UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

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| **Adventure Aviation** | ) | |
| | ) | |
| **COMPLAINANT** | ) | |
| **v.** | ) | |
| | ) | **Docket No. 16-01-14** |
| **City of Las Cruces, New Mexico** | ) | |
| | ) | |
| **RESPONDENT** | ) | |
| | ) | |

## DIRECTOR'S DETERMINATION

## I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on a complaint filed in accordance with the Rules of Practice for Federally-Assisted Airport Enforcement Proceedings, 14 CFR Part 16 (Part 16).

Adventure Aviation (AA)/(Complainant) has filed this Complaint against the City of Las Cruces, New Mexico (City/Respondent). AA alleges that the Respondent, as sponsor of Las Cruces International Airport (Airport), has engaged in activity contrary to its Federal obligations, stating that the Respondent is

> in violation of §C(22)(c) of the Airport Assurances due to the grossly disparate lease rates and related arrangements existing between the airport's two fixed-based operations ("FBOs"). Adventure Aviation, one of the FBOs, is directly and substantially affected by this ongoing violation because its only competitor, Southwest Aviation, is receiving dramatically more favorable rates and benefits. This is an unlawful subsidy from the City of Las Cruces... The City of Las Cruces has also violated its Sponsorship Assurances in failing to remedy Southwest Aviation's multiple and ongoing safety infractions.[1] [FAA Exhibit 1, Item 1, pages 1-2][2]

[1] As discussed more fully below, the FAA understands that the Complainant is alleging that the Respondent has violated three Federal grant assurances, #19, #22, and #24. These questions of fact and law and the question of whether these alleged violations has had the effect of constructing the grant of a prohibited exclusive right form the basis for this investigation.

[2] FAA Exhibit 1 provides the Index of the Administrative Record in this proceeding.

The decision in this matter is based on applicable law and FAA policy regarding the Respondent's Federal obligations as imposed upon it by its grant assurances #19, #22, #23 and #24 (under 49 U.S.C. § 47107(a)(1, 4, 5, 7 and 13) and 49 U.S.C. § 40103(e)), review of the arguments and supporting documentation submitted by the parties, and the administrative record in this proceeding.

With respect to the allegations presented in this Complaint, under the specific circumstances at the Airport as discussed below and based on the evidence of record in this proceeding, the FAA finds that the Respondent is not in violation of its Federal obligations.

## II. THE AIRPORT

Las Cruces International Airport is a public-use airport located approximately 8 miles west of Las Cruces, New Mexico. The airport is owned and operated by the City of Las Cruces. As of August 2001, Las Cruces International Airport had approximately 111 based-aircraft with 69,200 annual operations. [FAA Exhibit 2, attached]

The planning and development of Las Cruces International Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Plan (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, recodified at 49 U.S.C. § 47101 *et seq*. Specifically, since 1982, the City has entered into numerous AIP grant agreements with the FAA and has received a total of $8,392,929 through Fiscal Year 2002 in federal airport development assistance directly from the FAA. [FAA Exhibit 3, attached]

## III. BACKGROUND

Prior to the Complainant's initiation of tenancy at the Airport in 1998, Southwest Aviation, Inc. (SWA) had been operating its fixed-base operation (FBO)[3] at the Airport under a 1967 lease with the City. SWA's lease was most recently renewed in 1994 (1994 SWA Lease), and is described below. [FAA Exhibit 1, Item 1, page 3 and Item 3, page 2]

In August 1987, SWA entered into a lease for T-hangar structures and Canopy structures (SWA T-hangar Lease). These facilities are surrounded by public taxiway, existing in a footprint lease, as stated by the Respondent. [FAA Exhibit 1, Item 3, page 2] The SWA T-hangar lease includes a total rent of $1,761.88 per year, with annual escalation by the "Gross National Product Implicit Price Deflator." [FAA Exhibit 1, Item 1, exhibit E]

The 1994 SWA Lease allowed SWA to conduct business at the Airport as a FBO, including the ability to provide aircraft fuel services; aircraft maintenance; ground and flight instruction; sales of aircraft and aircraft accessories; commercial flight operations; avionics repair; and automobile rental and food service. [FAA Exhibit 1, Item 1, exhibit C, pages 3-4] This lease includes legal

[3] A fixed-base operation provides aeronautical services to general aviation users of an airport.

descriptions of six parcels, separated into two areas designated as East Lease (parcel #6, 0.1650 acres and parcel #7, 2.7480 acres) and West Lease (parcel #1, 0.2262 acres; parcel #2, 5.2498 acres; parcel #3, 6.0276 acres; and parcel #4, 0.0321 acres), totaling 14.4487 acres. [FAA Exhibit 1, Item 1, exhibit C] The lease term for those parcels expires in 2013. In regard to the East Lease, SWA is obligated to provide specific aeronautical services and facilities to standards described in the lease.

Both the East and West Lease comprising the 1994 SWA Lease contained an 'exhibit b' outlining the lease payments. From the documents submitted by the Complainant it appears that the lease rate for the two buildings, one in the East Lease and one in the West Lease, was $.02 per square foot per year, escalated by the terms of the lease to $.02271 per square foot per year. In addition to the square foot lease rate, SWA is required to pay the following:

1. Gross Receipts: payment equal to 2% of the adjusted gross receipts from all businesses conducted and carried on by Lessee at the Airport, excluding from the base, sales to government; sales taxes; aviation fuel sales; tuition payments; bad debts; and the rental car operation.
2. Parking Fees: payment of 20% of the parking fees collected for aircraft parking.
3. Aircraft Sales: payment of 0.5% "of the gross volume of business derived from the retail sale of new or used aircraft."
4. Fuel Flowage: payment of $0.10 per gallon on all fuel sold to FAR Part 121 charter flights and payment of 3% of the wholesale price of all aviation fuel sold. [FAA Exhibit 1, Item 1, exhibit C, exhibit B, pages 38-39]

Furthermore, the 1994 SWA Lease speaks to maintenance and utilities for the leased premises as responsibilities of the SWA. Regarding maintenance, the 1994 SWA Lease states, "Lessee agrees at its expense, without cost or expense to the City, during the term hereof, to keep the leased premises and improvements thereto and thereon in good and usable repair and maintenance..." [FAA Exhibit, Item 1, exhibit C, pages 14-15]. Regarding utilities, the 1994 SWA Lease states, "Lessee shall obtain and install underground at its own expense any necessary electrical, gas, water, sewer and septic tank, and any other utility service..." [FAA Exhibit 1 Item 1, exhibit C, pages 34-35] The Respondent states, "SWA is responsible for paying all utilities associated with its leased premises."[4] [FAA Exhibit 1, Item 3, page 7]

On June 1, 1998, the City adopted Ordinance 1677 and Resolution 98-371 regarding the management of the Airport. [FAA Exhibit 1, Item 3, exhibit 2] Ordinance 1677 was titled "An Ordinance Establishing Standardized Rules for the Management, Development, and Use of the Las Cruces International Airport, Repealing Existing Ordinances, and Setting Effective Dates." [pp. 52-64] Resolution 98-371 was titled "A Resolution Approving Standardized Policies and Fees for the Management, Administration, Development, and Use of the Las Cruces International Airport." [pp. 148-160] Ordinance 1677 established definitions and rules and regulations regarding commercial activity, airport safety aircraft operations, etc., but did not set exact rates and charges. Such a document is commonly referred to as an airport's Minimum Standards.

[4] The Complainant does not dispute this assertion.

Resolution 98-371 established specific rates and charges, including those charges applied to AA, in its lease established a couple of months after the Ordinance and Resolution and summarized below. The Resolution does not include a fuel flowage fee as described in the 1994 SWA Lease and listed above under #4. In 1998, the City adopted other standards, including a provision requiring paved aircraft movement surfaces to be, "no less than (2) inches of asphalt over a six (6) inch base course of 95% compaction, or four (4) inches of reinforced concrete." [FAA Exhibit 1, Item 3, exhibit 8]

In August 1998, the Complainant entered into lease agreements with the Respondent for the operation of an FBO at the Airport (1998 AA Lease). [FAA Exhibit 1, Item 1, exhibit D] The lease form is significantly different from that of the 1994 SWA Lease. The Complainant's submission of its 1998 AA Lease does not contain exhibits B and C, referred to in the lease documents as "Description of Area" and "Additional Lease Conditions." The 1998 AA Lease is comprised of two lease documents: a commercial lease and a facilities lease. The commercial lease appears to be a non-exclusive use lease, allowing non-exclusive use of airport aprons and parking areas, and requiring the payment of 0.5% of on-demand flying services and aircraft sales and 2% of all other activities.[5] This document permitted and required the following uses:

> Lessee shall have use of the Airport only for food services including catering and restaurants; aircraft manufacture, maintenance, repair and storage (as defined by the FARs); aircraft major and minor repair and maintenance; flammable liquid storage and/or sales; preventive maintenance for aircraft; sales, leasing, financing, insuring and/or brokerage of aircraft, airframes, engines, and/or other aeronautical items; storage of aircraft and parts; line services; on-demand flying services including aerial photograph or survey, aircraft rental to the public, dropping objects from aircraft, pilot instruction conducted independently of an FAR Part 141 certified flight school, pilot schools conducted in accordance with FAR Part 141; sightseeing flights; and pilot services. [FAA Exhibit 1, Item 1, Exhibit D]

The facility lease[6] appears to be a lease for specific facilities, described in the lease as

> ...the FBO portion of the Airport Management building, Suite N and Suite E in the same building, and the underground fuel tank on the north side of the building, and 12,000 sf of apron immediately east of the building, and 12 tiedowns, and more particularly described in Exhibit "B"[7] [FAA Exhibit 1, Item 1, exhibit D]

The term of both the facility and commercial leases is 1 year, with 4 one-year extensions. The lease payments throughout the extended term remain constant and expire on September 2003. The payments consist of "$40,000.00 per year for the building area, $600.00 per year for the apron, $1,850.00 for the 12 tie-downs, and $1,500.00 per year for the underground fuel tank."

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[5] The 1998 AA Lease does not appear to contain the fuel flowage fees included in the 1994 SWA Lease, listed under #4 above.

[6] The Complainant provides an unexecuted copy of the facility lease.

[7] As stated above, the Complainant did not include exhibits B and C.

[FAA Exhibit 1, Item 1, exhibit D] According to the lease the monthly payments equal $3,662.50. According to the Respondent, "AA does not pay utilities for its leased facility."[8] [FAA Exhibit 1, Item 3, page 8]

According to the 1998 AA Lease, "rent includes electrical utilities, HVAC, water and wastewater. Lessee shall participate in energy conservation practices established by the Airport Manager in common with other tenants in the same metered facility." [FAA Exhibit 1, Item 1, exhibit D, p. 3]

AA increased its leasehold in November 1999 and March 2000[9], increasing its competitive posture with SWA's prior business of providing hangars. [FAA Exhibit 1, Item 3, exhibit 6] The Respondent refers to these land leases as exclusive-use T-hangar leases (AA T-hangar Lease). They consist of two agreements for two parcels of land, parcel #28 and parcel #8W, totaling 2.1349 acres. Both leases have a term of 30 years, expiring in 2029. The Complainant's application for the AA T-hangar Lease proposes leasehold improvements, including a 6400 sq. ft. hangar, 14 T-hangars and 3 (three) 200-sq.ft. hangars. The AA T-hangar Lease states that the rent for the parcels shall be $6975 per year, with an escalation every five years. [FAA Exhibit 1, Item 3, exhibit 6]

As stated by the Respondent, "the City and SWA are currently in arbitration (and have been in litigation since 1999) to determine some issues related to the East and West Leases [1994 SWA Lease]; one of the primary issues is exactly what SWA must pay as rent. According to the City's interpretation of the Leases and the calculations based on those interpretations, SWA owes over $76,000 in past rent." [FAA Exhibit 1, Item 3, page 6] The Complainant does not address or refute this statement. The Respondent presents spreadsheets to demonstrate SWA's alleged underpayment of rent. [FAA Exhibit 1, Item 3, exhibit 1]

The Respondent presents an analysis of changing airport circumstances, including a graph of increasing airport revenues since the execution of the 1994 SWA Lease. The graph shows that airport revenues increased about six fold (from $5,000 to $30,000) for the period of 1995 through 1998. The graph does not indicate the growth rate prior to the first quarter of 1995. [FAA Exhibit 1 Item 5, exhibit 10]

On July 3, 2000, the City enacted Resolution 00-341B, titled "A Resolution Revising Resolution 98-371 to Amend the Fee Structure for Use of the Las Cruces International Airport by Aircraft Conducting Commercial Air Transportation of Passengers, Cargo, and Mail." [FAA Exhibit 1, Item 3, exhibit 2, pp. 114-116]

The parties agree that the City rents a 4,800 sq. ft. hangar to SWA for $150 per month and that it leases two T-hangars from SWA for approximately $260 per month. [FAA Exhibit 1, Item 3, p.

[8] The Complainant does not dispute this assertion.

[9] AA's decision to enter into competition with SWA was consummated 14 to 18 months after it first leased property at the Airport.

3] The Respondent does not dispute that the Complainant built a 6,400 sq. ft. hangar at its own expense on land leased from the Respondent for $0.075 per sq. ft. [FAA Exhibit 1, Item 1, p. 4] The Complainant states "The City of Las Cruces acquired [sic] Adventure Aviation to install four-inch concrete floors in the t-hangars, whereas the t-hangars owned by Southwest Aviation have asphalt floors and are in a state of extreme disrepair." [FAA Exhibit 1, Item 1, pp. 3-4] The Respondent does not dispute this allegation. Additionally, the Complainant presents photographs of SWA's alleged lack of upkeep in its leasehold. [FAA Exhibit 1, Item 4, exhibit G]

The Respondent presents a graphical analysis of its increasing percentage of operating revenue over expenditures. The graph shows that the percentage of airport expenditures covered by airport revenue has increased from less than 20% to 40% for the period of FY 95/96 to FY 99/00. [FAA Exhibit 1, Item 5, exhibit 11]

The Complainant presents appraisals of FBO property at the Airport. The Complainant includes a 1998 appraisal of the fair market value of the operations and assets of SWA's business [FAA Exhibit 1, Item 4, exhibits H] and a 1994 Appraisal Report of a Leasehold Estate of a previous occupant of AA's leasehold. [FAA Exhibit 1, Item 4, exhibits J-2]

The parties present evidence regarding other leases at the Airport. However, a review of these documents reveals that they are not relevant, either because they represent leases for non-FBO entities or they are sufficiently old as to not be comparable, or both. The Complainant presents a lease between the City and Mesilla Valley Aviation. This lease is dated April 3, 1989 and does not confer the right to sell fuel, unlike SWA and AA. [FAA Exhibit 1, Item 4, exhibit K] The Respondent submits examples of lease proposals from 1996 and 2000. [FAA Exhibit 1, Item 3, exhibits 4 & 5] The Respondent states, that these entities "pay the same rent per square foot for use of the facility where AA is housed." [FAA Exhibit 1, Item 3, p. 8]

On August 17, 2001 the FAA received AA's Formal Complaint in this matter. On September 27, 2001, the FAA received the City's Answer. On October 23, 2001, the FAA received the Complainant's Reply. On November 1, 2001, the FAA received the City's rebuttal.

## IV. ISSUES

The principal matter to be determined by the FAA is whether or not the airport sponsor is in compliance with its Federal obligations as embodied in its Federal grant agreements and conveyances of Federal land, listed in 14 CFR 16.1. Upon review of the Complainant's allegations and the record summarized above in the Background Section, the FAA has determined that the following issues require consideration and analysis in order to provide a complete review of this sponsor's compliance with applicable Federal law and FAA policy, discussed below:

1. Whether the disparity in FBO lease rates and treatment constitute unjust economic discrimination by the Respondent in violation of Federal grant assurance #22.

2. Whether other differences in treatment constitute unjust economic discrimination by the Respondent in violation of Federal grant assurance #22.

3. Whether the condition of the Airport demonstrates that the Respondent has failed to adequately operate and maintain the aeronautical facilities of its airport in compliance with Federal grant assurance #19.

4. Whether the Respondent has failed to make its airport operation as self-sufficient as possible given airport specific circumstances as required by Federal grant assurance #24

5. Whether the Respondent's alleged disparate treatment of its FBOs in terms of lease rates and application of standards constitutes the constructive grant of an exclusive right in violation of Federal grant assurance #23 and 49 U.S.C. § 40103.

## V. APPLICABLE FEDERAL LAW AND FAA POLICY

The Federal Aviation Act of 1958, as amended (FAAct), 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 sponsor assurances.

The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program, authorized by the Airport and Airway Improvement Act of 1982, (AAIA), 49 U.S.C. § 47101 *et seq*. This program provides financial assistance to an airport sponsor for airport development in exchange for binding commitments designed to assure that the public interest will be served. These commitments are set forth in the sponsor's applications for Federal assistance and in the grant agreement as sponsor assurances, *i.e.*, a list of applicable Federal laws, regulations, executive orders, statute-based assurances, and other requirements, binding the sponsor upon acceptance of the Federal assistance.

### The Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the AAIA, the Secretary of Transportation must receive certain assurances from the airport sponsor.

The AAIA sets forth requirements 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 as assurances in every airport improvement 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.

FAA Order 5190.6A, *Airport Compliance Requirements*, (hereinafter Order) provides policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances.

**Assurance #19: Operation and Maintenance of the Airport**

Assurance 19, "Operation and Maintenance," implements 49 U.S.C. § 47107(a)(7), and requires, in relevant part, that the sponsor of a Federally-obligated airport assure that

> The airport and all facilities which are necessary to serve the aeronautical users of the airport, ... shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith ...
>
> In furtherance of this assurance, the sponsor will have in effect arrangements for-
> (1) Operating the airport's aeronautical facilities whenever required;
> (2) Promptly marking and lighting hazards resulting from airport conditions;
> (3) Promptly notifying airmen of any condition affecting aeronautical use of the airport.
>
> Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.

The Order states that the owner should adopt and enforce adequate rules, regulations or ordinances as necessary to ensure safety and efficiency of flight operations and to protect the public using the airport. In fact, the prime requirement for local regulations is to control the use of the airport in a manner that will eliminate hazards to aircraft and to people on the ground. As in the operation of any public service facility, we advise that adequate rules covering, inter alia, vehicular traffic, sanitation, security, crowd control, access to certain areas, and fire protection be established. See Order, Sec. 4-7(b).

**Assurance #22: Use on Reasonable and Not Unjustly Discriminatory Terms**

Assurance 22, "Economic Nondiscrimination," of the prescribed sponsor assurances implements the provisions of 49 U.S.C. §§ 47107(a)(1) through (6), and requires, in pertinent part, that the 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 uses." Assurance 22(a).

"...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...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 sub-sections (a) and (f), and subsection (i) represents an exception to subsection (a) to permit the 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 grant assurance specifically addresses the issue of the treatment of fixed-based operators (FBOs), stating that "Each fixed-based operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport and utilizing the same or similar facilities." Assurance 22(c). Subsection (c) specifies the application of subsection (a) to the treatment of FBOs, providing additional specific guidance as to the sponsor obligations.

The Order describes the responsibilities under Assurance 22 assumed by the owners 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 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 on aeronautical activities. See Order, Sec. 3-8(a).

**Assurance #23: The Prohibition Against the Granting of an Exclusive Right**

Section 308(a) of the FAA Act, 49 U.S.C. § 40103(e), provides, in relevant part, that "[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended." An "air navigation facility" includes an "airport." See 49 U.S.C. §§ 40102(a) (4), (9), (28).

Section 511(a)(2) of the AAIA, 49 U.S.C. § 47107(a)(4), similarly provides, in pertinent part, that "there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

Assurance 23, "Exclusive Rights," of the prescribed sponsor assurances requires, in pertinent part, that the 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... It further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities..."

In the Order, the FAA discusses its exclusive rights policy and broadly identified 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, we have 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. However, a sponsor is under no obligation to permit aircraft owners to introduce on 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).

**Assurance #24: Airport Fee and Rental Structure**

Section 47107 (a)(13) of 49 U.S.C. requires, in pertinent part, that the sponsor of a Federally obligated airport "will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport." In addition, under § 47107(a), fees levied on aeronautical activities must be reasonable and not unjustly discriminatory.

Assurance 24, "Fee and Rental Structure," of the prescribed sponsor assurances satisfies the requirements of § 47107(a)(13). It provides, in pertinent part, that the sponsor of a Federally obligated airport agrees that it will maintain a fee and rental structure consistent with Federal grant assurances #22 and #23, discussed below, for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection.

The Order states that the sponsor's obligation to make an airport available for public use does not preclude the owner from recovering the cost of providing the facility through fair and reasonable fees, rentals or other user charges which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport. See Order, §4-14(a).

**The FAA Airport Compliance Program**

The FAA discharges its responsibility for ensuring airport owners' compliance with their Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on consensual obligations, which an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports; rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served.

The 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 to be followed by FAA personnel 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 made to the United States by airport owners as a condition to 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 nature of those assurances, addresses the application of these assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

As stated in the Order,

> It is the FAA's position that the airport owner meets [Federal obligations] when: a) the obligations are fully understood, b) a program (preventive maintenance, leasing policies, operating regulations, etc.) is in place which in FAA's judgment is adequate to reasonably carry out these commitments, and c) the owner satisfactorily demonstrates that such a program is being carried out. (See Order 5-6(a)(2).)

## VI. ANALYSIS

Whether the alleged difference in the City's treatment of its existing FBO tenants is acceptable under the City's Federal obligations is the central question at hand in this proceeding, taking into

account, to an appropriate degree, the relative value of the facilities, the respective timeframes of the leases and the City's legitimate and evolving management goals. In addition, the Complainant alleges that the Respondent has failed to adequately operate and maintain the Airport and has failed to be reasonably self-sustaining in violation of its grant assurances. The Complainant's allegation that the City has discriminated against AA, by its application of dissimilar lease rates and standards, implicates the grant assurance prohibiting the granting of an exclusive right.

**Issue One**

Whether the disparity in FBO lease rates and treatment constitute unjust economic discrimination by the Respondent in violation of Federal grant assurance #22.

The Complainant cites part (c) of Federal grant assurance 22, economic nondiscrimination, which states:

> (c) Each fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport and utilizing the same or similar facilities.

Throughout the initial Complaint filing, the Complainant contends that the plain wording of Assurance 22(c) requires identical treatment of FBOs, and that FBOs must be charged identical rates.[10] The parties agree that both AA and SWA are FBOs that make the same or similar use of the airport. However, "the City denies that AA and SWA utilize the same or similar facilities." [FAA Exhibit 1, Item 3, page 3] The Respondent denies that Assurance 22(c) requires it to provide identical terms to the competing FBOs, because they do not make use of similar facilities. [FAA Exhibit 1, Item 3, page 4]

Long-standing FAA policy and precedent that has withstood judicial challenge establish that Assurance 22(c) does not require that airport sponsors charge all FBOs identical lease rates.

First, it is the fundamental position of the FAA that the issue of rates and charges is best addressed at the local level by agreement between users and airports. Consequently, it is the FAA's policy to encourage direct negotiations between airport users and airport sponsors. [Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 32017 (June 21, 1996)][11] In these circumstances, it is probable that negotiations between an airport sponsor and different airport users with differing business strategies will not likely result in the same lease terms and rates. Furthermore, the FAA will not entertain a complaint about the reasonableness of a fee set by

[10] The Complainant raises the argument that the differences in rates are not justified by the differences in circumstances in its Reply.

[11] Sections of the policy not applicable herein were vacated and remanded by the United States Court of Appeals for the District of Columbia in Air Transport Association of America v. Department of Transportation, 119 F.3d 38 (D.C. 1997), as modified on Rehearing, Order of October 15, 1997.

agreement when filed by a party to the agreement. [See, *Policy Regarding Rates and Charges*, 61 Fed. Reg. 32018 (June 21, 1996) and Footnote 12. See also, e.g. FAA Docket No. 16-00-03, Aerodynamics of Reading, Inc. v. Reading Regional Airport Authority, Final Decision and Order, p. 20 (July 23, 2001), hereinafter *Aerodynamics*.[12]]
The purpose of Assurance 22(c), as with all grant assurances, is to protect the public interest in the operation of federally obligated airports. The purpose is not to provide alternative or supplemental rights to those normally available to commercial tenants in disputes with their landlords, i.e. negotiation or commercial litigation under applicable state and local laws. The FAA does not consider that Congress intended grant assurances and the FAA compliance process to provide a device by which a commercial aeronautical tenant could abrogate an otherwise valid commercial lease with a sponsor because the operations under the lease were less profitable than the tenant anticipated. [See, *Aerodynamics*, p. 12] The Complainant does not present evidence that it objected to the terms of the lease at the time it agreed to the lease provisions. The Complainant does not offer any explanation as to why (or even whether) it was unable to review the information it now presents prior to signing the lease. Conversely, the Respondent contends that "prior to opening for business, the owner of AA attempted to buy out SWA. In doing so, AA reviewed SWA's East and West Leases and had full knowledge of SWA's operation." [FAA Exhibit 1, Item 3, p. 8] Absent any evidence to demonstrate that the Complainant objected to the terms of the lease or was denied access to pertinent information during negotiations, the Director concludes that there can be no unjust discrimination under the principles in *Aerodynamics*.

Second, the Director concludes that Assurance 22(c) does not require the Respondent to offer lease rates and terms that are identical to other leases negotiated at different points in time, so long as there is no unjust discrimination. The FAA does not require a sponsor to maintain equal lease rates over time between competing FBOs. [See, *Aerodynamics*, p. 17; See also, Penobscot Air Services LTD v. FAA, 164 F.3d 713, 726 (1st Cir., 1999)] Further, two operators may not be considered essentially similar as to rates and charges even though they offer the same services to the public. For example, differences in lease terms are permitted when there is a difference in space, location, or facilities. [FAA Order 5190.6A, Chapter 4, Sec. 4-14d(2)(a, b)]

The Complainant does not establish a *per se* violation of Assurance 22(c) (unjust discrimination) simply by showing differences between two leases. The FAA has found that differences in lease terms executed at different points in time can be justified by the market conditions present at the time of lease execution. [See, FAA Docket No. 16-99-09, Wilson Air Center, LLC v. Memphis-Shelby County Airport Authority, Final Decision and Order (August 30, 2001), hereinafter, *Wilson*] Additionally, FAA policy provides that an airport sponsor may quite properly increase its standards from time to time in order to ensure a higher quality of service to the public. [See, FAA Order 5190.6A, Sec. 3-17(c)] In *Wilson*, the FAA held that differences in lease terms that result from an airport sponsor improving its business practice (i.e. increasing its standards) does not result in a *per se* violation of Assurance 22. [*Wilson*, p. 17] That said, an airport sponsor

[12] *Aerodynamics, p. 16* states that it is "incumbent upon the Complainant to prove its allegations of unjust discrimination by providing evidence that similar terms and conditions were requested and were subsequently denied without adequate justification." Agreeing to a term offered or negotiated, and then complaining later, does not fulfill this principle.

that increases its standards may be required to apply those same standards to previously executed leases at the time of lease modification or renewal.[13] [See, FAA Docket No. 16-01-10, Maxim United, LLC. v. Board of County Commissioners of Jefferson County, Colorado, Final Decision of Director's Determination (April 2, 2002)]

In response to the policy and precedent discussed above, the Respondent argues that the differing lease terms and rates between SWA and AA are justified by AA's agreeing to significantly more advantageous payment terms and term-lengths; by differing market conditions at the time that each lease was negotiated; and by marked differences in facilities and services leased by SWA and AA. Despite the fact that the Complainant did not raise the issue of unjustified differences in its Complaint,[14] it has the burden to present evidence that the difference in treatment is unreasonable considering the circumstances. As discussed below, the Complainant fails to present convincing evidence.

The Complainant focuses almost entirely on the differences in square footage lease rates for FBO facilities on the Airport, citing the fact that SWA's lease rate is less than AA's rate. However, the evidence in the record presents a broader perspective on the respective leases, including differences in lease terms, market differences, differences in facilities and other related issues, as discussed below.

*The lease terms agreed to by the Complainant differ significantly*

The Record reflects that the Complainant agreed to, apparently without objection, terms that differ significantly from those that SWA accepted four and one-half years earlier. As discussed below, many of those terms might confer a competitive advantage upon AA. Also, of note, AA continued to increase its competitive exposure to SWA in subsequent agreements, including those entered into as recently as March 2000. [FAA Exhibit 1, Item 3, exhibit 6] Negotiation and agreement to lease-terms and the time-frame of these activities are highly relevant factors in this case.

As discussed above, the 1998 AA Lease contains several terms which are potentially more favorable to the leaseholder, as compared to the terms in the 1994 SWA Lease.

- The 1994 SWA Lease contains a fuel flowage fee, in addition to its gross receipts fee, the 1998 AA Lease does not contain such a fee;
- SWA's lease terms require the payment of utilities, which AA's lease does not; and
- AA has exclusive use over its leased ramp, SWA does not.

[13] In this case, the lease with SWA was negotiated previous to AA entering into its lease with the Airport. There is no evidence of any lease modifications or renewals of SWA's lease subsequent to the execution of AA's lease.
[14] The FAA notes that the Complainant's argument changed significantly in its Reply, focusing more on rebutting the Respondent's contention of justified differences by arguing that the differences in lease rates are not justified and alleging that they do constitute unjust economic discrimination.

If one FBO accepts, without objection, an obligation to remit a fuel flowage fee, under certain business and economic circumstances, whereas another FBO accepts a different fee schedule, without a fuel flowage fee, at a later date, under different business and economic circumstances for a facility which provides a different level of service, it is reasonable and equitable for other rates and charges to differ between the FBOs.
In this case, the City's new rate schedule, instituted by City Resolution adopted prior to AA's lease, protects the sponsor's legitimate business interests by reducing the sponsor's exposure to the risk of decreased fuel consumption at the Airport. Whereas Airport management may have felt compelled to share that risk with earlier FBOs, management may properly decide to fashion new agreements with a different balance of risk and remuneration. Here, AA may have expected to experience a competitive advantage over SWA if fuel sales at the Airport had increased at a greater rate than actually occurred. Considering that AA agreed to its lease after SWA had, AA had the advantage of knowing the existing competitive situation at the Airport.

The Complainant does not argue that the leases it entered into with the Respondent were anything other than 'arms-length' transactions. There is no evidence of awareness by the City of AA's existence or interest in a leasehold at the Airport at the time it executed its agreements with SWA in 1994. There is no evidence that the Complainant was prevented from understanding the competitive situation at the Airport, including knowing the terms of SWA's 1994 Lease, when it entered into the 1998 AA Lease and agreed to its terms. Conversely, the Respondent states, "prior to opening for business, the owner of AA attempted to buy out SWA. In doing so, AA reviewed SWA's East and West Leases and had full knowledge of SWA's operation." [FAA Exhibit 1, Item 3, p. 8] The Complainant does not allege that it requested terms similar to SWA's and was denied such terms for unjust reasons. [See *Aerodynamics*, p. 16] Moreover, the Director finds it noteworthy that the Complainant leased facilities at the Airport under the lease terms at issue in this Complaint for nearly three years, and added to its leasehold subsequently by executing additional leases, before filing the Complaint. The record contains copies of AA's applications for leases on the Airport with the same terms and conditions in dispute herein. [FAA Exhibit 1, Item 1, exhibit D and Item 3, exhibit 6]

Also, length of lease terms is an additional factor to consider when determining whether lease terms unjustly discriminate between FBO tenants. In this instance, the duration of the FBO lease term lengths differ. The 1994 SWA Lease is a long-term lease, expiring in 2013. The 1998 AA Lease is a short term lease with an initial lease term of 1 year, with 4 one-year extensions at the option of AA. [FAA Exhibit 1, Item 1, exhibits C & D] There is no evidence or claim that AA requested a long-term lease or was denied the same.[15]

Consequently, we are not persuaded that the Complainant requested similar treatment to SWA and was denied. Nor can we conclude that AA did not accept these terms willingly, some of which are potentially, arguably beneficial to AA. AA has not established a record of objection to terms to which it agreed, until well after the relative benefit of such terms could be tested by the relative success of AA's business plan.

[15] In fact, there is no argument or claim that AA requested to pay a fuel flowage fee or pay less for its facilities.

*The leases concern different times and different market circumstances*

In its Reply, the Complainant argues that the City conveniently looks back to 1967 when the 2 cents per square foot lease with SWA was initiated and ignores that the current lease is a 1994 lease, which the City entered into without making any effort to alter the unreasonably low rate. The Complainant also argues that the City's suggestion that the four-year difference in time substantially affects the lease price is inaccurate. The Complainant admits that the timeframes differ, stating, "The relevant dates are 1994 for SWA and 1998 for AA." [FAA Exhibit 1, Item 4, p. 5] Specifically, the Director notes that the SWA lease was executed on January 7, 1994 and AA's first lease was executed on August 20, 1998. [FAA Exhibit 1, Item 1, exhibits C & D][16] The Complainant claims, without evidence, "By 1994, the City of Las Cruces was well into its significant economic growth." [FAA Exhibit 1, Item 4, p. 5]

The Respondent characterizes this time period (1994-1998), as follows:

> In 1994, SWA was the only FBO at the City's airport. The City's other main tenant, North American Institute of Aviation had gone out of business in 1992 and the industry was in the midst of an economic downturn. The City entered into the 1994 lease with SWA under the terms and conditions which were reasonable and in compliance with the Assurances given the circumstances. The airport's growth in revenues did not occur until the last quarter of 1995 and throughout 1996 when federal agencies began leasing space at the airport. [FAA Exhibit 1, Item 5, p. 7]

The Respondent attaches a graph, showing the increase in Airport revenues from 1995 through 2000. Although the graph does not show the status of Airport revenue in 1994, it does show an apparent jump in Airport revenue in the 1st Quarter of 1996, nearly two years after the execution of the 1994 SWA Lease. This increase (almost a doubling from approximately $6,000 to approximately $11,000) begins a continuing increase reaching a consistent quarterly revenue of approximately $28,000 throughout 1997. [FAA Exhibit 1, Item 5, exhibit 10] In this case, the record reflects that the business circumstances existing at the time the FBO leases were executed do appear to differ significantly.

Also, the Respondent's 1998 Resolutions and Ordinances constituting minimum standards and fee schedule show that the Respondent implemented these new terms uniformly. [FAA Exhibit 1, Item 3, exhibit 2] Furthermore, the Respondent supplies copies of other leases in which they apply consistent lease rates for comparable office facilities adjacent to AA's. [See FAA Exhibit 1, Item 3, exhibits 4 & 5]

Differing timeframes can result in differing lease rates and lease terms. The FAA acknowledges that differing timeframes represent differing business risk environments for the FBOs being compared and that these differences can result in competitive advantage or disadvantage for

[16] As stated in the background section, AA increased its leasehold and competitive posture with SWA when it executed additional leases on November 29, 1999 and March 29, 2000.

either the established FBO or the new entrant FBO. The FAA has clearly articulated the principle that Federal obligations do not require a sponsor to equalize the risk environment between the FBOs entering into business at different times, by perpetuating lease rates based on different market circumstances [See *Penobscot*].

Moreover, as discussed more fully below, the lease payments made by SWA are not limited to the 2 cents per square foot challenged by the Complainant. Consequently, the Complainant does not persuade the Director that the lease term differential is unreasonable given the circumstances.

*The leasehold facilities differ in character*

The Complainant argues that none of the differences in the quality or character of the FBO leaseholds justify something other than identical treatment by the City. The Complainant states, "The building is of a similar economic value and not so dissimilar in style and appearance to permit the City to ignore the Sponsorship Agreement." [FAA Exhibit 1, Item 4, p. 2] The Complainant interprets the Sponsorship Agreement as follows, "The City of Las Cruces has a responsibility to assure that all FBOs are subject to the same rates and fees applicable to all other FBOs making the same or similar utilization of the airport." [FAA Exhibit 1, Item 1, p. 4]

The Complainant states

> The City, however, seeks to dodge its "same rates" requirement... through suggesting that AA does not lease a facility that is the same or similar to that which SWA leases. Without significant analysis of any economic data or analysis of the relative structural integrity of the two buildings, the City contends that the SWA FBO building is built in the late 1940's or early 1950's whereas the AA FBO building was completed in 1988. The City engages in age discrimination: it describes 1988 as the modern construction era and suggests that older buildings are necessarily worth less. [FAA Exhibit 1, Item 4, p. 3]

The Complainant attempts to supply 'analysis of economic data' to show that the FBO facilities have similar values by performing calculations based on figures supplied from a 1998 appraisal of the fair market value of the operations and assets of SWA's business [FAA Exhibit 1, Item 4, exhibit H] and a 1994 Appraisal Report of a Leasehold Estate of a previous occupant of AA's leasehold. [FAA Exhibit 1, Item 4, exhibit J-2] The FAA cannot rely upon the information offered in support of the Complainant's assertion that the FBO facilities have similar value because the documents provided are not sufficiently comparable. The Complainant presents appraisal information for its facility from 1994, even though it leased the facility in 1998. Conversely, the Complainant relies on appraisal data from 1998 for SWA's leasehold even though SWA entered its current lease in 1994. Not only does this ignore the impact of increased market demand and simple inflation between 1994 and 1998, but also compounds the error by valuing the older lease with newer data, and the newer lease with older data.[17] The FAA is

[17] The fact that the newer appraisal shows a higher value and the older appraisal shows a lower value provides some support for the City's argument that values increased over the time period.

unable to determine whether the value calculations are based on the market conditions at the time (less demand in 1994 and more demand in 1998 as maintained by the City) or the physical conditions of the premises. In any case, neither document discusses the value of the lease terms agreed to by both parties. Also, SWA's lease is for SWA as a going concern, while, AA's 'appraisal' is for the leasehold estate.[18]

In the end, the Complainant concludes that the documents together suggest comparable values, "the $27.88 per square foot market rate for the SWA building is similar to the $52.29 per square foot market rate of the AA FBO." [FAA Exhibit 1, Item 4, p. 5] The Respondent disputes the accuracy of the analysis. Furthermore, the FAA cannot verify the validity of the adjustments made by the Complainant or the accuracy of its arithmetic. In any case, the values calculated by the Complainant in its analysis are not similar to each other.

The Respondent argues that

> the facilities leased by AA and SWA are markedly different in significant ways.... SWA's building is a cinder block building believed to have been built in the late 1940's or early 1950's, prior to the Department of the Interior's granting of the Airport to the City in 1955. The space rented by AA, however, is part of a modern-era construction project completed in 1988.... The office space, restrooms and conference rooms leased by the respective entities are vastly different in structural quality, aesthetics, and location. The modern quality and look of the AA leasehold compared to SWA, both internally and externally, is blatantly obvious. [FAA Exhibit 1, Item 3, p. 7]

The Respondent also states, "AA's facility was built in accordance with modern building codes.... SWA's facility was built, at best, to meet the building standards of the 1940's or 1950's." [FAA Exhibit 1, Item 3, p.3]

The parties dispute the value of the location of the FBOs; however, the Director determines that the record is insufficient to determine if there is a competitive advantage due to location. A

[18] The $270,510 value of the building leased by Southwest Aviation cited by the Complainant [FAA Exhibit 1, Item 4, p. 4] is not an acceptable or reliable estimate of the market value of the leased real estate. The Complainant computes a value citing the business value appraisal made for SWA dated May 8, 1998. This appraisal is not a real estate appraisal. Rather, it is a valuation of the business assets. The values quoted by the Complainant appear to include aircraft as well as other business assets, and actually do not appear to include a real estate value. The only real estate value that is cited in the appraiser's report is an estimate of SWA's leasehold value at $48,841. [FAA Exhibit 1, Item 4, exh. H, p. 9] However, no support or discussion is provided in the business appraisal to indicate whether this value may be considered an appraised value of the real estate. Therefore, there is no basis for the Complainant's assertion that the value of the real estate owned by the City can be derived by simply subtracting the value of SWA's assets from the total business valuation. In contrast, the October 14, 1994 appraisal of the building leased to the Complainant is a real estate appraisal and reports $728,000 as the value of the building which the City acquired and subsequently leased to the Complainant. [FAA Exhibit 1, Item 4, exh. J-2] This appraised value is a market value estimate of AA's leased building that reflects the condition and quality of those specific property improvements. No acceptable appraisal was provided in the record on the SWA leased improvements and the description of the building as a 60 year old (+/-) concrete block building would indicate that the SWA building may not be reasonably compared to the appraised value of the AA leased building.

cursory review of the airport layout and photos presented, suggest that the respective locations of the facilities are not a highly significant factor regarding relative worth.

The Director cannot rely on the computations provided by the Complainant because of the flaws in the evidence noted above. The Director does rely upon evidence representing the age of the facilities and upon the photographs supplied by the parties depicting their relative condition. [See FAA Exhibits 1, Item 3, exhibits 3A & 3B and Item 4, exhibit G] The Director concludes that the facilities are different in quality and character. In any case, the Complainant has failed to establish that the facilities are sufficiently similar in value as to show that the rate differential is unjustly discriminatory, considering the fact that the Complainant agreed to the terms and that some of the terms agreed may provide a competitive advantage to the Complainant, as discussed above.

*SWA Payments and City's Legal Action*

In its Reply, the Complainant presents argument regarding the actual dollar amount of payments made by SWA to the City, in an apparent attempt to show that these payments are less than that made by AA. However, there is no expectation that the dollar amounts paid will be similar, much less identical. These payments are related to the amount of property leased and the amount of sales made by the respective FBOs. Furthermore, as stated by the Respondent, and undisputed by the Complainant, "the City and SWA are currently in arbitration (and have been in litigation since 1999) to determine some issues related to the East and West Leases [1994 SWA Lease]; one of the primary issues is exactly what SWA must pay as rent. According to the City's interpretation of the Leases and the calculations based on those interpretations, SWA owes over $76,000 in past rent." [FAA Exhibit 1, Item 3, page 6]

The standard for an airport sponsor's noncompliance with its Federal obligations is not the simple fact of a tenant's noncompliance with its lease terms. To be clear, as stated in the Order,

> It is the FAA's position that the airport owner meets [Federal obligations] when: a) the obligations are fully understood, b) a program (preventive maintenance, leasing policies, operating regulations, etc.) is in place which in FAA's judgment is adequate to reasonably carry out these commitments, and c) the owner satisfactorily demonstrates that such a program is being carried out. (See Order 5-6(a)(2).)

In this case, the City has provided a lease with terms for payment, and has taken legal action against SWA for payment in accordance with those terms. This satisfies the FAA's requirement that the City understands its obligations, has an adequate program and is implementing that program. In any case, the evidence and argument presented by the Complainant does not establish a case of unjust economic discrimination.

*Findings on Issue One*

Consistent with well established policy and precedent, the FAA does accept that differences in time, market conditions, location of facilities, condition of facilities, lease terms, assumption of risk and evolving management strategy can be justifications for differences in lease rates. The Order states, "a sponsor may charge different rates to similar users of the airport if the differences can be justified as nondiscriminatory and such charges are substantially comparable." See Order §4-14(d)(1)(c).[19] In general terms, airport management may make changes in lease terms, rates and conditions of occupancy in order to more nearly balance the various legitimate interests of the public in civil aviation as the circumstances effecting civil aviation change over time. [See *Penobscot* and *Wilson*] At the very least, this means that a sponsor is *not* required to perpetuate identical lease terms of an established and/or pioneering FBO for a new entrant; nor must the sponsor demand that the new entrant pursue the same business plan as the established FBO. Market conditions and competitive situations change over time. These economic changes can occur during the time period between the respective negotiation of leases by competing FBOs starting up at different points in time. FBOs can also pursue competitive advantage by implementing opposing business strategies with differing lease terms. Grant assurance #22 is not intended to protect FBOs from the inherent business risks associated with an FBO proprietor's decision to implement a certain business plan at a certain point in time in competition with other FBOs. This is especially true when, as is the case here, an FBO agrees to specific terms, either cognizant of or able to know of the competitive circumstances at the airport at the time it agreed to such terms.

For all of the reasons discussed above, and based on long-standing FAA policy and precedent, the Director finds that the two FBOs do not utilize the same or similar facilities. Therefore, the City is not required to provide the same lease rates or the same lease payments. Furthermore, the Complainant has not established that the differences in lease rates and/or payments are unreasonable or discriminatory under the City's Federal requirements. Even though, the differences may appear to be quite significant, the Complainant fails to present convincing evidence that such differences are unreasonable, in light of the circumstances presented to the record. Most telling is the Complainant's acceptance of a much shorter lease term length, newer and more serviceable facilities and the absence of a fuel flowage charge. Evidence submitted by the Complainant to show that the facilities were more comparable in value than is reflected in lease rates is unconvincing. Also, the Director is persuaded that the differences in rates between the Complainant and SWA may be, at least in part, attributable to differences in market conditions based on the timing of the lease agreement. Finally the Director finds no evidence or argument that the Complainant objected to the terms that it agreed to in 1998, 1999 again in 2000 and that make up the issues addressed in this subsection.

In conclusion, the Complainant has failed to establish a *prima facie* case of unjust discrimination, under grant assurance #22 or #22(c), specifically.

[19] The FAA notes that this guidance appears under the sub-heading "At air carrier airports." The FAA has accepted that this guidance is generally applicable to the circumstances of FBO's and air carriers at air carrier and general aviation airports.

**Issue Two**

Whether other differences in treatment constitute unjust economic discrimination by the Respondent in violation of Federal grant assurance #22.

*T-hangars*

As part of the general allegation of discrimination, the Complainant addresses T-hangars, specifically, stating that SWA's T-hangar lease is a footprint lease at $0.025/sq. ft., while the AA T-hangar lease is for a entire parcel at $0.075/sq. ft. The parties do not dispute that AA's lease is exclusive, while SWA's lease is not exclusive.

The FAA notes, as discussed above, that the circumstances differ greatly in regard to these leases. Primarily, the time-frame of the leases is 12 and 13 years different. The FAA would expect that airport circumstances would change in that period of time. Thus, the Complainant's comparison is of little evidentiary value. Finally, the Complainant's claim does not overcome the fact that the Complainant agreed to the terms of its lease, without apparent objection again, 14 months after having signed its first lease with the City.

*Other Hangars*

The parties argue points regarding other hangars, without presenting evidence. The record is not well developed in regards to these other hangars and/or sunshades. The Complainant states, in its Complaint, "Southwest Aviation rents a 4,800 square foot hangar from the City of Las Cruces at $150.00 per month (3.75 cents per square foot).... Adventure Aviation built a 6,400 square foot hangar and had to build the accompanying ramp and pay 7 1/2 cents per square foot for all the land under and adjacent to the hangar." [FAA Exhibit 1, Item 1, p. 4] The Complainant states, in its Reply, "AA's lease for sunshades at the East end of the airport is set at $685.00 per month. The City only charges SWA $150.00 per month for approximately 5,000 square feet of fully functional hangar space." [FAA Exhibit 1, Item 4, p. 11] The parties agree that the City rents a 4,800 sq. ft. hangar to SWA for $150 per month and that it leases two T-hangars from SWA for approximately $260 per month. [FAA Exhibit 1, Item 3, p. 3]

The record regarding this sub-issue is not sufficiently developed. Neither party submits dates or circumstances, sufficient for the Director to make a finding. The record is not clear as to which facilities are being compared. The record does not contain sufficient information to clarify why the rates are allegedly unreasonable, or constitute unjust economic discrimination. The same principles, discussed above, would apply.

*Design Standards*

The Complainant states "The City of Las Cruces acquired [sic] Adventure Aviation to install four-inch concrete floors in the t-hangars, whereas the t-hangars owned by Southwest Aviation have asphalt floors and are in a state of extreme disrepair." [FAA Exhibit 1, Item 1, pp. 3-4] The Respondent states that in 1998, apparently prior to the Complainant's lease signing, the City

adopted other standards, including a provision requiring paved aircraft movement surfaces to be, "no less than (2) inches of asphalt over a six (6) inch base course of 95% compaction, or four (4) inches of reinforced concrete." [FAA Exhibit 1, Item 3, exhibit 8]

There is no evidence that the Complainant sought some other standard, objected to the standard when signing the lease or building the improvements, or was deceived regarding the applicable standard for new construction on the airport. The FAA does not expect that design standards will not be increased or changed over time. Considering again, the amount of time that passed between the executions of the two leases (4.5 to 12 years), it is not unreasonable for the City to institute new standards.

***Findings on Issue Two***

The Director finds that these issues of alleged incidences of differences in treatment are not adequately supported by record evidence. In the case of the T-hangars, the Complainant's pleadings contain information regarding differences in time that the Complainant has not supported with probative evidence regarding the allegedly unjustly discriminatory treatment. The record evidence regarding these issues is inadequate to establish a case of unjust discrimination. While the record does show treatment that is not identical; as discussed above, identical treatment is not required by law and in the cases described herein, would not be expected in the ordinary course of business. Finally, regarding the subsequent allegation of the application of lease rates that are substantially different, the record fails to establish that the rates are not justified by the differences in circumstances.

**Issue Three**

Whether the condition of the Airport demonstrates that the Respondent has failed to adequately operate and maintain the aeronautical facilities of its airport in compliance with assurance #19.

The Complainant states, "the [City] has taken no corrective measures of other actions with respect to Southwest Aviation's multiple and ongoing safety infractions." [FAA Exhibit 1, Item 1, p. 7] It also states, "AA has repeatedly asked the City to have the ramp in front of its FBO repaired to prevent propeller and engine damage.... More than one year after discussions initiated.... it has not restored the ramp to a reasonable condition." [FAA Exhibit 1, Item 4, p. 12] The Complainant cites multiple alleged safety violations, lease term violations or improper activity by SWA to support its allegation against the Respondent. [FAA Exhibit 1, Item 1, p. 7] There are other allegations under this subheading that are irrelevant to the City's obligations under assurance #19.[20]

The Respondent states, "AA's alleged safety concerns do not remotely fit within the assurance at issue." [FAA Exhibit 1, Item 3, p. 11] The City states, in its rebuttal, "AA's ramp is currently being repaired.... The City consistently attempts to monitor activities at the airport that could

[20] For example, SWA's alleged use of hangars for nonaeronautical activity and new design standards for emergency showers are not related to this obligation.

create safety issues and has taken legal action against various individuals and entities to ensure compliance." [FAA Exhibit 1, Item 5, p. 11]

As stated in the Order,

> It is the FAA's position that the airport owner meets [Federal obligations] when: a) the obligations are fully understood, b) a program (preventive maintenance, leasing policies, operating regulations, etc.) is in place which in FAA's judgment is adequate to reasonably carry out these commitments, and c) the owner satisfactorily demonstrates that such a program is being carried out. (See Order 5-6(a)(2).)

The FAA considers that incidental violation of airport rules by tenants is not sufficient to create the presumption of unjust discrimination or failure to maintain. The Order states that the owner should adopt and enforce adequate rules, regulations or ordinances as necessary to ensure safety and efficiency of flight operations and to protect the public using the airport. In fact, the prime requirement for local regulations is to control the use of the airport in a manner that will eliminate hazards to aircraft and to people on the ground. (See Order, Sec. 4-7(b))

Here, as summarized extensively above, the Respondent has submitted evidence of its minimum standards, design standards, lease terms and has stated that it has taken legal action and other steps to enforce these terms and standards: "The City's Codes Enforcement Force and Fire Department personnel have issued citations to SWA (and other entities, including AA) for various infractions similar to those raised in the Complaint. AA admits SWA's receipt of a criminal citation (for a fueling violation) in the Complaint. ...[E]nforcement efforts at the airport have been the subject of multiple City Staff meetings and enforcement has increased over the past year." [FAA Exhibit 1, Item 3, p. 12]

***Finding on Issue Three***

The Director finds that the evidence submitted is insufficient to conclude that the Respondent has so neglected the facilities at the Airport as to have violated assurance #19.

**Issue Four**

Whether the Respondent has failed to make its airport operation as self-sufficient as possible given airport specific circumstances as required by assurance #24

The Complainant alleges that "the below market rate charged to Southwest Aviation is in violation of the City's obligation to make a good faith effort to become self-sustaining," in violation of Assurance #24. [FAA Exhibit 1, Item 1, p. 6] The Respondent states, "the FAA does not consider an airport's decision to establish rates below the amount needed to make the airport self-sustaining inconsistent with the airport's obligation under this provision. In fact, the FAA does not even require airports to charge fair market value in order to comply with this assurance." [FAA Exhibit 1, Item 3, p. 10]

FAA's long-standing interpretation of self-sustainability is that there is no requirement to charge aeronautical service providers market rates. The FAA specifically contemplates subsidies to FBOs and other commercial aeronautical service providers. The very existence of Federal assistance to airports is to serve civil aviation interests, by providing opportunities for the public to access aeronautical services. The requirement for market rates is to be imposed upon nonaeronautical users of airport property.

***Finding on Issue Four***

The Director finds that there is no Federal obligation for the City to charge market rates to aeronautical service providers. The Director finds insufficient evidence to establish that the City's acceptance of lease rates in 1994 were so low as to be a violation of assurance #24.

**Issue Five**

Whether the Respondent's alleged disparate treatment of its FBOs in terms of lease rates and application of standards constitutes the constructive grant of an exclusive right in violation of Federal grant assurance #23 and 49 U.S.C. 40103(e).

In FAA Order 5190.6A, the FAA published its exclusive rights policy and broadly identified 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, the FAA has taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a 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 F.2d 1529 (11th Cir, 1985)]

The Complainant's allegation that the City has discriminated against AA, by its application of dissimilar lease rates and standards has implications for the grant assurance prohibiting the granting of an exclusive right, as discussed above. However, at the very least the FAA would have to determine that the City had established such inequity in its lease rates, standards and/or practices as to violate a provision of grant assurance #22. The FAA is not persuaded by the record that this is the case for the reasons discussed in Issues 1 through 4.

***Finding on Issue Five***

Therefore, the Director finds that the City has not granted an exclusive right.

**Conclusion**

The Director acknowledges that the Complainant and the Respondent agree that the lease terms and rates between SWA and AA are different. The Complainant, however, carries a greater burden in order to show that differences, even differences that can be described as large,

constitute unjust economic discrimination. The evidence presented by the Complainant is unconvincing and insufficient to establish unjust economic discrimination by the application of unreasonably divergent lease rates. Of primary relevance is the fact that the Complainant agreed to the terms of which it now complains and that the Complainant has not presented convincing evidence that the rate differential is unjustified by differences in terms, time, market condition or facilities. Merely presenting evidence of different lease rates is not sufficient to require a Respondent to prove that the lease rates are justified.

Therefore, the Director finds that the City has not unjustly discriminated against the Complainant and is in compliance with its Federal grant assurances regarding unjust discrimination, operation and maintenance, self-sufficiency and exclusive rights.

## ORDER

Accordingly, it is ordered that:

1. The Complaint is dismissed.

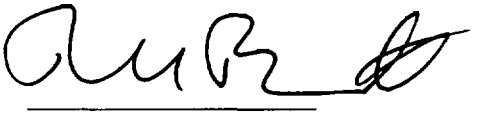
2. All Motions not expressly granted in this Determination are denied.

These Determinations are made under Sections 313(a), 1002(a) and 1006(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 40103(e), 44502, 40113, 40114, 46104, and 46110, respectively, and Sections 511(a), 511(b), and 519 of the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. §§ 47105(b), 47107(a)(1)(4)(5)(7)(13), 47107(g)(1), 47110, 47111(d), 47122, respectively.

## RIGHT OF APPEAL

This Director's Determination is an initial agency determination and does not constitute a final agency decision and order subject to judicial review. 14 CFR § 16.247(b)(2). A party adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR § 16.33(b) within thirty (30) days after service of the Director's Determination.

Signed,



David L. Bennett
Director, Office of Airport
Safety and Standards

August 7, 2002
Date