other airports being considered as justification for a restriction on services at an obligated airport. The FAA has affirmed that an airport sponsor is required to satisfy its obligations at its own airport and cannot rely on accommodation by other airports.² This policy is grounded in the promotion of fair competition among aeronautical operations and services and indicates that each airport is a distinct and complete market for aviation ground services. The availability of fuel or rentable space at other airports in the region does not relieve NAC of its obligations for reasonable access, non-discrimination, and the avoidance of exclusive rights.

4. Effect on competition.

For an FBO, sales of fuel to based operators is an essential segment of the business, typically about 75 to 85% of total fuel sales. By effectively allowing FLN to prevent any BEH fuel sales to based operators at OWD, NAC has made it impossible for BEH to sustain a viable FBO business at OWD.

It is not difficult to infer that NAC finds this result acceptable, given NAC's long history of protecting FLN from competition. Indeed, in 2018 ACO-1 determined in the Director's Determination in FAA Part 16 proceeding 16-15-05:

...the Director concludes that the Commission's action and inaction unreasonably restricted BEH efforts to expand while aiding in the expansion of Flight Levels' already significant footprint at the Airport, the Town and Commission are in violation of Grant Assurance 23 ...

Director's Determination, at 33.

² Final Agency Decision and Order, at 24 (February 18, 1999). *Centennial Express Airlines v. Arapahoe Cnty. Pub. Airport Auth.*; *Kehmeier v. Arapahoe Cnty. Pub. Airport Auth.*; *Centennial Express Airlines v. Arapahoe Cnty. Pub. Airport Auth.*; *FAA v. Arapahoe Cnty. Pub. Airport Auth.* — No. 16-98-05, 13-94-25, 13-95-03. Affirmed *sub nom.* *Arapahoe Cnty. Pub. Airport Auth. v. FAA*, 242 F.3d 1213 (10th Cir. 2001), *cert. denied*, 534 U.S. 1064 (2001).

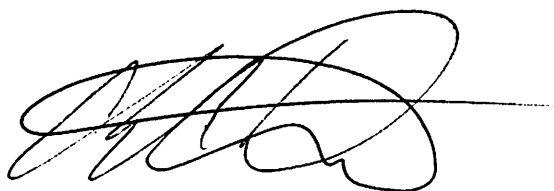
NAC's knowledge of, and inaction on, the Aviation Fuel clause in FLN subleases constitutes an exclusive right for FLN, in violation of grant assurance 23. First, neither BEH nor any other party at the airport can impose this same condition on other tenants, because FLN controls the leasable space. Second, FLN's ability to effectively require all based tenants to buy all their fuel from FLN makes it impossible to maintain a second FBO at the airport as a viable business. This is certainly FLN's intent behind the Aviation Fuel clause, and NAC's acceptance of this situation is clearly the continuation of an exclusive right for FLN by the airport sponsor.

Conclusion

NAC, by leasing about 90% of airport facilities to one FBO for the next three decades, then allowing that FBO to use its control of facilities to require sublessees to buy all their fuel from that FBO:

- Has allowed the establishment of an exclusive right for FLN at the airport, in clear violation of grant assurance 23.
- Has discriminated against BEH by allowing FLN access to the airport on terms that are more favorable than provided to BEH and that actually allow FLN to interfere with BEH's core business, in violation of grant assurance 22, paragraphs 22.a and 22.c.
- Has allowed FLN to impose unreasonable, and effectively unavoidable, terms on access to the airport by aeronautical businesses that can only obtain access through sublease from FLN, in violation of grant assurance 22.b.
- While not an FAA issue, may be in violation of U.S. antitrust laws.

For the above reasons, BEH requests that the FAA investigate the effects of the Aviation Fuel clause in FLN subleases and find that NAC's acceptance of this practice is a violation of grant assurances 22 and 23.



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Exhibits.

Please follow this link:

https://drive.google.com/drive/folders/1g0JuNva76-FqVju-PK_omAqASu5ktoZW?usp=sharing

1. Sublease Agreement between Flight Level Norwood, LLC (FLN) and Blue Hill Helicopters, LLC. Dated May 5, 2021. #20 at p. 9.
2. Sublease agreement for 6 hangars on lot 5 and 6 (Hangar #4 is provided) between FLN and various tenants until 2050. #20 p. 9.
3. ABC lease agreement between the NAC and FLN LLC.
4. Leases, Subleases for Lots 5,6 and 7 to FLN extended on February 15, 2017, to 2050 by the NAC.
5. Leases, Subleases for Lots W,X,Y and Z to FLN.
6. Excerpts from the Norwood Airport Technical Master Plan Update dated May 28, 2020, which detail hangar locations and sizes.
7. Various maps of the Norwood Airport showing Leased areas, hangars, and layout.
8. BEH Sublease for Lot F on which BEH constructed a hangar and fuel facility, conditioned on BEH paying BMA 200% of the FLN fuel flow fee. Lot F is not an AIP improved lot. BEH leases the West and DC-3 ramps, both improved with AIP funds, from the NAC, for 5 years with a possible 3-year extension.