

**ORAL ARGUMENT NOT YET SCHEDULED**

UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

THE CITY OF SANTA MONICA,	)	
	)	
Petitioner	)	
	)	Case No. 16-72827
v.	)	
	)	
FEDERAL AVIATION ADMINISTRATION,	)	
	)	
Respondent	)	
	)	

MOTION FOR LEAVE TO INTERVENE AS RESPONDENT  
BY THE AIRCRAFT OWNERS AND PILOTS ASSOCIATION  
AND THE NATIONAL BUSINESS AVIATION ASSOCIATION

Pursuant to Federal Rule of Appellate Procedure 15(d), the Aircraft Owners and Pilots Association ("AOPA") and the National Business Aviation Association ("NBAA") (collectively "the Associations") hereby move to intervene as respondents in this action. As complainants in the Federal Aviation Administration ("FAA") administrative proceeding that resulted in the order at issue, the Associations have a substantial interest in the outcome of this petition and seek to protect these interests by continuing to engage the claims of the petitioner, the City of Santa Monica ("the City"). The Respondent does not oppose the Associations' Motion For Leave to Intervene; the City is aware of the Associations' intent but, as of the time of filing, has not stated a position in regard to this motion.

RELEVANT PROCEDURAL HISTORY

This action originated with a complaint filed by the Associations and various others, all of whom are aviation tenants or users of Santa Monica Municipal Airport ("SMO" or "the Airport") or organizations with members who are aviation tenants or users of the Airport. The complainants, including the Associations, were reacting to the City's repeated assertions that it would no longer be obligated by "grant assurances" given in return for the receipt of funds under the Airport Improvement Program (AIP) after June 29, 2014, despite the FAA's clear and appropriate position, supported by the Associations, that the City remains obligated by grant assurances until August 27, 2023. The City had stated its intent to close SMO, or prohibit or restrict some or all aircraft operations and other aeronautical activities at SMO, after July 1, 2015 (when a separate agreement between the City and the FAA, not at issue in this proceeding, expired). To prevent the City from doing so, the Associations and other interested parties filed a complaint with the FAA in accordance with 14 C.F.R. § 16.23, requesting that the FAA take action to ensure the City's compliance with its grant assurance obligations until August 2023.

On December 4, 2015, the Director of the FAA's Office of Airport Compliance and Management Analysis issued an initial

determination finding that the City remains obligated by AIP grant assurances until 2023. Nat'l Bus. Aviation Ass'n, et. al. v City of Santa Monica, FAA Docket No. 16-14-04 (Dec. 4, 2015) ("Director's Determination"). The City appealed, the Complainants responded, and the Associate Administrator for Airports subsequently issued a final agency decision affirming the Director's Determination and dismissing the City's appeal. Nat'l Bus. Aviation Assoc., et. al. v. City of Santa Monica, FAA Docket No. 16-14-04 (Aug. 15, 2016) ("Final Agency Decision"). The instant petition followed.

#### Interests of the Associations

AOPA is a not-for-profit education and advocacy association headquartered in Frederick, Maryland. AOPA is the world's largest aviation membership association, representing approximately 320,000 pilots who fly for personal and business reasons. In filing a complaint in this matter, AOPA acted particularly on behalf of its more than 4,700 members who are within a 25-mile radius of Santa Monica, such as John Rosenberg, Ed Story, and fellow complainants before the FAA Harrison Ford, Youri Bulko, and James Ross, many of whom base their aircraft at SMO and regularly use SMO for their personal and business flight operations. AOPA members who use or wish to use SMO have been and will be directly and significantly affected by the City's attempts to misconstrue the expiration

date of its grant assurance obligations, and to close or significantly limit operations at SMO contrary to these obligations.

NBAA is a not-for-profit education and advocacy association headquartered in Washington, DC. NBAA is the leading voice for companies that operate general aviation aircraft in support of their business or are otherwise involved in business aviation, with more 11,000 members nationwide. In filing a complaint in this matter, NBAA acted particularly on behalf of its numerous members who are located at and/or utilize SMO, including fellow complainants before the FAA Krueger Aviation, Inc., Kim Davidson Aviation, Inc., Aero Film, and Wonderful Citrus LLC. NBAA members who use or wish to use SMO have been and will be directly and significantly affected by the City's attempts to misconstrue the expiration date of its grant assurance obligations, and to close or significantly limit operations at SMO contrary to these obligations.

In general and on behalf of their members nationwide, the Associations are interested in preserving access to the nation's public-use airports. This includes SMO, which serves the important role of a reliever airport in the congested and complex southern California airspace. Any changes and particularly closure could and would significantly and negatively affect airspace operations in the entire southern

California area. Moreover, SMO is part of an integrated national air transportation system, which is funded in large part by AIP grants. Any decision in this case may set a precedent for other airports in regard to their obligations to adhere to restrictions and covenants agreed upon with the FAA.

The FAA must continue to have reasonable and appropriate oversight of the airports that are the beneficiaries of federal investment, to ensure a safe and efficient system. Notably, the FAA must be able to ensure that AIP grant recipients comply with their obligations to maintain and improve those airports, and to make them available to all types of aeronautical users on reasonable terms and without unjust discrimination.

The Associations have thus been involved in various litigation proceedings to counter the City's continued attempts to close SMO.<sup>1</sup> In these and other cases, as representatives of

---

<sup>1</sup> In addition to filing a complaint against the City with the FAA in this instance, the Associations participated as *amici curia* in City of Santa Monica v. FAA, 631 F.3d 550 (D.C. Cir. 2010), supporting affirmance of the FAA's order finding a city ordinance in violation of Federal Grant Assurances and ordering the City to cease and desist from banning operations of category C & D aircraft at SMO. The Associations also filed briefs as *amici curia* with both the District Court for the Central District of California and this Court in support of dismissing the City's claim to quiet title to the Airport and, before the district court, also the City's claims under the Fifth and Tenth Amendments. City of Santa Monica v. United States, 2014 WL 1348499 (C.D. CA 2014) and --- Fed. Appx. ---, 2016 WL 2849595 (9th Cir. 2016). The Associations also joined with several individuals and businesses in filing another complaint with the FAA under 14 C.F.R. Part 16 in response to the City's attempts

the individuals who utilize airports, the Associations have offered a practical perspective on the real world impacts and broader implications of access restrictions. This action is simply the latest in a series of efforts by the City to circumvent its federal obligations to maintain SMO as an airport, and the Associations intend to continue their efforts to ensure SMO remains open as legally obligated for the entire duration of its grant assurances, as appropriately applied by the FAA to extend until August 27, 2023.

#### Grounds for Intervention

This Court has previously looked to the standards set forth in Federal Rule of Civil Procedure ("FRCP") 24 in considering motions to intervene on appeal. See, e.g., Bates v. Jones, 127 F.3d 870, 873 (9th Cir. 1997); Day v. Apoliona, 505 F.3d 963, 965-66 (9th Cir. 2007). Additionally, sister courts have noted that FRCP 24 sets the standard for intervention in the review of an agency order pursuant to Federal Rule of Appellate Procedure 15(d), under circumstances similar to those present here. See, e.g., Sierra Club, Inc. v. EPA, 358 F.3d 516, 517-18 (7th Cir. 2004) ("[t]his follows the pattern in litigation

---

to financially squeeze tenants with burdensome and excessive charges contrary to federal statutory obligations and in violation of its grant assurances, all in furtherance of its documented agenda to close SMO. Smith et. al v. City of Santa Monica, Part 16 Complaint, FAA Docket No. 16-16-02 (Feb. 5, 2016).

under the National Labor Relations Act, where the losing side ... petitions for review, thus becoming a party, and the other intervenes to defend its victory. ... Intervention by the original victor places the private adversaries on equal terms").

FRCP 24(b) provides for permissive intervention by an applicant who "has a claim or defense that shares with the main action a common question of law or fact."<sup>2</sup> This court has found that "a court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." Green v. U.S., 996 F.2d 973, 978 (9th Cir. 1993)(citations omitted). Even if those threshold requirements are met the court, in its discretion, may deny the motion if "intervention will unduly delay or prejudice the adjudication of the original parties' rights." FRCP 24(b)(3); see also Donnelly v. Glickman, 159 F.3d 405, 412 (9th Cir. 1998).

However, precedent from the Supreme Court and other Circuits

---

<sup>2</sup> Moreover, the Supreme Court has indicated that parties to administrative proceedings have a right to intervene in Court of Appeals proceedings to review administrative orders under either the standards of FRCP 24(a)(2) or (b)(2), as noted infra; other circuit courts likewise have cited FRCP 24 but not specified if

indicate that the Associations' request is routine and should be granted. See, e.g., Int'l Union, United Auto., Aerospace and Agricultural Implement Workers of America v. Scofield, 382 U.S. 205, 216 n.10 (1965) (finding that parties to the administrative proceeding have a right to intervene in the Court of Appeals proceeding seeking review of National Labor Relations Board decisions, and intervention is appropriate under FRCP 24(a)(2) or (b)(2)); American Nuclear Resources, Inc. v. U.S. Department of Labor, 134 F.3d 1292, 1294 n.2 (6th Cir. 1998) ("[p]arties to an agency proceeding ... are not proper respondents, although they may move to intervene"); see also International Union of Operating Engineers v. NLRB, 1989 WL 71452 (9th Cir. June 26, 1989) and Arizona Public Service Co. v. NLRB, 453 F.2d 228, 230 n.2 (9th Cir. 1971) (applying Scofield, 382 U.S. 205).

(1) Jurisdiction: This Court has clarified that "the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims." Freedom from Religion Foundation, Inc. v. Geithener, 644 F.3d 836, 844 (9th Cir. 2011). Here, this case is before this Court pursuant to federal statute, i.e. as a matter of federal question

---

analogy should be made to intervention by right or to permissive intervention. See, e.g., Sierra Club, 358 F.3d at 518.



jurisdiction, and the Associations are not raising new issues, merely responding to those raised on appeal by the Petitioner.

Additionally, it is worth noting that had the Associate Administrator found to the contrary and decided in favor of the City's appeal of the Director's Determination, as parties the Associations would have had a statutory right to file an appeal in the Court of Appeals. 49 U.S.C. § 46110; see also 14 C.F.R. § 16.247(a). The Associations, along with the other complainants, were "directly and substantially affected" by the City's actions, as required by federal regulation. See 14 C.F.R. § 16.23(a); Final Agency Decision at 13-14. And, there are multiple other instances in which parties to a Part 16 complaint have intervened in the judicial appeal thereof. See, e.g., Boca Airport, Inc. v. FAA, 389 F.3d 185 (D.C. Cir. 2004); Wilson Air Ctr. LLC v. FAA, 372 F.3d 807 (6th Cir. 2004); Arapahoe Cty. Pub. Airport Auth. V. FAA, 242 F.3d 1213 (10th Cir. 2001); 41 N. 73 W., Inc. v. U.S. Dep't of Transp., 408 Fed.Appx. 393 (2d Cir. 2010).<sup>3</sup>

---

<sup>3</sup> Likewise, associations have previously intervened to defend other federal agency actions. See, e.g., San Luis & Delta-Medota Water Auth. v. Locke, 776 F.3d 971 (9th Cir. 2014) (various parties - including commercial users and interested organizations - intervened in proceedings to defend against a challenge to the validity of a Commerce Department order); Air Transportation Association of America, Inc. v. DOT, 613 F.3d 206 (D.C. Cir. 2010) (airport trade association intervened in proceedings to defend against a challenge to FAA order regarding methodology that airports could use to set landing fees).

(2): Timeliness: In considering whether a motion for intervention is timely under FRCP 24, this Court has considered three factors: the stage of the proceeding at which an applicant seeks to intervene; prejudice to other parties; and the reason for and length of the delay. See, e.g., Northwest Forest Resources Council v. Glickman, 82 F.3d 825, 836 (9th Cir. 1996). Here, the Associations were parties to the administrative proceedings below and are seeking intervention promptly upon learning of the City's petition to this Court, and within the time specifically authorized by this Court's rules. Pursuant to Federal Rule of Appellate Procedure 15(d), interested parties must file a Motion for Leave to Intervene within 30 days after the petition for review is filed. Here, the City filed its petition on August 25, 2016. Thus, this Motion is timely as filed by September 26, 2016.<sup>4</sup> See Alabama Mun. Distributors Group v. FERC, 300 F.3d 877, 878 (D.C. Cir. 2002) (motion to intervene timely when filed in accordance with Rule 15(d)). Nor will intervention delay or prejudice the adjudication of the original parties' rights; the Associations do not seek any change to the schedule for this appeal, and they are in fact original parties to the proceeding below.

---

<sup>4</sup> The 30th day falls on Saturday, September 24, thus the 30-day period continues to run until Monday, September 26 pursuant to FRAP 26(a)(1)(C).

(3) Common Question of Law or Fact: In this case, the main action is predicated on an administrative complaint filed by the Associations and other affected parties. The questions of law and fact at issue in this action, resolution of which are the basis for this appeal, are those raised by the Associations and the other complainants in initiating this action before the FAA. The City's petition to this Court is the next step in challenging the requests of the formal complaint filed by the Associations and the other complainants. The Associations here simply desire to continue their participation as parties in this action, maintaining their defense of the FAA's appropriate determination that the City's grant assurances, and the obligations based upon them, do not expire until August 27, 2023.

#### Conclusion

The Associations here meet the Court's requirements for intervention. In light of AOPA's and NBAA's participation as parties in the proceedings before the FAA, it is reasonable and appropriate for the Associations to continue their participation as respondents to the City's appeal of the FAA's decision. Wherefore, the Associations respectfully requests permission from the Court to intervene as respondents in the above-captioned matter. In the alternative, the Associations respectfully requests permission to participate as *amici*

*curiae*, in light of the substantial interest set forth herein.

Respectfully submitted,

          /s/ Kathleen A. Yodice  
Kathleen A. Yodice, Esq.  
Elizabeth M. Candelario, Esq.  
Law Offices of Yodice Associates  
411 Aviation Way, Suite 245  
Frederick, MD 21701  
301-695-2300  
kathy.yodice@aopa.org  
elizabeth.candelario@aopa.org

Ken Mead, General Counsel/EVP  
Aircraft Owners & Pilots Association  
421 Aviation Way  
Frederick, MD 21701  
301-695-2018  
ken.mead@aopa.org

          /s/ Edward M. Bolen  
Edward M. Bolen, Esq.  
National Business Aviation Association  
1200 G Street, N.W., Suite 1100  
Washington, DC 20005  
202-783-9450  
ebolen@nbaa.org

Dated: September 26, 2016

Rule 26.1 Statement

The Aircraft Owners and Pilots Association ("AOPA") is a national not-for-profit membership association incorporated under the laws of New Jersey and headquartered in Frederick, Maryland. AOPA has no parent corporation. As a non-profit association, AOPA does not have any stock and therefore no corporation owns any AOPA stock.

The National Business Aviation Association ("NBAA") is a national not-for-profit membership association incorporated under the laws of and headquartered in Washington, DC. NBAA has no parent corporation. As a non-profit association, NBAA does not have any stock and therefore no corporation owns any NBAA stock.

Certificate of Service

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 26, 2016. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

Alisa B. Klein  
U.S. Department of Justice  
950 Pennsylvania Avenue, Room 7235  
Washington, DC 20530

Ivan Campbell  
City of Santa Monica  
1685 Main Street, Room 310  
Santa Monica, CA 90401

G. Brian Busey  
Morrison & Forester, LLP  
2000 Pennsylvania Avenue, N.W.  
Washington, DC 20006

Zane O. Gresham  
Morrison & Forester, LLP  
425 Market Street  
San Francisco, CA 94015

/s/ Kathleen A. Yodice