

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CITY OF DALLAS,	§	
Plaintiff,	§	
v.	§	Civil Action No. 3:15-cv-02069-K
	§	
DELTA AIR LINES, INC., <i>et al.</i> ,	§	
Defendants.	§	

**CITY OF DALLAS' RESPONSE TO UNITED STATES DEPARTMENT OF
TRANSPORTATION'S AND FEDERAL AVIATION ADMINISTRATION'S MOTION
TO DISMISS OR TRANSFER AND FOR A STAY**

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TO THE HONORABLE JUDGE OF SAID COURT:

The City of Dallas (the "City") submits its response to the motion by U.S. Department of Transportation ("DOT") and Federal Aviation Administration ("FAA") (together, the "Federal Agencies") to dismiss or transfer and for a stay (ECF No. 165) and states the following:

I. Introduction

Congress has stripped the Federal Agencies of the title 49 enforcement jurisdiction on which they base their motions. None of the precedent on which movants rely is applicable to the situation here, where the Federal Agencies act in direct violation of congressional limits on their powers. The Federal Agencies were joined to this action because they issued letters in violation of the prohibitions on their powers as stated in the Wright Amendment Reform Act of 2006 ("WARA").¹

The principal dispute in this action involves whether Southwest Airlines Co. ("Southwest"), or some other signatory airline, must accommodate Delta Air Lines, Inc.'s ("Delta") flights at Love Field. Much of the need for judicial intervention came from two letters

¹ Pub. L. 109-352, 120 Stat. 2011 (2006).

written by DOT's general counsel ("the Letters"). The Letters had legal consequences and mandated that either the City deny signatory airlines of their preferential lease rights or risk losing its aviation grants. WARA forbids the federal agencies to use title 49 enforcement to alter preferential gate rights at Love Field except on a nationwide basis. Because the Letters directed the City to take action that adversely affected it, the City joined the Federal Agencies to this action. Only after the City filed this lawsuit and highlighted the Letters' failure to consider WARA, did the Federal Agencies claim the Letters were merely guidance and acknowledge that WARA was not considered. The Federal Agencies' other response was to issue a notice of investigation. As evidenced by the Notice of Investigation, the Federal Agencies are still threatening to enforce the unlawful policies set out in the Letters while trying to prevent this Court from exercising its jurisdiction. When the City filed this lawsuit, there was no investigation, but the Federal Agencies now urge it as a basis for their jurisdictional motion to dismiss.

The Federal Agencies argue that their sovereign immunity has not been waived because there has been no final agency action. Alternatively, they argue that this case should be transferred to the D.C. Circuit and also seek a stay. Once again, they ignore WARA and do not discuss its express limitations on the Federal Agencies' authority at Love Field. They also ignore that 5 U.S.C. § 702 of the Administrative Procedure Act ("APA") waives sovereign immunity for "nonstatutory" review for which there is no finality requirement. *Alabama–Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 488 (5th Cir. 2014). The City's complaint alleged a waiver of sovereign immunity based on WARA regardless of the finality of the DOT Letters. Moreover, sovereign immunity is waived to prevent federal agencies and officials from acting outside their authority. See *e.g.* 28 U.S.C. § 1361. WARA stripped the

Federal Agencies of their usual authority as it relates to Love Field and the Federal Agencies' actions in issuing the Letters and now starting a retaliatory investigation were outside of both agencies' authority and jurisdiction. Their motion and all of their requested relief should be denied. Finally, the motions ignore this Court's power to protect its own jurisdiction in this ongoing case from inappropriate interference. 28 U.S.C. § 1651(a).

II. Background

A. The Federal Agencies' Usual Authority

DOT is the parent agency of FAA and FAA administers the DOT and FAA grants at Love Field (*See* ECF 165-1 at 6, n. 1). Federal law imposes a complex set of obligations on airport proprietors that accept federal airport improvement grants. These obligations, known as "grant assurances," are statutorily mandated contractual commitments between the airport proprietor and the FAA that the airport proprietor must execute each time it receives a federal grant. 49 U.S.C. § 47107. Also for certain airports, including Love Field, the airport proprietor is required to submit a competition plan for review. 49 U.S.C. §§ 47106(f), 40117(k) .

Generally, the FAA has the authority to enforce grant assurances and related obligations. *See* 49 U.S.C. § 47122; 14 C.F.R. Parts 13, 16. In most instances, the FAA has plenary authority to take appropriate action to carry out its enforcement obligations. 49 U.S.C. § 40113. That authority includes the ability to conduct investigations, to compel compliance with federal aviation statutes, 49 U.S.C. § 46101(a)(4), and to bring a civil action to enforce applicable statutes or regulations under the FAA's purview. 49 U.S.C. §§ 46106, 46107, 47122.

The FAA's Part 16 regulations set forth the agency's procedures for investigation and resolution of potential violations of the grant assurances and other airport obligations under Part A of Subtitle VII of Title 49 of the U.S. Code, entitled "Aviation Programs." 14 C.F.R. Part

16.11. Those regulations provide authority for orders terminating an airport sponsor's eligibility for future federal grants, for issuance of cease and desist orders, and for "other compliance orders." 14 C.F.R. § 16.109. It is under these FAA powers that DOT issued its Letters and the FAA issued its Notice of Investigation.

B. The Wright Amendment Reform Act of 2006 ("WARA").

WARA expressly limits the Federal Agencies' general enforcement and compliance authority at Love Field. Congress has denied them any authority over the specific preferential gate rights and gate accommodation issues in this litigation. WARA deprives both DOT and the FAA of authority to direct the City to take the action as outlined in the DOT Letters (except on a nationwide basis) and deprives the FAA of the authority to make determinations, findings or impose sanctions that are the subject of the noticed FAA investigation.

WARA states, "To accommodate new entrant air carriers, the city of Dallas shall honor the scarce resource provision of the existing Love Field leases." (ECF No. 21 at 15; WARA § 5(a)) However, WARA provides:

Notwithstanding any other provision of law, the Secretary of Transportation and the Administrator of the Federal Aviation Administration may not make findings or determinations, issue orders or rules, withhold airport improvement grants or approvals thereof, deny passenger facility charge applications, or take any other actions, either self-initiated or on behalf of third parties— (A) that are inconsistent with [the Five-Party Agreement] unless actions by the parties to the contract are not reasonably necessary to implement such contract; or (B) that challenge the legality of any provision of such contract.

(ECF No. 21 at 15; WARA § 5(d)(1))(emphasis added). WARA adds that:

Nothing in this Act shall be construed—

(A) to limit the obligations of the parties under the programs of the Department of Transportation and the Federal Aviation Administration relating to aviation safety, labor, environmental, national historic preservation, civil rights, small business concerns (including disadvantaged business enterprise), veteran's preference, disability access, and revenue diversion;

* * *

(E) to limit the authority of the Federal Aviation Administration or any other Federal agency to enforce requirements of law and grant assurances (including subsections (a)(1), (a)(4), and (s) of section 47107 of title 49, United States Code) that impose obligations on Love Field to make its facilities available on a reasonable and nondiscriminatory basis to air carriers seeking to use such facilities, or to withhold grants or deny applications to applicants violating such obligations with respect to Love Field.

(ECF 21 at 16; WARA § 5(e)(1)(A), (E)). WARA emphasizes that FAA’s grant of authority as stated above shall not be construed to require the City “to modify or eliminate preferential gate leases with air carriers in order to allocate gate capacity to new entrants or to create common use gates, *unless such modification or elimination is implemented on a nationwide basis.*” (ECF 21 at 16; WARA § 5(e)(2)(B)(ii) (emphasis added)). WARA also provides that “any actions taken by the parties to [the Five-Party Agreement] that are reasonably necessary to implement its provisions, shall be *deemed to comply in all respects with the parties’ obligations under title 49, United States Code.*” (ECF No. 21 at 15-16; WARA, § 5(d)(2) (emphasis added)).

C. The Five-Party Agreement

The Five-Party Agreement provides that if a new entrant seeks access to Love Field the City will seek voluntary accommodation but if the signatory airlines are unable or unwilling, the City will “require the sharing of preferential lease gates, pursuant to Dallas’ existing lease agreements.” (ECF No. 21 at 31 [¶ 3(b)]).

D. The Preferential Leases

The City has leases with Southwest, American, and United. The leases are virtually identical. Section 4.06(C) states an airline has preferential use of its leased gates and:

At those times that Airline has no scheduled use for one or more of its assigned Gate(s), Airline will allow other scheduled or nonscheduled airlines authorized by City to use Airport facilities to use such Gate(s), as circumstances and the public interest may

require, for loading and unloading only, but in no event shall said use by others take precedence over Airline's scheduled use.

(ECF No. 24 at 173). Section 4.06(F) states, in part, that the parties agree that the Love Field facilities:

may become a scarce resource if a new entrant airline ("Requesting Airline") requests to provide service at the Airport. In such circumstances, Airline agrees to accommodate such Requesting Airline at its Leased Premises at such times that will not unduly interfere with its operating schedule and upon such reasonable terms as may be agreed upon between Airline and the Requesting Airlines, taking into consideration all the circumstances of such an accommodation agreement.

(ECF No. 24 at 174). The provision continues by creating a procedure for handling requests whereby the requesting airline first seeks a voluntary agreement and after it "has exhausted all reasonable efforts to secure accommodations," the City will select a signatory airline to accommodate the requesting airline. (ECF No. 24 at 174-175). Any accommodation is subject to the condition that: "In case of a conflict between schedules of the Signatory Airline and the Requesting Airline, the Signatory Airline will have priority in use of its personnel and its Leased Premises." (ECF No. 24 at 175).

In Section 14.02 of the lease, the parties acknowledged that certain portions of the lease were subject to review by DOT or FAA "concerning possible effects on airline competition and access at the Airport" and if as result of the review the federal government threatened to withhold federal assistance, the City and the signatory airline would modify the lease "to reflect any necessary change as a result of such action." (ECF No. 24 at 211). Section 14.09 added that the lease was subject to Airport Improvement Program Grant Agreements and, to the extent relevant, were considered part of the lease, "*but only to the extent, that the provisions of any such agreements are required generally by the United States at other civil airports receiving federal funds.*" (ECF No. 24 at 217) (emphasis added).

E. The Combined Effect of WARA, the Five-Party Agreement, and the Leases

WARA incorporates the terms of the Five-Party Agreement into federal law. *Love Terminal Partners, L.P. v. City of Dallas, Tex.*, 527 F.Supp.2d 538, 558-59 (N.D. Tex. 2007) (Fitzwater, J). WARA limits the Federal Agencies' powers under title 49 to the extent that the exercise of those powers would be inconsistent with WARA or the Five-Party Agreement. This Court noted that the language in § 5(d)(1) of WARA was a "directive to the Federal Aviation Administrator not to frustrate performance of the [Five-Party Agreement]." *Id.* at 559. This Court continued that WARA "refers without qualification to Dallas' obligation to act in accordance 'with contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006.' The 'contractual rights and obligations' that existed 'as of the effective date of' the Reform Act are those included in the Contract." *Id.*

In *Love Terminal Partners v. United States*, 97 Fed. Cl. 355, 406 (2011), the Court of Federal Claims held that "Congress by incorporating [the Five-party Agreement] into WARA, rendered the obligations set forth in the [Five-Party Agreement] matters of federal law;" and "Congress reinforced its intention to incorporate the [Five-Party Agreement] into federal law by ensuring that DOT and FAA policymaking does not affect any of the provisions contained therein." *Id.* at 415. The court held that "Congress simultaneously defined and limited the ability of DOT and the FAA to regulate those matters encompassed in the [Five-Party Agreement]" and "the DOT and the FAA are statutorily obligated to neither act in a manner that is inconsistent with [the Five-Party Agreement] nor challenge the legality of [the Five-Party Agreement]. *Id.* at 415. The court added that "WARA requires that Dallas manage Love Field in accordance with the contractual rights and obligations existing for certified air carriers providing scheduled

passenger service at Love Field on July 11, 2006.” *Id.* at 411. *Also see Id.* at 416. The court stated that WARA’s provision “mandate that Dallas abide by the terms in its leases with American and Southwest that pertain to the sharing of preferential lease gates.” *Id.* at 410. Finally, the court held “WARA explicitly authorizes Dallas to implement those portions of [the Five-Party Agreement] that relate to preferential gate leases with American, Southwest, and ExpressJet by ensuring that neither the FAA nor any other federal agency can interfere with those contractual agreements.” *Id.* at 410. Thus, federal law requires that the City address accommodation requests subject to the signatory airlines’ rights as stated in the leases. WARA statutorily directs the City to act in accordance with the rights and obligations of the signatory airlines in the leases, and DOT and FAA lack authority to direct the City to act contrary to those rights and obligations.

WARA, through its adoption of the Five-Party Agreement and the leases, was the imperfect solution to resolve the conflicts between Love Field and DFW Airport and the major airlines serving each. It was also an effort to address the concerns of the residents living near Love Field by restricting the number of gates and hours of operation. WARA represented a compromise in the truest sense of the word. Southwest and American Airlines, Inc. (“American”) gave up gates and Southwest effectively limited itself to Love Field. DFW and the airlines operating there were allowed to operate another eight years without full competition from Love Field. The signatory airlines agreed to continued restrictions at Love Field for the eight years but part of the consideration was the right to operate as provided in the terms of the leases both before and after the Wright Amendment restrictions expired.

In passing WARA, Congress recognized that competition between airlines located at DFW Airport and Love Field was ultimately in the best interest of the flying public and agreed to

the release of the Wright Amendment restrictions. Through WARA, Congress also recognized that the usual standards for grant assurances, exclusive use, and competition plans imposed by title 49 for other airports could not apply if the compromise was to succeed, particularly given the unique limitations on the number of gates at Love Field. As part of the compromise by all parties, Congress purposefully denied DOT and the FAA their usual enforcement powers. Congress did not want any federal agency to muck up the compromise as reflected in WARA.

F. The DOT Letters

On December 17, 2014, DOT's General Counsel sent the City's City Attorney the first DOT letter ("First Letter"). (ECF No. 1 at 48-50). It started by saying it was summarizing DOT's prior telephone communications with the City regarding Delta's accommodation request and an overall City access policy. (*Id.* at 48). The First Letter stated DOT appreciated the City's understanding of its legal obligations under the competition plan and the grant assurances as it related to accommodation requests and was pleased that the City was formalizing the accommodation process. (*Id.*). The letter acknowledged that the City was seeking DOT's views regarding competition plan requirements for addressing accommodations requests at Love Field and the letter continued that the provided guidance was in light of the unique and constrained circumstances at Love Field. (*Id.*). The letter stated that DOT's competition plan policy requires airport proprietors to assist carriers seeking accommodation and if a voluntary agreement is not reached, "the City will accommodate" the request to the extent possible based on the "current or already-announced, for sale services by the signatory airlines." (*Id.* at 49). The letter continued that it was DOT's position that once an airline had been accommodated, it was entitled to maintain an ongoing similar pattern of service even after the expiration of any agreement between the accommodated and accommodating airlines. (*Id.*). The letter added that the

accommodated airline should not be pushed out by the accommodating airline at a later date and it was “the City’s responsibility to continue the accommodation and ensure space is available” and allow the pattern of service to continue “based on the available space on the snapshot date of the original accommodation request.” (*Id.*). The First Letter also stated that the accommodating airline was limited to recovering only its pro-rata share of the subleased facilities plus a reasonable allowance for administration that could not exceed 25%. (*Id.* at 50). The letter only mentions WARA and the Five-Party Agreement once and only in the context that they constrained operations at Love Field. (*Id.* at 48-49).

After receipt of the First DOT Letter, the City sought clarification from DOT including clarification in light of the WARA provisions. Six months later on June 15, 2015, DOT sent a second letter (“Second Letter”). (ECF No. 1 at 52-55).

The Second Letter acknowledged that the City’s request was in the context of Delta’s request for accommodation. (*Id.* at 52). It repeated that pursuant to the grant assurance and competition plan statutes, the City had a legal obligation to reasonably accommodate airlines seeking to provide service at Love Field. (*Id.*) It continued by stating that the First Letter provided guidance to the City in assessing accommodation request “from a new entrant such as Delta or other carrier seeking expansion and determining the length of such anticipated accommodation at Love Field.” (*Id.*). In response to the question whether the First Letter set standards necessary for the City to comply with grant assurance, DOT stated “the answer to that question is yes.” (*Id.*). It added, “there is no doubt that these grant assurances govern the City’s actions with respect to Delta’s requests for accommodation.” (*Id.* at 53). Again relying upon the grant assurance statute and the competition plan statute as the basis for its conclusions, DOT reiterated that the City “is required to accommodate a requesting carrier unless Love Field’s

facilities are fully utilized at the time of the request, or the Signatory Airlines at the time of the request are selling tickets for future flights fully-utilizing the facilities.” (*Id.*). It stated that a signatory airline’s planned future operations should not be considered unless the carrier was selling tickets for the future flights and consideration of such plans would be inconsistent with grant assurances and other authorities. (*Id.* at 53-53). It repeated that an accommodated carrier must be allowed to continue a similar pattern of service. (*Id.* at 54). The letter concluded by stating that the decision on Delta’s request was the City’s responsibility but the City “must make this decision made in compliance with the grant assurances and [the City’s] other legal obligations.” (*Id.* at 55). The Letter contained no reference to WARA. Neither letter acknowledged the very unusual and unique nature of changes at Love Field because of the lifting of the Wright Amendment restrictions.

After receipt of the Letters, the City advised DOT that the City understood that for the City to be in compliance with title 49, it was required to accept the directions contained in the Letters. (City App’x at 1-2, 5). The Federal Agencies never advised the City that the directions in the Letter were not requirements necessary for compliance.

In filing this action, the City alleged that the Letters are contrary to WARA, the Five-Party Agreement, and the leases in at least five significant ways. First, the Federal Agencies were directing the City to modify the terms of its leases without doing so on national basis. Second, the Letters altered the meaning of term of “new entrant” to include any airline currently operating at the airport and cover situations when currently operating airlines seeks to expand. Third, the Letters directed the City to force a mandatory accommodation based on existing gate usage based on a snapshot date and without any regard to the signatory airlines future plans. Fourth, the Letters ordered that once a requesting airline was accommodated, the airline was

entitled to a permanent accommodation and could operate the same pattern of service forever. Finally, the Federal Agencies were acting beyond its jurisdiction and authority because Congress, through WARA, had removed it. The City joined the Federal Agencies because they had exceeded their authority and jurisdiction.

III. Sovereign Immunity Was Waived

A. Waiver Under the Administrative Procedure Act

The Federal Agencies do not dispute that the Court has general subject matter jurisdiction and do not dispute that even without their presence, the Court has jurisdiction. At a minimum, there is federal question jurisdiction based upon WARA. 28 U.S.C. § 1331. The Federal Agencies' contention is limited to arguing that the Court lacks jurisdiction over the Federal Agencies because there has been no waiver of their sovereign immunity. (ECF No. 165-1 at 17-22). Sovereign immunity has been waived.

The APA provides for waivers of the United States' sovereign immunity for certain suits. First, 5 U.S.C. § 702 states:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Second, it states:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. Section 702 waives immunity for two types of claims. The first waiver is for claims under the general provisions of the APA and the second is for claims pursuant to a statutory or non-statutory cause of action that arises completely apart from the general provisions

of the APA. *Alabama–Coushatta Tribe of Tex.*, 757 F.3d at 488; *Inclusive Communities Project, Inc. v. U.S. Dep’t of Treas.*, No. 3:14-CV-3013-D, 2015 WL 4629635, *3-4 (N.D. Tex. Aug. 4, 2015). The latter type waives sovereign immunity in equitable actions brought under § 1331 seeking “nonstatutory” review of agency action. *Sheehan v. Army & Air Force Exch. Serv.*, 619 F.2d 1132, 1139 (5th Cir.1980), *rev’d on other grounds*, 456 U.S. 728 (1982). For the first type of waiver there must be “final agency action,” but for the second type of waiver there only needs to be “agency action” as set forth by 5 U.S.C. § 551(13). *Alabama–Coushatta Tribe of Tex.*, 757 F.3d at 489. Finality is not required. *Id.* The Federal Agencies’ motion ignores nonstatutory review and is wrong about statutory review.

B. Sovereign immunity was waived for “nonstatutory” review.

The Federal Agencies’ entire argument concerns whether there has been the first type of waiver, a claim under the general provisions of the APA. (ECF No.165-1 at 11-17). In a footnote, the Federal Agencies make the conclusory claim that judicial review is not sought under the second type of waiver. (ECF No. 165-1 at 17, n. 8). However, elsewhere they admit that the City sought declaratory relief that the DOT Letters violated the APA and WARA. (*Id.* at 15). The City’s complaint urged that even if the Letters and other actions did not constitute a final agency action, they still violated WARA. (ECF No. 1 at 8, 9-10, 40 [¶¶ 13, 15, 112]). In Claim I of its complaint, the City specifically referenced 5 U.S.C. § 702, argued that the APA confers a right of review, and that the Court should grant relief regardless of whether the action was a final agency action because the Federal Agencies’ actions violated WARA. (*Id.* at 39-41 [¶¶ 107-112]). The City alleged a waiver of sovereign immunity outside the general provisions of the APA and sought “nonstatutory” review of the Federal Agencies’ actions.

The City does not seek money damages from the Federal Agencies, but only seeks declaratory and injunctive relief. The first requirement for a waiver exists.

The Federal Agencies do not challenge that the DOT Letters constituted agency action under 5 U.S.C. § 551(13). “Agency action” is defined as “the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” *Id.* The term “agency action” is to be interpreted expansively, as it “brings together previously defined terms to assure the complete coverage of every form of agency power, proceeding, action or inaction.” *Federal Trade Comm'n v. Standard Oil Co. of Cal.*, 449 U.S. 232, 238, n. 7 (1980) (quoting S.Rep. No. 752, 79th Cong., 2d Sess. 255 (1946)). The APA defines a “rule” as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes [various substantive agency functions] or practices bearing on any of the foregoing.” 5 U.S.C. § 551(4). An “order” is “the whole or a part of a final disposition ... of an agency in a matter other than rule making....” 5 U.S.C. § 551(6). Issuing a complaint is agency action because it is “a part of a final disposition.” *Id.* Issuing interpretative letters is agency action. *Am. Land Title Ass’n v. Clarke*, 743 F. Supp. 491, 494–95 (W.D. Tex. 1989). DOT’s actions are agency actions under 5 U.S.C. § 551(13). The second requirement for a waiver exists. As noted, the Federal Authorities only complain that the actions were not final.

As for the final requirement, the City seeks relief that arises apart and outside of the general provisions of the APA. The “nonstatutory” review is for “those situations where a party’s suit is not brought under a statute that explicitly provides for review of agency action.” *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017, n.11 (3rd Cir. 1991). In *Jaffee v. U.S.*, 592

F.2d 712 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979), cited approvingly in *Alabama–Coushatta Tribe of Tex.*, the *Jaffee* court stated:

These suits are called “nonstatutory” because they are not brought under the statutes that specially provide for review of agency action. See H.R. Rep. No.94-1656, 94th Cong., 2d Sess. 5, Reprinted in (1976) U.S. Code Cong. & Admin. News, pp. 6121, 6125. “In these instances, judicial review is available, if at all, through actions involving matters which arise ‘under the Constitution, Laws, or treaties of the United States’ as provided in section 1331(a) of title 28.”

Id. at 718-19. See also *Sheehan*, 619 F.2d at 1139; *Church of Scientology of Ca. v. Linberg*, 529 F. Supp. 945, 968 (C.D. Ca. 1981); *Michigan v. U.S. Army Corps of Eng’rs.*, 667 F.3d 765, 774-75 (7th Cir. 2011). In *Khodara Environmental, Inc. v. Burch*, 245 F. Supp. 2d 695 (W.D. Pa. 2002), the plaintiff sought equitable relief against the FAA and others because of actions taken pursuant Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR-21”) regarding a landfill. AIR-21 is the same statute that requires certain airports to submit competition plans. The court concluded that sovereign immunity was waived and the procedural mandates of APA were inapplicable. *Id.* at 711-12.

The City brought this action because the Federal Agencies’ actions violate WARA. WARA does not provide a vehicle for judicial review. WARA is not part of title 49 and is not part of or within the administrative authority of the FAA under its governing regulations. See 14 C.F.R. 16.11. In passing DOT argues that the proper statute for seeking reviews is 49 U.S.C. § 46110 (a). (ECF No. 165-1 at 17, n. 8). The plain language of section 46110(a) makes it inapplicable to federal agency actions not carried out under the designated parts in title 49. See *Comm. to Stop Airport Expansion v. FAA*, 320 F.3d 285, 288 (2nd. Cir. 2003) (finding a lack of jurisdiction under earlier version of Section 46110 because the plain language “this part” authorized judicial review of only those actions carried out under Part A, not Part B); see also

City of Los Angeles v. FAA, 239 F.3d 1033, 1035 (9th Cir. 2001) (same). WARA does not appear in title 49 of the U.S. Code and is not subject to section 46110(a).

Moreover, having the Federal Agencies review their own violation of congressional mandates would defeat the purpose of WARA. Congress' express intent was to prevent the Federal Agencies from "mak[ing] findings or determinations, issu[ing] orders or rules, ... or tak[ing] any other actions" inconsistent with or that challenge the legality of the Five-Party Agreement. (ECF No. 21 at 15; WARA § 5(d)(1)). The Federal Agencies do not dispute that the directives in the Letters were determinations inconsistent with the Five Party Agreement.

In its motion to dismiss, the Federal Agencies do not reference the two published opinions that specifically address WARA and the limitations imposed on the Federal Agencies. (ECF No. 165-1). This Court and the Court of Federal Claims concluded that WARA was a "directive to the Federal Aviation Administrator not to frustrate performance of the [Five-Party Agreement]" and "ensur[ed] that DOT and FAA policymaking does not affect any of the [the Five Party Agreement]" and "limited the ability of DOT and the FAA to regulate those matters encompassed in the [Five-Party Agreement]" and "the DOT and the FAA are statutorily obligated to neither act in a manner that is inconsistent with [the Five-Party Agreement] nor challenge the legality of [the Five-Party Agreement]" and "ensur[ed] that neither the FAA nor any other federal agency can interfere with [the Five-Party Agreement and the preferential gate leases]." *Love Terminal Partners, L.P.*, 527 F.Supp.2d at 559; *Love Terminal Partners*, 97 Fed. Cl. at 410, 415.

Sovereign immunity has been waived pursuant to 5 U.S.C. § 702's waiver for "nonstatutory" review and a final agency action was not needed to confer jurisdiction.

C. Sovereign immunity was waived for statutory review.

Sovereign immunity has also been waived under the other type of waiver found in 5 U.S.C. § 702 because there has been a final agency action. The Federal Agencies' argument focuses on the alleged lack of finality as to a claimed City violation. (ECF No. 165-1 at 18-21). But that is not the agency action at issue in the City's original complaint. Rather, the agency action is the rules and directives contained in the Letters and those rules and directives were final, as evidenced by the way the FAA frames the issues in its Notice of Investigation.

Any review of the finality of agency action is evaluated pragmatically and with flexibility. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 150 (1967). Generally, two conditions must be satisfied for agency action to be final. First, the action must mark the "consummation" of the agency's decision making process—it must not be of a merely tentative or interlocutory nature and, second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177 (1997).

Generally, four factors are used to determine if an agency action is final: (1) whether the challenged action was a definitive statement of the agency's position, (2) whether the action has the status of law with penalties for noncompliance, (3) whether the impact on the plaintiff was direct and immediate, and (4) whether the agency expected immediate compliance. *Dunn–McC Campbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997) (citing *Abbott Lab.*, 387 U.S. at 149-53). Other considerations include whether "these regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business;" and whether the rule put the regulated party "in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate" because the

regulated party must either comply with very costly changes or risk prosecution. *Abbott Laboratories*, 387 U.S. at 1152.

Applying the factors to the Letters, the Letters constituted a definitive statement of the Federal Agencies' position. The Letters were not written by some subordinate but instead written by DOT's general counsel. Other than the DOT's Secretary, no other person's statements could carry more weight as to the position of the agency. The Letters were written specifically and definitively about Love Field and directed the City how it had to act to remain in compliance with title 49. This was no general pronouncement of policy. Rather, it stated a very narrow and focused set of rules that the City was being directed to follow. The new set of rules had the status of law with penalties for noncompliance. The Notice of Investigation confirms the Federal Agencies' views that the Letters constituted the applicable law.

Indeed the notice highlights the hypocritical nature of the Federal Agencies' arguments. In the notice, it invites the City to resolve informally the matters addressed in the notice. (ECF No. 150-1 at 33). But that has been tried many times with Federal Agencies' involvement and without success. And while claiming no final agency action, the notice states the FAA "strongly recommends" accommodating Delta pending the FAA's investigation. (*Id.* at 23). The "or else" is not even silent – the threat to grants is overt. Without this Court's intervention, the City is placed in the dilemma of compliance that would force the claimed deprivation of property rights of signatory airlines and trigger litigation or face sanctions from the Federal Agencies.

The Letters themselves reflect the Federal Agencies' message to the City that the expressed positions were now the law. DOT unequivocally stated that compliance with the positions in the Letters was necessary for compliance with title 49. (ECF No 1 at 52.) A failure to comply with title 49 could result in a funding loss or forced refunds. 14 C.F.R. § 16.109.

The impact on the City was direct and immediate. The City could have accepted the positions expressed in the Letters, acted accordingly, and immediately been sued by one or more of the signatory airlines. DOT does not dispute the immediacy of the adverse consequences to the City if it complied with its Letters. Nor do the Federal Agencies claim they would have rushed to the City's aid to defend the dictates in the Letter. Likewise, if the City declined to follow the positions in making an accommodation, it would be subject to sanctions and immediate litigation, either in a civil or administrative action, by the non-accommodated airline. DOT does not dispute the immediacy of the adverse consequences to the City if it declined to comply with Letters. Instead, it argues that the City could always assert the impact of WARA in defense of the administrative proceeding that it initiated. (ECF No. 165-1 at 19) ("DOT is open to considering that argument."). The Supreme Court has rejected agency attempts to avoid judicial review when announced rules have immediate and adverse impact. In *Abbott Laboratories*, the Court held:

To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstances

Id., 387 U.S. at 153). *See also Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986) ("Once the agency publicly articulates an unequivocal position ... and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review").

As to the final factor, the Federal Agencies expected immediate compliance. The Letters were issued in relation with and directed to Delta's accommodation request. (ECF No. 1 at 48,

52). At the time each letter was written, the temporary gate use accommodation agreements were nearing their respective end dates. (See ECF No. 1 at 23 [¶¶ 58, 60, 76]). The Letters urged the City to act in a “reasonable and timely manner.” (ECF No. 1 at 55). Now, part of FAA’s investigation is whether the City’s failure to act on the request violated title 49, even though Delta continues to operate at Love Field without interruption and the City sought judicial resolution. (ECF No. 150-1 at 32). In their motion, the Federal Agencies argue that the FAA instituted its administrative proceedings against the City because it was “faced with the City’s continued refusal to make any decision on Delta’s accommodation request.” (ECF No. 165-1 at 15). Thus they have confirmed: (1) that the agencies expected immediate compliance; (2) that the City was subject to direct and immediate impact if it followed the new rules, refused to follow the new rules, or did neither and sought judicial review; and (3) the FAA is prepared to sanction the City for seeking judicial review of facially-invalid directives while being threatened with suit by its tenant airline if it obeys them. The Notice defies this Court’s jurisdiction, because it ignores that the City’s purported “refusal” occurred only in the course of seeking declarative and injunctive relief here.²

Applying the factors to determining finality, the Letters were in fact the consummation of the agency’s decision making process. Likewise, the Letters did determine rights and had legal consequences. Sovereign immunity was waived.

D. The Court has jurisdiction because DOT has acted outside of its statutory authority and jurisdiction.

Even if the DOT Letters and the Federal Agencies’ other actions did not constitute a final agency action, the Court still has jurisdiction because each agency has exercised authority

² Indeed, the FAA threatens to punish the City for seeking the Court’s help – a situation that begs for invocation of the Courts “all writs” powers, 28 U.S.C. § 1651(a), in addition to other grounds for jurisdiction.

outside the jurisdiction of the agency or otherwise acted in a manner that is clearly at odds with the specific language of a statute. *Leedom v. Kyne*, 358 U.S. 184, 189 (1958); *Coca-Cola Co. v. Federal Trade Comm.*, 475 F.2d 299, 303 (5th Cir.1973), *cert. denied* 414 U.S. 877 (1973); *Central Hudson Gas & Elec. Corp. v. U.S. EPA*, 587 F.2d 549, 555 (2d Cir. 1978). In *Kyne*, the National Labor Relations Board acted in defiance of an express statutory prohibition. Since this “was an attempted exercise of power that had been specifically withheld,” it was properly enjoined by the district court. *Kyne*, 358 U.S. at 189. “This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.” *Id.* at 190.

DOT and the FAA each have attempted to exercise authority that Congress specifically and expressly withheld through WARA. Again, the only courts that have interpreted WARA have concluded that the Congressional intent was to limit the Federal Agencies’ authority and jurisdiction at Love Field. The Court has the jurisdiction to confer judicial protection against agency action “taken in excess of delegated powers.”

E. The remaining claims are viable.

DOT argues that the other claims in the City’s complaint, Claims II – IV, must be dismissed because there is no jurisdiction for Claim I. As discussed above the Court has jurisdiction over DOT and the FAA as to Claim I and the Court has jurisdiction as to Counts II-IV with or without the Federal Agencies.

V. DOT’s MOTION TO TRANSFER SHOULD BE DENIED

As alternative relief and relying on 49 U.S.C. § 46110(a), the Federal Agencies ask the Court to transfer this case to the D.C. Circuit. (ECF No. 165-1 at 23-25). They argue that 49 U.S.C. § 46110(a) grants court of appeals exclusive jurisdiction over a Federal Agencies’ order

issued under portions of title 49 and that whatever the Letters are, they were issued under title 49. (ECF No. 165-1 at 23-24). But that is precisely the point. WARA is not found in title 49. The grant of jurisdiction provided in section 46110(a) does not include WARA. To the contrary, Congress intentionally removed these issues from the Federal Agencies' reach. Through its Letters and now the Notice of Investigation, DOT and the FAA have attempted to exercise authority and jurisdiction that Congress expressly denied them.

The Federal Agencies argue for a backdoor evasion of the statutory bar by claiming they are acting through other powers by providing guidance as to grant assurances, exclusive use, and competition plan requirements which are part of title 49 and therefore subject to section 46110(a). (ECF No. 165-1 at 23). Again they ignore WARA, which provides that "any actions taken by the parties to [the Five-Party Agreement] that are reasonably necessary to implement its provisions, shall be deemed to comply in all respects with the parties' obligations under title 49;" that the Federal Agencies "may not make findings or determinations, issue orders or rules .. or take any other actions" that are inconsistent with the Five-Party Agreement; and that they do not have the authority to require the City "to modify or eliminate preferential gate leases with air carriers in order to allocate gate capacity to new entrants or to create common use gates, unless such modification or elimination is implemented on a nationwide basis." (ECF No. 21 at 15-16; WARA, §§ 5(d)(1),(2); 5(e)(2)(B)(ii)). Congress mandated that the City was deemed in compliance with title 49 and the Federal Agencies had no authority to issue the DOT Letters or to review of the City's actions by following the usual procedures. WARA makes the usual procedures inapplicable to Love Field. This Court, not the Federal Agencies, has the authority to construe the Five Party Agreement, the airport leases, and WARA, just as did the Court of Federal Claims and this Court in earlier litigation.

The Federal Agencies misunderstand the City's contention and allegation regarding WARA by asserting that the City contends that the Federal Agencies acted pursuant to WARA. As to Love Field, it is WARA that limits and defines the Federal Agencies' authority. The Federal Agencies have acted in defiance and disregard of WARA, not pursuant to WARA.

Moreover, the D.C. Circuit APA appeal will not resolve the underlying issues in this case. If the Federal Agencies prevail there, the court of appeals will simply dismiss. If Southwest prevails, not all of the conflicting claims and issues will be resolved and a court will again be asked to construe the Love Field gate leases, the Five Party Agreement, and WARA.

This Court is the only forum that can grant complete and timely relief that will not subject parties to conflicting obligations. Thus, for prudential reasons the Court should not transfer. The Federal Agencies admit it seeks dismissal in the Court of Appeals because the Letters were not final and not meant to be binding. The Federal Agencies are seeking to have a live justiciable case that needs resolution transferred to a venue where they will try to have the case and issues dismissed and left unresolved.

VII. THE FEDERAL AGENCIES' MOTION TO STAY SHOULD BE DENIED

The Federal Agencies argue that because they have launched their after-the-fact investigation as to whether the City violated title 49 by in part filing this action, the Court should defer and stay further proceedings so that the Federal Agencies can decide the issues through their normal processes. The Federal Agencies insist that this Court should defer to them. This represents the latest attempt by DOT and the FAA to usurp the Court's jurisdiction and evade the constrictions placed on them by WARA.

The Federal Agencies argue the heart of the claims before the Court, whether federal law requires accommodation of Delta, is the question being considered by the Federal Agencies.

(ECF 165-1 at 26). The Federal Agencies contend that under the doctrine of primary jurisdiction the Court should suspend or dismiss the pending matter because under the statutory regulatory scheme, any enforcement will require resolution of issues which “have been placed in the special competence” of the Federal Agencies. (*Id.* at 25-26). Again the Federal Agencies ignore WARA. The statutory scheme, WARA, expressly removed enforcement from DOT and FAA and “ensur[ed] that neither the FAA nor any other federal agency can interfere with [the Five-Party Agreement and the preferential gate leases].” *Love Terminal Partners*, 97 Fed. Cl. at, 415. Moreover, the Federal Agencies have no special competence, knowledge, or expertise as to WARA.

The Federal Agencies next argue that the Court may find it more efficient and fairer to issue a stay in favor the FAA proceeding. (ECF No. 165-1 at 27). The most efficient and fairest decision is to find the Federal Agencies’ sovereign immunity was waived, find their actions are subject to judicial review, stay the FAA’s Notice of Investigation, and conduct one proceeding with all parties and all issues joined. The decision by this Court will moot any possible issue raised by the Notice of Investigation. Any outcome in a FAA proceeding will take years to finalize and would leave unresolved the competing claims of the airlines at Love Field.

CONCLUSION AND PRAYER

WARA dispenses with all of the Federal Agencies’ arguments. Congress expressed its intent that the Federal Agencies make no determinations, perform no investigation, and issue no rules or orders contrary to the Five-Party Agreement. The Federal Agencies cannot backdoor that prohibition by issuing orders, rules, and conducting investigations and then claim such actions are subject to review according to FAA’s usual procedures. The City requests that the

Court deny in whole or alternatively in part the Federal Agencies' motion to dismiss or transfer and for stay. The City further moves for such further relief to the City as the Court finds just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2015, I electronically filed the foregoing document with the Clerk of Court for the United States District Court for the Northern District of Texas using the electronic case filing system of the Court. Service on all attorneys of record who are Filing Users will be automatically accomplished through Notice of Electronic Filing.

s/ Peter B. Haskell