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

Jimsair Aviation Services, Inc., **COMPLAINANT** **v.** **San Diego County Regional Airport Authority,** **RESPONDENT**	**Docket No. 16-06-08** *Issued April 12, 2007*

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA), Director of the Office of Airport Safety and Standards, to investigate pursuant to the Rules of Practices for Federally Assisted Airport Enforcement Proceedings found in Title 14 Code of Federal Regulations (CFR), Part 16.

Jimsair Aviation Services, Inc. (Complainant) filed a formal Complaint pursuant to 14 CFR Part 16 against the San Diego County Regional Airport Authority (Authority or Respondent), sponsor and operator of San Diego International Airport (Airport), alleging Respondent has taken steps that will cause Complainant's lease to terminate without an opportunity for renewal. Complainant argues this action will restrict the Airport to a single entity offering fixed-base operator (FBO)[1] services for general aviation, thereby granting an exclusive right in violation of 49 United States Code (U.S.C.) § 40103(e) and related grant assurance 23, *Exclusive Rights*, and favoring scheduled air carriers over general aviation users in violation of Title 49 U.S.C. § 47107(a)(1) through (6) and related grant assurance 22, *Economic Nondiscrimination*. In addition, Complainant alleges Respondent violated grant assurances 8, *Consultation with Users*; 16, *Conformity to Plans and Specifications*; 18, *Planning Projects*; and 29, *Airport Layout Plan*; in conjunction with developing the Airport Master Plan. Complainant also alleges Respondent violated grant assurance 24, *Fee and Rental Structure,* by allowing non-tenant aeronautical service providers to conduct business on the Airport without entering into agreements or paying fees. In addition, Complainant alleges Respondent violated grant assurance 5, *Preserving Rights and Powers.*

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

Based on the Director's review and consideration of the evidence submitted, the administrative record designated at FAA DD Exhibit 1, the relevant facts, and the pertinent laws and policy, the Director concludes:

> The Authority is in violation of grant assurance 22, *Economic Nondiscrimination*, by allowing non-tenant aeronautical service providers to engage in ground handling and related services in direct competition with the Complainant without requiring those entities to meet comparable requirements imposed on the Complainant.

The Director notes the Authority has identified in the pleadings proposed corrective actions to resolve the violation cited. Submission of a corrective action plan that addresses this finding to the satisfaction of the Director within 20 days of receipt of this determination will resolve the matter and the Director will find the violation to be cured.

The Director finds the Authority is not currently in violation of the remaining seven grant assurances related to allegations in this Complaint.

The basis for the Director's conclusion is set forth herein.

II. PARTIES

A. Airport

San Diego International Airport (Airport), also known as Lindbergh Field, is a single runway airport serving both scheduled air carriers and general aviation.

The San Diego County Regional Airport Authority (Authority) is the sponsor and operator of the Airport. The Authority succeeded the San Diego Unified Port District (Port District) as the sponsor of the Airport on January 1, 2003. [FAA DD Exhibit 1, Item 3, page 2, footnote; and Item 9, exhibit 1.] The Authority and Port District are separate and distinct units of government. Until January 1, 2003, the Port District was the only sponsor and operator of the San Diego International Airport. [FAA DD Exhibit 1, Item 9, page 1.] In this Complaint, the Authority is the only named Respondent. While both Complainant and Respondent refer to historical actions of the Port District, this determination will address only allegations of current violations related to the Authority.

The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, (AAIA), as amended, 49 U.S.C. § 47101, *et seq*. Since 1982, the Airport has received $218 million in grant funds, including $8.7 million to conduct and update Airport Master Plan studies. [FAA DD Exhibit 1, Item 2, pages 4 and 5.]

B. Complainant

The Complainant, Jimsair Aviation Services, Inc., is currently the sole tenant fixed-base operator (FBO) providing flight support services for general aviation users at the Airport. [FAA DD Exhibit 1, Item 3, page 2.] Complainant is also a Part 135 certificated air carrier conducting on-demand charter operations, and a Part 145 aircraft repair station. [FAA DD Exhibit 1, Item 3, page 5.] Complainant has been operating on the Airport continuously since 1952. [FAA DD Exhibit 1, Item 3, page 4.]

III. BACKGROUND and PROCEDURAL HISTORY

In 1952, Complainant Jimsair Aviation Services, Inc. began serving as a fixed-base operator (FBO) at San Diego International Airport. [FAA DD Exhibit 1, Item 3, exhibit 1, page 1.] Initially, Complainant operated on the south side of Airport Runway 9-27 while the airline terminal was located on the north side of the runway. During the 1960's, the Airport sponsor relocated Complainant to the north side and moved the terminal to the south side. [FAA DD Exhibit 1, Item 3, exhibit 1, pages 1-2.] In 1967, Complainant entered into its first lease with the Airport. The leased area included the old terminal site. [FAA DD Exhibit 1, Item 3, exhibit 1, page 1 and 2.]

Since 1978, Complainant has been the only fixed-base operator (FBO) at the Airport. [FAA DD Exhibit 1, Item 3, exhibit 1, page 1.]

On May 1, 1988, Complainant entered into a new lease with the Port District, who was the Airport sponsor at the time. [FAA DD Exhibit 1, Item 3, exhibit 1, page 2.]

On December 20, 1990, Complainant filed a Chapter 11 bankruptcy petition. [FAA DD Exhibit 1, Item 9, exhibit 13.] From 1991 through 1993, Complainant underwent court supervised bankruptcy reorganization. [FAA DD Exhibit 1, Item 3, exhibit 1, page 3.]

In 1995, the Port District approved capital improvements to Complainant's leasehold, including plans to build and operate a fuel storage facility. [FAA DD Exhibit 1, Item 3, exhibit 1, page 3.] However, in 1996, the Port District developed a centralized tank farm for jet fuel and advised Complainant it must use this facility. Subsequently, the FAA intervened, and the Port District permitted Complainant to use its own fuel storage facility for aviation fuel. [FAA DD Exhibit 1, Item 3, page 9; and Item 9, page 8.]

In 1997, Complainant proposed construction and operation of a combined FBO and cargo facility; the proposal was rejected by the Airport Director. [FAA DD Exhibit 1, Item 3, page 8.]

In 1999, Complainant proposed expanding its FBO facilities only, including adding a new corporate terminal and three hangars capable of accommodating large aircraft. Complainant moved forward on its expansion project prior to completing negotiations with the Port District. Complainant was forced to stop construction in April 2002 when it learned it would not get a lease extension. [FAA DD Exhibit 1, Item 3, pages 8-9.]

On January 1, 2003, the San Diego County Regional Airport Authority (Authority) succeeded the Port District as the sponsor of the Airport. [FAA DD Exhibit 1, Item 3, page 6.]

In 2004, the Authority obtained a federal grant to conduct an Airport Master Plan study. [FAA DD Exhibit 1, Item2, page 4.] As part of this planning process, the Authority is considering relocating Complainant's current fixed-base operator site in order to expand the taxiway and holding area into the space that is now occupied by the Complainant. [FAA DD Exhibit 1, Item 3, page 13.] The Authority is also considering whether it will have just one FBO or will invite two fixed-base operators onto the Airport to increase competition. [FAA DD Exhibit 1, Item 3, page 14.] While the Authority is involved in this planning process, it has declined to enter into a lease extension or renewal with Complainant.

On April 11, 2006, Complainant filed a formal Part 16 Complaint with the FAA.

On April 28, 2006, Complainant filed a lawsuit against the San Diego Regional Airport Authority. [FAA DD Exhibit 1, Item 9, exhibit 29.]

On June 9, 2006, Respondent filed its Answer to the Complaint, following an extension of time to file.

On July 19, 2006, Complainant filed its Reply to Respondent's Answer.

On September 5, 2006, Respondent filed it Rebuttal, following an extension of time to file.

IV. ISSUES

Upon review of the allegations and the relevant airport-specific circumstances, the FAA has determined that the following issues require analysis in order to provide a complete review of the Respondent's compliance with applicable federal law and policy:

A. *Issue 1:* Whether the Respondent is in violation of grant assurances 22, *Economic Nondiscrimination*, 23, *Exclusive Rights*, and 24, *Fee and Rental Structure*, by (1) failing to (a) renew Complainant's lease for fixed-base operator services or (b) renew Complainant's fuel permit, and (2) refusing to allow Complainant to expand its facility and extend its lease. [FAA DD Exhibit 1, Item 3, page 25, "count one."]

B. *Issue 2:* Whether the Respondent is in violation of grant assurance 5, *Preserving Rights and Powers*, grant assurance 22, *Economic Nondiscrimination*, and grant assurance 23, *Exclusive Rights*, by limiting flight support services for general aviation users to a single entity. [FAA DD Exhibit 1, Item 3, page 30, "count two."]

C. *Issue 3:* Whether Respondent is in violation of grant assurance 29, *Airport Layout Plan*, by inappropriately converting space designated as aeronautical to nonaeronautical purposes or by permitting changes that would adversely affect the safety, utility, or efficiency of the Airport. [FAA DD Exhibit 1, Item 3, page 30, "count three."]

D. *Issue 4:* Whether Respondent is in violation of grant assurances 16, *Conformity to Plans and Specification*, and 18, *Planning Projects*, by failing to execute the Airport Master Plan project in accordance with the plans, specifications, and schedules approved by the Secretary. [FAA DD Exhibit 1, Item 3, page 31, "count three."]

E. *Issue 5:* Whether Respondent is in violation of grant assurance 8, *Consultation with Users*, by failing to undertake reasonable consultation with affected Airport users during the development of the Airport Master Plan. [FAA DD Exhibit 1, Item 3, page 31, "count three."]

F. *Issue 6:* Whether Respondent is in violation of grant assurance 22, *Economic Nondiscrimination*, by imposing unreasonable requirements on the Complainant. [FAA DD Exhibit 1, Item 3, page 33, "count four."]

G. *Issue 7:* Whether Respondent is in violation of grant assurance 22, *Economic Nondiscrimination*, by allowing non-tenant aeronautical service providers to engage in ground handling and related aeronautical services in direct competition with the Complainant without requiring those entities to meet applicable terms and conditions as imposed on the Complainant. [FAA DD Exhibit 1, Item 3, page 34, "count five."]

H. *Issue 8:* Whether Respondent is in violation of grant assurance 24, *Fee and Rental Structure*, by allowing non-tenant aeronautical service providers to engage in ground handling and related aeronautical services without entering into agreements with the Airport or paying fees to the Airport. [FAA DD Exhibit 1, Item 3, page 34, "count five."]

Our determination in this matter is based on the applicable federal law and FAA policy, review of the arguments and supporting documentation submitted by the parties, and the administrative record reflected in the attached FAA DD Exhibit 1.[2]

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing federal 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 and efficiently and in accordance with specified conditions. Commitments assumed by

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

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 fair and reasonable access to the Airport.

The following is a discussion pertaining to (A) the Airport Improvement Program, (B) Airport Sponsor Assurances, (C) the FAA Airport Compliance Program, and (D) Enforcement of Airport Sponsor Assurances.

A. Airport Improvement Program

Title 49 U.S.C. § 47101, *et seq*., provides for federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. Title 49 U.S.C. § 47107, *et seq*., sets forth assurances to which an airport sponsor agrees as a condition of receiving federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

B. Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the Airport Improvement Program, 49 U.S.C. § 47107, *et seq*., the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 U.S.C. § 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving federal financial assistance must agree.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.[3] FAA Order 5190.6A, *Airport Compliance Requirements* (Order), issued on October 2, 1989, provides the 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. 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.

Complainant alleges violations of eight (8) grant assurances, which are listed below in numerical order: (1) grant assurance 5, *Preserving Rights and Powers*, (2) grant assurance 8, *Consultation with Users*, (3) grant assurance 16, *Conformity to Plans and Specifications*, (4) grant assurance 18, *Planning Projects*, (5) grant assurance 22,

[3] *See*, *e.g.*, the Federal Aviation Act of 1958, as amended and recodified, Title 49 U.S.C. §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and recodified, Title 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122.

Economic Nondiscrimination, (6) grant assurance 23, *Exclusive Rights*, (7) grant assurance 24, *Fee and Rental Structure*, and (8) grant assurance 29, *Airport Layout Plan*.

1. Grant Assurance 5, *Preserving Rights and Powers*

Grant assurance 5, *Preserving Rights and Powers*, requires the airport owner or sponsor to retain all rights and powers necessary to ensure the continued operation of the airport consistent with its federal obligations. This assurance implements the provisions of the Airport and Airway Improvement Act of 1982 (AAIA), 49 U.S.C. § 47107(a), et seq., and requires, in pertinent part, that the owner or sponsor of a federally obligated airport "...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor."

Grant assurance 5 states in pertinent part:

a. [The airport owner or sponsor] will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.

b. [The airport owner or sponsor] will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application or, for a noise compatibility program project, that portion of the property upon which federal funds have been expended, for the duration of the terms, conditions, and assurances in the grant agreement without approval by the Secretary. If the transferee is found by the Secretary to be eligible under Title 49, United States Code, to assume the obligations of the grant agreement and to have the power, authority, and financial resources to carry out all such obligations, the sponsor shall insert in the contract or document transferring or disposing of the sponsor's interest, and make binding upon the transferee all of the terms, conditions, and assurances contained in this grant agreement.

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

2. Grant Assurance 8, *Consultation with Users*

Grant assurance 8, *Consultation with Users*, states in its entirety:

> In making a decision to undertake any airport development project under Title 49, United States Code, [the airport owner or sponsor] has undertaken reasonable consultations with affected parties using the airport at which project is proposed.

3. Grant Assurance 16, *Conformity to Plans and Specifications*

Grant assurance 16, *Conformity to Plans and Specifications*, states in its entirety:

> [The airport owner or sponsor] will execute the project subject to plans, specifications, and schedules approved by the Secretary. Such plans, specifications, and schedules shall be submitted to the Secretary prior to commencement of site preparation, construction, or other performance under this grant agreement, and, upon approval of the Secretary, shall by incorporated into this grant agreement. Any modification to the approved plans, specifications, and schedules shall also be subject to approval of the Secretary, and incorporated in to the grant agreement.

4. Grant Assurance 18, *Planning Projects*

Grant assurance 18, *Planning Projects*, requires airport owners or sponsors to meet certain requirements in carrying out planning projects. These include:

a. [The airport owner or sponsor] will execute the project in accordance with the approved program narrative contained in the project application or with the modifications similarly approved.

b. [The airport owner or sponsor] will furnish the Secretary with such periodic reports as required pertaining to the planning project and planning work activities.

c. [The airport owner or sponsor] will include in all published material prepared in connection with the planning project a notice that the material was prepared under a grant provided by the United States.

d. [The airport owner or sponsor] will make such material available for examination by the public, and agrees that no material prepared with funds under this project shall be subject to copyright in the United States or any other county.

e. [The airport owner or sponsor] will give the Secretary unrestricted authority to publish, disclose, distribute, and otherwise use any of the material prepared in connection with the grant.

f. [The airport owner or sponsor] will grant the Secretary the right to disapprove the sponsor's employment of specific consultants and their subcontractors to do all or any part of this project as well as the right to disapprove the proposed scope and cost of professional services.

g. [The airport owner or sponsor] will grant the Secretary the right to disapprove the use of the sponsor's employees to do all or any part of the project.

h. [The airport owner or sponsor] understands and agrees that the Secretary's approval of this project grant or the Secretary's approval of any planning material developed as part of this grant does not constitute or imply any assurance or commitment on the part of the Secretary to approve any pending or future application for a federal airport grant.

5. Grant Assurance 22, *Economic Nondiscrimination*

The owner of any airport developed with federal grant assistance is required to operate the airport for the use and benefit of the public. Grant assurance 22, *Economic Nondiscrimination*, deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Grant assurance 22 of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part:

> [The airport owner or sponsor] will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. [Assurance 22(a).]
>
> Each 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-base operators making the same or similar uses of such airport and utilizing the same or similar facilities. [Assurance 22(c).]
>
> [The airport owner or sponsor] 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).]
>
> In the event the sponsor itself exercises any of the rights and privileges referred to in the assurance, the services involved will be provided on the same conditions as would apply to the furnishing of such services by commercial aeronautical service providers authorized by the sponsor under these provisions. [Assurance 22(g).]

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

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

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [FAA Order 5190.6A, para. 4-8.]

6. Grant Assurance 23, *Exclusive Rights*

Title 49 U.S.C. § 40103(e), provides, in relevant part, that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which federal funds have been expended."

Title 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."

Grant assurance 23, *Exclusive Rights*, of the prescribed sponsor assurances implements both statutory provisions, and states in its entirety:

> [The airport owner or sponsor] will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. For purposes of this paragraph, the providing of the services at an airport by a single fixed-base operator shall not be construed as an exclusive right if both of the following apply:
>
> a. It would be unreasonably costly, burdensome, or impractical for more than one fixed-base operator to provide such services, and
>
> b. If allowing more than one fixed-base operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-base operator and such airport.
>
> [The airport owner or sponsor] 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, including but not limited to, charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity, and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49, United States Code.

7. Grant Assurance 24, *Fee and Rental Structure*

Grant assurance 24, *Fee and Rental Structure*, addresses fees the owner or sponsor levies on airport users in exchange for the services the airport provides.

Section 47107(a)(13) of 49 U.S.C. requires, in pertinent part, that the owner or sponsor of a federally obligated airport "will maintain a fee and rental structure for the facilities and services being provided to 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.

Grant assurance 24 satisfies the requirements of § 47107(a)(13). It provides, in pertinent part, that the owner or sponsor of a federally-obligated airport agrees that it will maintain a fee and rental structure consistent with assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights.* The airport owner or sponsor agrees to establish a fee and rental structure that 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 intent of the assurance is for the airport operator to charge fees that are sufficient to cover as much of the airport's costs as is feasible.

Moreover, FAA Order 5190.6A, *Airport Compliance Requirements*, states that the owner or sponsor's obligation to make an airport available for public use does not preclude the owner or sponsor from recovering the cost of providing the facility. The owner or sponsor is expected to recover its costs through the establishment of fair and reasonable fees, rentals, or other user charges that will make the airport as self-sustaining as possible under the circumstances existing at the particular airport. [*See* Order, 4-14(a).]

8. Grant Assurance 29, *Airport Layout Plan*

Grant assurance 29, *Airport Layout Plan*, requires the airport owner or sponsor to keep its Airport Layout Plan (ALP), which is a planning tool for depicting current and future airport use, up to date. Grant assurance 29 prohibits the airport owner or sponsor from making or permitting any changes or alterations in the airport or any of its facilities that

are not in conformity with its FAA-approved Airport Layout Plan. Grant assurance 29 states:

a. [The airport owner or sponsor] will keep up to date at all times an Airport Layout Plan of the airport showing (1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars, and roads), including all proposed extensions and reductions of existing airport facilities; and (3) the location of all existing and proposed non-aviation areas and of all existing improvements thereon. Such Airport Layout Plans and each amendment, revision, or modification thereof, shall be subject to the approval of the Secretary which approval shall be evidenced by the signature of a duly authorized representative of the Secretary on the face of the Airport Layout Plan. The sponsor will not make or permit any changes or alternations in the airport or any of its facilities that are not in conformity with the Airport Layout Plan as approved by the Secretary and which might, in the opinion of the Secretary, adversely affect the safety, utility, or efficiency of the airport.

b. If a change or alteration in the airport or the facilities is made which the Secretary determines adversely affects the safety, utility, or efficiency of any federally owned, leased, or funded property on or off the airport and which is not in conformity with the Airport Layout Plan as approved by the Secretary, the owner or operator will, if requested by the Secretary (1) eliminate such adverse effect in a manner approved by the Secretary; or (2) bear all costs of relocating such property (or replacement thereof) to a site acceptable to the Secretary and all costs of restoring such property (or replacement thereof) to the level of safety, utility, efficiency, and cost of operation existing before the unapproved change in the airport or its facilities.

C. The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations 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. FAA Order 5190.6A 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 of receiving a grant of federal funds or the conveyance of federal property for airport purposes. The Order analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

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

D. Enforcement of Airport Sponsor Assurances

FAA Order 5190.6A covers all aspects of the airport compliance program except enforcement procedures.

Enforcement procedures regarding airport compliance matters may be found at *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* (14 CFR Part 16). These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and became effective on December 16, 1996.

VI. ANALYSIS and DISCUSSION

Complainant alleges the Authority has taken steps that will cause Complainant's lease to terminate without an opportunity for renewal, and as a result, the Airport will be restricted to a single entity providing fixed-base operator (FBO) services for general aviation. Complainant states this demonstrates that the Authority unjustly favors scheduled air carriers over general aviation. [FAA DD Exhibit 1, Item 3, page 2.] The Director notes, however, that the Complainant has been the sole fixed-base operator on the Airport since 1978. [FAA DD Exhibit 1, Item 3, exhibit 1, page 1.] This Complaint arose as a result of concerns the Complainant would not be guaranteed the right to

operate as at least one fixed-base operator on the Airport after the Authority completes its Airport Master Plan study.[4]

Complainant's primary objection is that the Authority has failed to negotiate a renewal lease for fixed-base operator services with the Complainant outside of any competitive bidding process. The Authority has not yet determined whether the Airport will have one or more than one fixed-base operator in the future. [FAA DD Exhibit 1, Item 9, page 21.] The record indicates, however, that if the Authority elects to seek proposals for FBO services in the future, it will do so through an open, formal public process. [*See* FAA DD Exhibit 1, Item 9, exhibit 24.]

Complainant alleges violations of eight grant assurances, including 5, *Preserving Rights and Powers;* 8, *Consultation with Users;* 16, *Conformity to Plans and Specifications;* 18, *Planning Projects;* 22, *Economic Nondiscrimination*, 23, *Exclusive Rights*, and 24, *Fee and Rental Structure;* and 29, *Airport Layout Plan*. [FAA DD Exhibit, Item 3.]

Upon review of the allegations and the relevant airport-specific circumstances, the FAA has determined that the following issues require analysis in order to provide a complete review of the Respondent's compliance with applicable federal law and policy:

A. *Issue 1:* Whether the Respondent is in violation of grant assurances 22, *Economic Nondiscrimination*, 23, *Exclusive Rights*, and 24, *Fee and Rental Structure*, by (1) failing to (a) renew Complainant's lease for fixed-base operator services or (b) renew Complainant's fuel permit, and (2) refusing to allow Complainant to expand its facility and extend its lease. [FAA DD Exhibit 1, Item 3, page 25, "count one."]

B. *Issue 2:* Whether the Respondent is in violation of grant assurance 5, *Preserving Rights and Powers*, grant assurance 22, *Economic Nondiscrimination*, and grant assurance 23, *Exclusive Rights*, by limiting flight support services for general aviation users to a single entity. [FAA DD Exhibit 1, Item 3, page 30, "count two."]

C. *Issue 3:* Whether Respondent is in violation of grant assurance 29, *Airport Layout Plan*, by inappropriately converting space designated as aeronautical to nonaeronautical purposes or by permitting changes that would adversely affect the safety, utility, or efficiency of the Airport. [FAA DD Exhibit 1, Item 3, page 30, "count three."]

D. *Issue 4:* Whether Respondent is in violation of grant assurances 16, *Conformity to Plans and Specification*, and 18, *Planning Projects*, by failing to execute the Airport Master Plan project in accordance with the plans, specifications, and schedules approved by the Secretary. [FAA DD Exhibit 1, Item 3, page 31, "count three."]

[4] Complainant states, "the gravamen of this complaint is that the efforts of the Authority to limit the Airport to one [fixed-base operator] and to make that [fixed-base operator] an entity other than [Complainant], at present and for the foreseeable future, is inconsistent with applicable federal law, FAA policy, and the Authority's federal obligations." [FAA DD Exhibit 1, Item 3, page 3.]

E. *Issue 5:* Whether Respondent is in violation of grant assurance 8, *Consultation with Users*, by failing to undertake reasonable consultation with affected airport users during the development of the Airport Master Plan. [FAA DD Exhibit 1, Item 3, page 31, "count three."]

F. *Issue 6:* Whether Respondent is in violation of grant assurance 22, *Economic Nondiscrimination*, by imposing unreasonable requirements on the Complainant. [FAA DD Exhibit 1, Item 3, page 33, "count four."]

G. *Issue 7:* Whether Respondent is in violation of grant assurance 22, *Economic Nondiscrimination*, by allowing non-tenant aeronautical service providers to engage in ground handling and related aeronautical services in direct competition with the Complainant without requiring those entities to meet applicable terms and conditions as imposed on the Complainant. [FAA DD Exhibit 1, Item 3, page 34, "count five."]

H. *Issue 8:* Whether Respondent is in violation of grant assurance 24, *Fee and Rental Structure*, by allowing non-tenant aeronautical service providers to engage in ground handling and related aeronautical services without entering into agreements with the Airport or paying fees to the Airport. [FAA DD Exhibit 1, Item 3, page 34, "count five."]

We have conducted our review and analysis to determine whether the Respondent is currently in violation of its federal obligations.

A. Lease Renewal and Facility Expansion

Issue 1: Whether the Respondent is in violation of grant assurance 22, *Economic Nondiscrimination*, grant assurance 23, *Exclusive Rights*, and grant assurance 24, *Fee and Rental Structure*, by (1) failing to (a) renew Complainant's lease for fixed-base operator services or (b) renew Complainant's fuel permit, and (2) refusing to allow Complainant to expand its facility and extend its lease. [FAA DD Exhibit 1, Item 3, page 25, "count one."]

Complainant alleges violations of grant assurances 22, 23, and 24, but does not describe how the Authority has violated each of these grant assurances in *Issue 1*. [FAA DD Exhibit 1, Item 3, page 25.]

(1) Lease and Fuel Permit Renewal

(a) Lease Renewal

Under *Issue 1*, Complainant argues that the Authority has refused to conduct good faith negotiations with Complainant to renew its lease. [FAA DD Exhibit 1, Item 3, page 25.]

The record shows Complainant occupies 11.32 acres at the Airport. Approximately 4.64 acres are on a month-to-month rental arrangement while the remaining is on a long-term lease.

Complainant's current long-term lease was entered into on May 1, 1988, and expires on April 30, 2012. [FAA DD Exhibit 1, Item 3, page 4.] Lease terms permit the Authority to terminate the lease on 180 days notice for any reason other than for allowing another fixed-base operator to use the leased premises. Complainant states this termination provision was included in anticipation that the Airport would be moved to a new location prior to the expiration of the lease. [FAA DD Exhibit 1, Item 3, page 4.]

In addition, two parcels included in the Complainant's total leasehold were acquired through five-year temporary use and occupancy permits. These permits have expired and the Authority has not negotiated a renewal or extension. Complainant continues to occupy this space under a month-to-month rental arrangement. [FAA DD Exhibit 1, Item 3, page 4.]

The record shows the Authority has a Capital Improvement Plan associated with a new Airport Master Plan to expand the holding area and runway on taxiway C. That plan requires relocating the Complainant's current fixed-base operator facility. [FAA DD Exhibit 1, Item 3, exhibit 15, pages 64-65 and 72.] This is a future event that has not yet occurred.

The Authority determined it should not continue negotiations with the Complainant to renew Complainant's lease until the Authority identifies through its planning process whether the fixed-base operator site will be relocated and whether multiple fixed-base operators can be accommodated on the Airport. [FAA DD Exhibit 1, Item 9, pages 12-13.] In the meantime, the Complainant is operating on the Airport under its current lease at its present location.

(b) Fuel Permit Renewal

Under *Issue 1*, Complainant argues the Authority has not renewed its fuel permit, placing the Complainant in technical default on its lease. [FAA DD Exhibit 1, Item 3, page 10.] The Complainant has a fuel storage facility, which it operates by permission but without a fuel permit. [FAA DD Exhibit 1, Item 6, exhibit 1, pages 3-4.]

In 1995, the Port District approved capital improvements to Complainant's leasehold, including plans to build and operate a fuel storage facility. [FAA DD Exhibit 1, Item 3, exhibit 1, page 3.] However, in 1996, the Port District developed a centralized tank farm for jet fuel and advised Complainant by letter March 15, 1996, that its fuel permit[5] was being cancelled pending completion of the Port District's new centralized fuel storage

[5] Tideland Use and Occupancy Permit (TUOP) for fueling operations at San Diego International Airport.

facility.[6] [FAA DD Exhibit 1, Item 9, exhibit 15.] Subsequently, the FAA intervened, and the Port District permitted Complainant to use its own fuel storage facility for aviation fuel. [FAA DD Exhibit 1, Item 3, page 9; and Item 9, page 8.]

Complainant admits that even though neither the Port District nor the Authority renewed Complainant's fuel permit, the Authority has allowed Complainant to continue its fuel storage operation. In fact, Complainant has continued its fuel storage operations for the past 10 years, subject to the payment of fuel flowage fees. [FAA DD Exhibit 1, Item 3, page 10; and Item 9, page 9.] According to the Complainant, operating its fuel farm without a fuel permit places Complainant in technical default on its lease. [FAA DD Exhibit 1, Item 3, page 10.] The Authority states that "neither the Port District nor the Authority has ever claimed that [Complainant] is in default under its lease or threatened to take any action to terminate [Complainant's] lease because [Complainant] does not have a fuel permit." [FAA DD Exhibit 1, Item 9, page 9.]

Director's conclusion:

The Director finds the Complainant is operating on the Airport with a long-term lease that is still valid. The lease does not expire until April 30, 2012. The grant assurances do not obligate the sponsor to renegotiate lease terms early to suit the Complainant. Rather, the grant assurances obligate the Airport to provide airport access to aeronautical users on reasonable, not unjustly discriminatory terms. The Airport Compliance Program deals in current compliance only.[7] Currently, the Complainant has access under terms that were negotiated by the Complainant. If there is a contract dispute regarding the terms of that negotiated agreement, that is a matter to be resolved in State Court. [*See* Jet 1 Center, Inc. v Naples Airport Authority, FAA Docket No. 16-04-03, (January 4, 2005) (Director's Determination).]

The Director finds the Authority is not currently in violation of its grant assurances as a result of failing to renew Complainant's lease prior to its expiration date. The Director also finds the Authority is not currently in violation of its grant assurances as a result of failing to renew Complainant's fuel permit. Complainant presents no support to show the Authority's reluctance to renew Complainant's fuel permit has negatively impacted Complainant's aeronautical operation in any manner. [8]

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[6] The record reflects that all fuel permits were cancelled when the Port District established its centralized fuel farm. [FAA DD Exhibit 1, Item 9, page 9.] Complainant was given the opportunity to become a signatory to the lease as a member of the fuel consortium. [FAA DD Exhibit 1, Item 9, exhibit 15.]

[7] The FAA's primary role is to determine if the airport sponsor acted in a manner consistent with its grant obligations. Conjectures or statements about things that may or may not happen contingent on some future event are not germane to this investigation. [*See* The Aviation Center, Inc. v. City of Ann Arbor, Michigan, FAA Docket No. 16-05-01 (December 16, 2005) (Director's Determination).]

[8] In Skydance Helicopters, Inc. d/b/a Skydance Operations, Inc. v. Sedona Oak-Creek Airport Authority and Yavapai County, Arizona, FAA Docket No. 16-02-02 (March 7, 2003) (Director's Determination), the FAA found the sponsor in violation of its grant assurances where a limited-term licensing requirement in conjunction with a long-term lease could impair the complainant's ability to obtain financing and maintain an adequate revenue stream to service its loans. In the current case, Complainant's operation and financial position have not been negatively impacted by the sponsor's failure to renew the fuel permit.

(2) Facility Expansion and Lease Extension

Under *Issue 1*, Complainant argues that the Authority has refused to conduct good faith negotiations with the Complainant to expand Complainant's facilities. [FAA DD Exhibit 1, Item 3, page 25.] Complainant states it has been trying to expand its operations to meet unmet general aviation demand for over 10 years. [FAA DD Exhibit 1, Item 3, page 26.] Complainant states the Authority has been unwilling to consider Complainant's proposals for improving its fixed-base operation and has created unnecessary delays. [FAA DD Exhibit 1, Item 3, page 28.] In fact, Complainant states the Authority has systematically and continuously taken steps to prohibit Complainant from improving its FBO operations. [FAA DD Exhibit 1, Item 3, page 28.] Specifically, Complainant alleges the Authority has stalled Complainant's request for three additional acres for FBO operations while expanding its own nonaeronautical park-and-ride facilities.[9] [FAA DD Exhibit 1, Item 3, page 28.]

The record shows Complainant proposed facility improvements as early as 1997:

- In 1997, Complainant proposed the private construction and operation of a combined FBO and cargo facility. [FAA DD Exhibit 1, Item 3, page 8.]

- In 1999, Complainant proposed expanding its FBO facility at its existing site. Complainant proposed adding a new corporate terminal and three hangars. [FAA DD Exhibit 1, Item 3, pages 8-9.]

Complainant states it has been unsuccessful over the last decade in getting first the Port District and then the Authority to approve Complainant's proposal to improve its facility and to extend its lease to amortize those improvements. [FAA DD Exhibit 1, Item 3, page 8.] The record shows, however, that the Complainant did obtain approval to expand its business and a lease modification in support of these improvements:

- On July 24, 2001, Complainant received concept approval to expand and remodel its restaurant and certain offices. [FAA DD Exhibit 1, Item 9, exhibit 9.]

- On February 5, 2002, the Port District amended Complainant's lease to incorporate approximately 19,000 additional square feet of land previously covered by a short-term tideland use and occupancy permit. [FAA DD Exhibit 1, Item 9, exhibits 9, 10, and 11.]

In addition to this lease modification, however, Complainant wanted a lease extension to amortize the cost of the improvements. In anticipation of – but prior to – successful negotiations with the Port District to obtain the desired lease extension, Complainant demolished its existing terminal and restaurant building. [FAA DD Exhibit 1, Item 3,

[9] The Authority denies it has expanded its park-and-ride facilities. [FAA DD Exhibit 1, Item 9, page 20.] Complainant has not presented credible evidence that the Authority converted aeronautical use property to a nonaeronautical use inappropriately or without FAA permission.

pages 8-9.] Complainant halted construction on the new facility in April 2002 when it learned the Port District would not approve the desired lease extension. [FAA DD Exhibit 1, Item 3, pages 8-9.]

When the Authority took over from the Port District in January 2003, Complainant expected lease discussions to progress more smoothly. [*See* FAA DD Exhibit 1, Item 6, exhibit 1, page 8.] Three months later, though, in March 2003, the Authority notified Complainant it was discontinuing negotiations on a lease extension pending resolution of a $300,000 deficiency identified in a 2001 audit. [FAA DD Exhibit 1, Item 3, page 9, footnote 11; and Item 6, exhibit 1, page 8.] The deficiency was disputed, and the amount was later reduced to $70,000. Complainant's offer to settle for half that amount was initially rejected. In November 2005, the Authority agreed to the settlement amount, pending other conditions.[10] [FAA DD Exhibit 1, Item 3, pages 10-11.] Complainant rejected the conditions. [FAA DD Exhibit 1, Item 6, exhibit 1, page 12.] The Authority ultimately withdrew the conditions and accepted Complainant's payment in final settlement. The Authority considers the matter resolved.[11] [FAA DD Exhibit 1, Item 9, page 10.] Nonetheless, as of the date of this Complaint, Complainant has been unsuccessful in getting the lease extension it requested.

Complainant cites Maxim United, LLC v. Board of County Commissioners of Jefferson County, Colorado, FAA Docket No. 16-01-10, (April 2, 2002) (Director's Determination), (*Maxim United*) to support its contention that the Authority is acting contrary to its federal obligations by delaying action on Complainant's request to improve its facilities. [FAA DD Exhibit 1, Item 3, page 26.] In *Maxim United*, one airport tenant was precluded from self-fueling its aircraft, which is a direct violation of grant assurance 22(f), while other similarly situated airport tenants were permitted to do so pending the adoption and implementation of revised minimum standards. In the current case, Complainant is not precluded from conducting any specific aeronautical activity protected by the grant assurances, nor is the Complainant precluded from engaging in an activity that other similar situated tenants enjoy.[12]

Complainant also cites United States Construction Corp. v. City of Pompano Beach, FAA Docket No. 16-00-12, (August 16, 2001) (Director's Determination) and United States Construction Corp. v. City of Pompano Beach, FAA Docket No. 16-00-12, (July 10, 2002) (Final Agency Decision). [FAA DD Exhibit 1, Item 3, page 27.] In *United States Construction*, the complainant was effectively denied a lease and access to the airport to

[10] Settlement was conditioned on Complainant's acknowledging that the original audit liability was based on certain lease provisions. [FAA DD Exhibit 1, Item 3, page 11.]

[11] Complainant states the Authority stated orally in January 2006 that it would withdraw its condition, but Complainant has not received written confirmation that the 2001 audit is closed. [FAA DD Exhibit 1, Item 3, page 11.] The Authority states in its Answer that it "considers this matter to have been resolved." [FAA DD Exhibit 1, Item 9, page 10.]

[12] Complainant acknowledges there are no similarly situated tenants at the Airport. [FAA DD Exhibit 1, Item 11A, page 22.]

establish an aeronautical business. In the current case, Complainant Jimsair Aviation Services, Inc. has a lease and is operating on the Airport as the sole fixed-base operator.

In addition, Complainant cites Pacific Coast Flyers, Inc. v. County of San Diego, FAA Docket No. 16-04-08 (July 25, 2005) (Director's Determination), to argue that entering into a 30-year long-term lease is not necessarily a violation of the sponsor's federal grant assurances. Neither is it an obligation. The Director notes Complainant is currently operating under a 24-year long-term lease that was entered into on May 1, 1988, and expires on April 30, 2012. [FAA DD Exhibit 1, Item 3, page 4.]

Director's conclusion:
Complainant's failure to obtain additional acreage or to secure its desired lease extension is not sufficient, alone, to show the Authority acted contrary to its grant assurances. The record shows the Port District did work with the Complainant to approve facility improvements and to amend Complainant's lease to accommodate the Complainant's requested improvements. The record also shows the Authority ceased negotiations with the Complainant for cause when it was discovered through an audit that the Complainant had a financial deficiency. It is not imprudent for a sponsor to require resolution of outstanding financial matters prior to entering into additional financial arrangements with the same airport tenant. [*See* BMI Salvage Corporation & Blueside Services, Inc. v. Miami-Dade County, Florida, FAA Docket No. 16-05-16, (July 25, 2006) (Director's Determination).] This is a business decision of the airport sponsor and not a violation of grant assurances.

While resolution of the audit issue was still pending, the Authority began an Airport Master Plan process that could require the relocation of Complainant's fixed-base operator site. The Authority states it determined not to continue its negotiations with Complainant until the Authority has clear direction on whether the fixed-base operator facilities will need to be relocated and whether multiple fixed-base operators can be accommodated on the Airport. [*See* FAA DD Exhibit 1, Item 9, pages 12-13.]

The Authority states the Complainant's present location has prevented the Airport from implementing a standard separation distance between Runway 9-27 and Taxiway C for the safe and efficient circulation of aircraft. [FAA DD Exhibit 1, Item 9, page 19.] The Authority further states that the proximity of Complainant's present facilities to Taxiway C and the Runway 27 end causes taxiing aircraft to direct high velocity jet blast onto the general aviation apron. [FAA DD Exhibit 1, Item 9, page 20.]

Under these circumstances, the Director concurs with the Authority that it would be unwise to negotiate a lease extension prematurely for a facility expansion when the facility may need to be relocated.

The Director notes, however, that the Authority may not generally restrict airport access to a single fixed-base operator if space is available and more than one qualified provider is willing to establish fixed-base operator facilities. To do so could result in a violation of grant assurance 23, *Exclusive Rights*. An exception may exist if the airport sponsor

could demonstrate that it would be unreasonably costly, burdensome, or impractical for more than one fixed-base operator to provide services and if allowing more than one fixed-base operator would require the reduction of space leased pursuant to an existing agreement. [*See* FAA Order 5190.6A, *Airport Compliance Requirements*, October 2, 1989, paragraphs 3-8 and 3-9(b).] In this case, the Authority is in a planning mode and has not artificially restricted access to a single fixed-base operator. While the Complainant is currently the sole fixed-base operator on the Airport, that situation occurred as a result of market forces in the 1960's and 1970's rather than through the design or actions of the Authority. [FAA DD Exhibit 1, Item 3, page 4.]

At the present time, the Complainant does have access on the Airport to conduct its fixed-base operator business; there is no allegation from a second qualified fixed-base operator that it requested and was denied reasonable access.[13] As noted previously, the Airport Compliance Program deals with current compliance only.

Director's conclusion on Issue 1:
The Director finds the Authority is not currently in violation of grant assurances 22, 23, or 24 as a result of failing to renew Complainant's lease or fuel permit or failing to approve Complainant's expansion plans with an accompanying lease extension.

Grant assurance 22, *Economic Nondiscrimination*, obligates the airport sponsor to make the airport available to aeronautical users on reasonable terms that are not unjustly discriminatory. The Complainant is operating on the Airport under a combination of a long-term lease and month-to-month rentals. Complainant has not demonstrated that the terms under which the Complainant is operating are unreasonable or unjustly discriminatory under the circumstances at the Airport.

Grant assurance 23, *Exclusive Rights*, prohibits the airport sponsor from granting one tenant a right to operate on the airport while excluding other aeronautical tenants from operating on the airport in the same manner. Complainant argues that it has been trying to expand its operations to meet unmet general aviation demand. [FAA DD Exhibit 1, Item 3, page 25.] This statement is not sufficient to demonstrate that one aeronautical tenant – or a group of aeronautical tenants – has been granted an exclusive right on the Airport. Complainant has not demonstrated that another aeronautical tenant has been granted the exclusive right to provide a service that Complainant intends to provide. In fact, Complainant has not demonstrated that it has been denied the opportunity to provide any specific aeronautical service. Rather, Complainant argues only that it has been unable to obtain the type of lease it desires to guarantee it will be able to continue its fixed-base operator business on the Airport in the future, regardless of competition.

Grant assurance 24, *Fee and Rental Structure*, obligates the airport to establish a fee and rental structure that will make the airport as self-sustaining as possible under the

[13] While Complainant alleges other potential fixed-base operators have asked to serve at the Airport, only Jimsair Aviation Services, Inc. is listed as a Complainant in this Part 16 action. No evidence is presented to demonstrate Complainant has been denied access. [*See* FAA DD Exhibit 1, Item 11A, page 1.]

particular circumstances at that airport. Complainant does not argue in *Issue 1* that the Authority has established fees and rents that are inconsistent with this grant assurance.

B. Restricting Flight Support Services

Issue 2: Whether the Respondent is in violation of grant assurance 5, *Preserving Rights and Powers*, grant assurance 22, *Economic Nondiscrimination*, and grant assurance 23, *Exclusive Rights*, by limiting flight support services for general aviation users to a single entity. [FAA DD Exhibit 1, Item 3, page 30, "count two."]

Complainant alleges violations of grant assurances 5, 22, and 23, but does not describe how the Authority has violated each of these grant assurances in *Issue 2*. [FAA DD Exhibit 1, Item 3, page 30.] In addition, Complainant argues under *Issue 2* that the Authority has revised its Airport Layout Plan maps to change aeronautical space designated for fixed-base operations to nonaeronautical parking space, thus violating the Authority's obligation to make space available for an additional fixed-base operation. [FAA DD Exhibit 1, Item 3, page 30.] (Complainant does not allege a violation of grant assurance 29, *Airport Layout Plan*, under *Issue 2*.[14] Rather, Complainant argues that the change described by Complainant affects the space available for future fixed-base operations.)

Complainant has expressed concern throughout the pleadings that the Authority is committed to having just one fixed-base operator to serve general aviation at the Airport in the future. (Both Complainant and the Authority agree the Complainant is presently the only fixed-base operator on the Airport.) It is clear from the pleadings that the Complainant wants to guarantee it will be allowed to continue its own fixed-base operator business – whether or not it is the sole fixed-base operator – once the new Airport Master Plan is implemented.

Complainant argues the Authority is "locked into allowing only a single [fixed-base operator] … and everything it has done to date indicates that it wants an operator other than [Complainant] to fill that slot." [FAA DD Exhibit 1, Item 11A, page 3.] Complainant states the Authority has taken "actions to exclude [Complainant] from continuing its [fixed-base operation]." Complainant does not elaborate on the actions it is referring to in the Complaint, nor does it cite documents in the extensive administrative record that would support such a statement. [FAA DD Exhibit 1, Item 3, page 30.] However, the Director may conclude from statements throughout the administrative record that the actions Complainant refers to include the Authority's failure to enter into a new lease with the Complainant or to extend Complainant's current lease. [*See Issue 1* above.]

The Authority denies it has not given adequate consideration to allowing multiple fixed-base operators on the Airport. The Authority states in its Answer to the Complaint, it "has not yet made a decision to relocate [fixed-base operator] facilities or to continue to limit [fixed-base operator] services to a single provider." [FAA DD Exhibit 1, Item 9,

[14] Allegations related to grant assurance 29, *Airport Layout Plan*, are discussed under *Issue 3*.

page 21, #47.] The Authority also denies there is adequate space for a second fixed-base operator on the Airport. [FAA DD Exhibit 1, Item 9, page 21, #43.] Nonetheless, the record does not show that the Authority has committed to the number of fixed-base operators it will have in the future, whether it will be one or more than one.

In fact, the record reflects the Authority's Airport Master Plan identifies one space for a fixed-base operator *with room for other* fixed-base operators. [FAA DD Exhibit 1, Item 3, exhibit 14, page 46.] The record shows that as of June 6, 2005, the Airport Board expected to prepare an Environmental Impact Report (EIR) with a project description for the north side of the Airport that included *at least two* fixed-base operators and air cargo. [FAA DD Exhibit 1, Item 3, exhibit 11, page 63.] In addition, the record shows that as of March 13, 2006, the Authority was considering a proposed airport implementation plan that identified a site of approximately 12.4 acres west of Complainant's existing site as a preferred location for general aviation. The Authority noted this location could accommodate *one or more* fixed-base operators. [FAA DD Exhibit 1, Item 9, exhibit 26, page 2.]

In a Part 16 action, the Complainant has the burden of proof.[15] The Complainant has not presented credible evidence that the Authority has limited flight support services for general aviation users to a single entity.[16] While there is a single entity providing these services today, the Complainant admits market forces caused the number of fixed-base operators to decline from three to one by the late 1970's. [FAA DD Exhibit 1, Item 3, page 4.] The record reflects various entities have expressed interest in developing fixed-base operator services at the Airport, [FAA DD Exhibit 1, Item 3, exhibit 17] but as of

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[15] The FAA makes conclusions of fact and law regarding the Complainant's allegations. Underlying these conclusions is the basic requirement of Part 16 that the Complainant demonstrate that the airport owner or sponsor is violating its commitments to the federal government to serve the interests of the public by failing to adhere to its grant assurances. [*See* Part 16, Sections 16.23 and 16.29.]

It is the Complainant's responsibility to substantiate that the airport owner or sponsor has unreasonably denied access, unjustly discriminated against him or her, granted an exclusive right, or violated some other applicable grant assurance. The FAA *Rules of Practice for Adjudicating Matters at Federally Assisted Airports*, 14 Code of Federal Regulations (CFR), Part 16, Section 16.23, provides, in relevant part, that complaints filed under this subpart shall "Provide a concise but complete statement of the facts relied upon to substantiate each allegation." Additionally, Section 16.29 provides that "In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided under this subpart. Each party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance." Specifically, a claim of unjust discrimination must include a showing that similarly situated users have been treated dissimilarly without adequate justification.

[16] The record shows the Authority issued a Request for Qualifications for fixed-base operation services on March 13, 2006. That document clearly states "The [Request for Qualifications] is not intended to and does not commit the Authority to award a contract or lease to any person or firm…]." [FAA DD Exhibit 1, Item 6, attachment 5A; and Item 9, exhibit 26, page 3.] In addition, this document states the Authority is considering a location that "could accommodate *one or more* [fixed-base] operators." (Emphasis added.) [FAA DD Exhibit 1, Item 9, exhibit 26, page 2.] Yet, in a State Court action brought against the Authority April 28, 2006, Complainant depicted this document as "competing out the sole [fixed-base operator] contract at the Airport." [FAA DD Exhibit 1, Item 9, exhibit 29, #17.] This statement was disingenuous at best.

February 6, 2006, none had submitted an application or business proposal. [FAA DD Exhibit 1, Item 3, exhibit 15, page 75.]

Complainant has not demonstrated that the Authority has currently restricted access. The Complainant has not identified a prospective fixed-base operator that has requested access to the Airport to establish a fixed-base operation and been denied access based on space limitations.[17] Neither can the Complainant demonstrate it has been denied the opportunity to establish its own fixed-base operator business on the Airport. As noted above, the Complainant is operating on the Airport under a lease and a month-to-month rental agreement. Complainant's business, Jimsair Aviation Services, remains the sole fixed-base operator at the Airport.

Complainant is not arguing it has been denied current access. Rather, it is arguing a future action that may or may not take place. To protect its own current business interests, Complainant argues the Authority should negotiate independently with Complainant to renew its lease for fixed-base operator services outside of the bidding process and *then* offer a second fixed-base operator site for competitive bidding. The Authority has declined to negotiate a lease renewal with the Complainant in advance of its current lease expiration date of April 30, 2012, and has provided Complainant with no guarantees it would be selected as a fixed-base operator should the bidding process be implemented. This is not a grant assurance violation. (*See Issue 1* above.)

Director's conclusion on Issue 2:
The Director finds the Authority is not currently in violation of grant assurance 5, 22, or 23 by limiting flight support services for general aviation users to a single entity.

Grant assurance 5, *Preserving Rights and Powers*, obligates the airport sponsor to retain the necessary control and power to make unencumbered decisions affecting the airport. This assurance is not relevant to *Issue 2*, as there is neither information nor documentation presented to the contrary, nor plausible explanation as to application.

Grant assurance 22, *Economic Nondiscrimination*, obligates the airport sponsor to make the airport available to aeronautical users on reasonable terms that are not unjustly discriminatory. Complainant does not argue it has been denied current access. While Complainant might prefer more desirable terms, the record does not substantiate that the terms under which Complainant operates are unreasonable or unjustly discriminatory under the current circumstances at the Airport.

Grant assurance 23, *Exclusive Rights*, prohibits the airport sponsor from granting one tenant a right to operate on the airport while excluding other aeronautical tenants from operating on the airport in the same manner. Complainant provides no evidence the Authority has granted another airport tenant the exclusive right to offer any service the Complainant wants to provide while denying Complainant the same right. In fact,

[17] Even if such were the case, Complainant would not have standing to bring the issue forward in a Part 16 complaint. Only a person directly and substantially affected by the alleged noncompliance may file a complaint under Part 16. [14 CFR § 16.23]

Complainant is the sole fixed-base operator currently on the Airport. The record reflects this occurred as a result of market forces and not by design or actions of the Authority.

C. Airport Layout Plan

Issue 3: Whether Respondent is in violation of grant assurance 29, *Airport Layout Plan*, by inappropriately converting space designated as aeronautical to nonaeronautical purposes or by permitting changes that would adversely affect the safety, utility, or efficiency of the Airport. [FAA DD Exhibit 1, Item 3, page 30, "count three."]

Complainant alleges the Authority inappropriately converted space designated for the aeronautical fixed-base operator to nonaeronautical parking space and made changes to the Airport Layout Plan that would adversely affect the safety, utility, or efficiency of the Airport. [FAA DD Exhibit 1, Item 3, page 30.] Complainant does not identify the areas of safety, utility, or efficiency that are allegedly affected.

Grant assurance 29, *Airport Layout Plan*, obligates the airport sponsor to keep its Airport Layout Plan up to date at all times. An Airport Layout Plan shows the boundaries of the airport, as well as offsite areas owned or controlled by the sponsor. It shows the location and nature of all existing and proposed airport facilities and structures, including runways, taxiways, aprons, terminal buildings, hangars, and roads. It shows all proposed extensions and reductions of existing airport facilities. It also shows the location of all existing and proposed nonaviation areas. The airport sponsor may not make or permit any changes or alternations in the airport or any of its facilities that are not in conformity with the Airport Layout Plan.

The FAA must approve the Airport Layout Plan and any amendments, revisions, or modifications to the plan. If the FAA determines that a change or alteration in the airport or the facilities is inconsistent with the Airport Layout Plan and adversely affects the safety, utility, or efficiency of the airport, the FAA will require the airport sponsor to eliminate any adverse effect in a manner approved by the FAA. [See grant assurance 29, *Airport Layout Plan*.]

Complainant states the Airport Layout Plan presently in effect is dated November 2001 and was revalidated by the FAA in June 2004. [FAA DD Exhibit 1, Item 3, page 12.] Complainant presents no support to show the Authority is currently using Airport property in a manner that is inconsistent with the approved Airport Layout Plan. Complainant argues, however, that the Authority is proceeding with a plan to reallocate space that results in changes to the Airport Layout Plan that would adversely affect the safety, utility, or efficiency of the Airport. [FAA DD Exhibit 1, Item 3, page 30.] Complainant does not elaborate on the alleged adverse impacts, but does admit the current process may not even result in an adopted revised Airport Layout Plan. [FAA DD Exhibit 1, Item 11A, page 11.]

The Authority denies this allegation. [FAA DD Exhibit 1, Item 9, page 21.] The Authority states that the current Airport Layout Plan is dated June 5, 2003, and was

approved by the FAA on that date. The record includes the Airport Layout Plan and the FAA's approval letter, both dated June 5, 2003. [FAA DD Exhibit 1, Item 9, exhibits 22 and 23.] This letter does not identify any issues with safety, utility, or efficiency. The Authority further states that a revised Airport Layout Plan has been submitted to the FAA for review and comment. [FAA DD Exhibit 1, Item 9, page 12.] The Director is confident any issues affecting safety, utility, or efficiency on a prospective Airport Layout Plan will be discovered during the FAA review and will be addressed appropriately. Such a review will also address any areas where the sponsor proposes using aeronautical property for a nonaeronautical purpose.

Complainant states – and the Authority agrees – that the current Airport Layout Plan shows the Complainant's leasehold as the only fixed-base operator site on the Airport. [FAA DD Exhibit 1, Item 3, pages 12-13; and Item 9, page 12.] Complainant does not allege that this depiction is inaccurate or in any way affects the Authority's compliance with grant assurance 29, *Airport Layout Plan*.

The Director finds the Authority is not currently in violation of grant assurance 29, *Airport Layout Plan*, as there is nothing in the record herein to support the allegation that the Authority has inappropriately converted space designated as aeronautical to nonaeronautical purposes or permitted changes that would adversely affect the safety, utility, or efficiency of the Airport.

Director's conclusion on Issue 3:
The Director finds the Authority is not currently in violation of grant assurance 29, *Airport Layout Plan.*

D. Airport Master Plan

There are two issues related to the Authority's Airport Master Plan:

(1) *Issue 4:* Whether Respondent is in violation of grant assurance 16, *Conformity to Plans and Specification*, and grant assurance 18, *Planning Projects*, by failing to execute the Airport Master Plan project in accordance with the plans, specifications, and schedules approved by the Secretary. [FAA DD Exhibit 1, Item 3, page 31, "count three."]

(2) *Issue 5:* Whether Respondent is in violation of grant assurance 8, *Consultation with Users*, by failing to undertake reasonable consultation with affected airport users during the development of the Airport Master Plan. [FAA DD Exhibit 1, Item 3, page 31, "count three."]

Issue 4: Whether Respondent is currently in violation of grant assurance 16, *Conformity to Plans and Specification*, and grant assurance 18, *Planning Projects*, by failing to execute the Airport Master Plan project in accordance with the plans, specifications, and schedules approved by the Secretary. [FAA DD Exhibit 1, Item 3, page 31, "count three."]

Complainant states the Authority has made decisions that are not consistent with the current Airport Layout Plan[18] and Airport Master Plan regarding the relocation of Complainant's fixed-base operations. [FAA DD Exhibit 1, Item 3, page 32.] Specifically, Complainant argues the Authority issued the Notice of Preparation of a Draft Environmental Impact Report (NOP) and Request for Qualifications (RFQ) before examining the feasibility of fixed-base operator facilities in violation of grant assurances 16 and 18. [FAA DD Exhibit 1, Item 3, page 32.]

Complainant acknowledges that the Authority put out its draft airport layout plan for comment under the NOP. [FAA DD Exhibit 1, Item 3, page 32.] The record also shows Complainant's representative had access to the NOP and represented Complainant's interests at Authority staff and board meetings. [FAA DD Exhibit 1, Item 3, exhibit 3, #3.] Complainant's objection is not that it didn't have access to the documents and an opportunity to comment after the fact, but that Complainant was not consulted on the content of the draft airport layout plan in advance of the opportunity to comment along with the rest of the public. [FAA DD Exhibit 1, Item 3, page 32.] This is not a grant assurance violation.

Complainant also acknowledges that the Authority issued a Request for Qualifications (RFQ) on March 13, 2006 asking individuals and firms to submit their qualifications and experience showing their ability to develop and operate a fixed-base operator facility at the Airport. [FAA DD Exhibit 1, Item 3, page 20.] The RFQ specifically states it is "not intended to and does not commit the Authority to award a contract or lease to any person or firm…" In addition, the RFQ describes the existing fixed-base operator site (which is the Complainant's current location) and states future potential airfield improvements may require moving the fixed-base operator facility to a new location. The RFQ identifies a proposed site that it states could accommodate one or more fixed-base operators. [FAA DD Exhibit 1, Item 9, exhibit 26.]

The RFQ appears to be one method by which the Authority is, in fact, examining the feasibility of fixed-base operations in conjunction with planned airfield improvements.

The Complainant asserts the RFQ is designed to seek its replacement. [FAA DD Exhibit 1, Item 3, page 25.] Complainant argues throughout its Complaint that it should be guaranteed the opportunity to continue and even expand its current fixed-base operation without having to compete for the opportunity.

Complainant cites Jim Martyn v. Port of Anacortes, FAA Docket No. 16-02-03, (April 14, 2003) (Director's Determination) in arguing that the Authority should continue its negotiations with Complainant outside of a bidding process. Complainant argues the Authority has an obligation to continue negotiations that predate the issuance of a Request for Proposals (RFP)[19]. [FAA DD Exhibit 1, Item 3, page 29.] In *Martyn*, the

[18] Matters relating the revisions in the Airport Layout Plan are addressed under *Issue 3* above.

[19] The Authority has issued a Request for Qualifications (RFQ). At the time of this Complaint, it had not issued a Request for Proposals (RFP).

complainant was effectively denied a lease and access to the Airport to establish an aeronautical activity. The FAA found the airport sponsor was not justified in denying access to the complainant based solely on the timing of complainant's request. In the current case, Complainant Jimsair Aviation Services, Inc. has a lease and is operating on the Airport as the sole fixed-base operator.

The Authority's federal obligations do not confer onto the Complainant the guaranteed right or privilege to secure a future fixed-base operator site without participating in a bidding process if, indeed, that is the method the Authority chooses to use.

Grant assurance 16, *Conformity to Plans and Specifications*, obligates the airport sponsor to execute its grant-funded project subject to plans, specifications, and schedules approved by the Secretary. Such plans, specifications, and schedules shall be submitted to the Secretary prior to commencement of site preparation, construction or other performance. Complainant is not alleging the Authority has begun construction that is contrary to approved plans. Rather, Complainant is arguing the Authority is not following federal obligations in connection with the planning process. Grant assurance 16 does not apply to airport planning projects undertaken by a sponsor. [*See* airport sponsor grant assurances, Assurance B(3), *Airport Planning Undertaken by a Sponsor*.]

Grant assurance 18, *Planning Projects*, is applicable to the planning process. It lists eight requirements the sponsor must meet. These include:

- executing the project in accordance with the approved program narrative contained in the project application or with approved modifications.

- furnishing the Secretary with periodic reports as required pertaining to the planning project and planning work activities.

- including in all published material prepared in connection with the planning project a notice that the material was prepared under a grant provided by the United States.

- making such material available for examination by the public, and agreeing that no material prepared with funds under this project shall be subject to copyright in the United States or any other county.

- giving the Secretary unrestricted authority to publish, disclose, distribute, and otherwise use any of the material prepared in connection with the grant.

- granting the Secretary the right to disapprove the sponsor's employment of specific consultants and their subcontractors to do all or any part of this project as well as the right to disapprove the proposed scope and cost of professional services.

- granting the Secretary the right to disapprove the use of the sponsor's employees to do all or any part of the project.

- agreeing that the Secretary's approval of the project grant or the Secretary's approval of any planning material developed as part of the grant does not constitute or imply any assurance or commitment on the part of the Secretary to approve any pending or future application for a federal airport grant.

Complainant does not identify which of the eight items it alleges the Authority has violated. Complainant's argument is that the Authority has made changes to the allocation of fixed-base operator space. As noted above, these changes were presented in draft form and made available for comment. In addition, the FAA must approve the Airport Layout Plan and any amendments, revisions, or modifications to the plan before they become final.

Complainant's arguments are difficult to follow. For example, Complainant states the Airport Master Plan process is "still at a very preliminary stage." [FAA DD Exhibit 1, Item 3, page 13.] Complainant also states it is too early to decide whether or not there is space on the Airport for more than one fixed-base operator. [FAA DD Exhibit 1, Item 3, page 32.] Yet at the same time, Complainant devotes a whole argument under *Issue 2*, above, to insisting the Airport does have room for more than one fixed-base operator. How is the Complainant able to make such a determination in advance of the completed Airport Master Plan while asserting the Authority would be unable to make a similar determination?

Regardless of this argument, the record does not support Complainant's contention that the Authority is acting outside of the plans, specifications, and schedules approved by the Secretary.

- The FAA Western-Pacific Region Airports Division approved the Authority's forecasts as the basis for continuing planning at the Airport, including Airport Layout Plan development and environmental analysis of near term Airport development. [FAA DD Exhibit 1, Item 9, exhibit 3.]

- The record shows the FAA approved the current Airport Layout Plan June 5, 2003, [*see* FAA DD Exhibit 1, Item 9, exhibits 22 and 23] and the Authority submitted a revised Airport Layout Plan to the FAA for review and comment. [*See* FAA DD Exhibit 1, Item 9, page 12.]

- The record show a representatives from FAA[20] attended the February 6, 2006, Airport Board Meeting and participated in discussions regarding general aviation and fixed-base operator options. [FAA DD Exhibit 1, Item 3, exhibit 15, page 54.]

- The record also includes a May 2006 draft Environmental Impact Report/Airport Master Plan. [FAA DD Exhibit 1, Item 9, exhibit 4A.]

[20] Mr. Tony Garcia, FAA Western Pacific Region, Airport Compliance Specialist. [FAA DD Exhibit 1, Item 3, exhibit 15, page 54.]

The Authority states it is engaged in "collaborative, orderly and transparent planning with the FAA." [FAA DD Exhibit 1, Item 8A, page 18.] Complainant has not demonstrated otherwise.

Director's conclusion on Issue 4:
The Director finds the Authority is not currently in violation of grant assurance 16, *Conformity to Plans and Specification*, or grant assurance 18, *Planning Projects*, by failing to execute the Airport Master Plan project in accordance with the plans, specifications, and schedules approved by the Secretary.

Issue 5: Whether Respondent is in violation of grant assurance 8, *Consultation with Users*, by failing to undertake reasonable consultation with affected airport users during the development of the Airport Master Plan. [FAA DD Exhibit 1, Item 3, page 31, "count three."]

Complainant states the Authority has been working on the Airport Master Plan for the past 15 years without meaningful consultation with affected airport users.[21] [FAA DD Exhibit 1, Item 3, page 6; and Item 11A, page 4.] Complainant admits the Authority "held a few public meetings" on the Airport Master Plan, but states there was no real opportunity for interested parties to participate effectively. Complainant states the Authority staff merely presented their final conclusions without consideration or input from stakeholders and that the Authority rejected or ignored direction from the Airport Board that conflicted with the Authority's conclusions. [FAA DD Exhibit 1, Item 11A, page 5.]

At a June 6, 2005, Airport Board Meeting, the Authority's Vice President for Strategic Planning[22] stated the Airport Master Plan presentation was the culmination of six months' effort to solicit input from the public, airport tenants, stakeholder, and regional agencies. [FAA DD Exhibit 1, Item 3, exhibit 11, page 46.] At that meeting, the Authority's Manager of Airport Planning[23] stated that the Authority would be developing the project description for the proposed fixed-base operator area for the Environmental Impact Report and would give it to the Operations Committee for review and comment. [FAA DD Exhibit 1, Item 3, exhibit 11, page 60.]

The Manager of Airport Planning also stated "as required by both state and federal law, we would include all of the parties that have expressed an interest, all of the agencies that have an interest or are stakeholders in the process – certainly all the community advisory committees and groups that surround San Diego International Airport, all the agencies that we have coordinated with and will continue to coordinate with – would all receive notice of the scoping, and we would accommodate their involvement in the scoping process." [FAA DD Exhibit 1, Item 3, exhibit 11, page 66.]

[21] The administrative record shows the Authority received federal grants to conduct and update its Airport Master Plan study in fiscal years 2004 and 2005. [FAA DD Exhibit 1, Item 2, page 4.]

[22] Ms. Angela Shafer-Payne [*See* FAA DD Exhibit 1, Item 9, exhibit 25.]

[23] Mr. Ted Anasis [*See* FAA DD Exhibit 1, Item 9, exhibit 25.]

The Authority noted that the Airport Master Plan process "is an open, public process" and indicated the Authority welcomed the participation of any member of the public, including all prospective fixed-base operators that have indicated an interest in providing services at the Airport. [FAA DD Exhibit 1, Item 9, exhibit 24.] The record shows the public attended meetings and had access to documents through the Airport's web site prior to meetings. [*See* FAA DD Exhibit 1, Item 3, exhibit 17, January 12, 2006, letter from Gibbs Flying Service, Inc.] The record also indicates there has been media coverage of the airport planning process and that issues impacting the Airport Master Plan were voted on in a public election. [FAA DD Exhibit 1, Item 3, exhibit 2, page 4]

Complainant states the Authority has changed the allocation of fixed-base operator space in the Airport Layout Plan through the Airport Master Plan process without Complainant's participation and without consultation with other affected general aviation users.[24] [FAA DD Exhibit 1, Item 3, page 13.] Complainant argues that it had no opportunity to participate in the reallocation planning.

The record shows, however, the Complainant has been active in voicing its opinion regarding proposed changes affecting the fixed-base operator site both directly and through consultants and other representatives. For example:

- May 20, 2005, Complainant attended a meeting with Authority staff and other airport tenants to begin discussions with north-side tenants regarding their competing interests for the air support section of the Airport Master Plan. (Complainant objected that it had expected, but was not given, an additional opportunity for input into the proposed layout for a fixed-base operator site that could accommodate Complainant's expansion proposal separate from the general meeting with all north-side tenants.) [FAA DD Exhibit 1, Item 3, exhibit 10, July 7, 2005 letter.]

- June 6, 2005, representatives for the Complainant[25] attended and spoke at the Authority Board Meeting. Discussions included the purpose of the Environmental Impact Report (EIR), and the relationship of the EIR to Complainant's fixed-base operator site and Complainant's expansion proposal. [FAA DD Exhibit 1, Item 3, exhibit 11, page 55.] The meeting minutes reflect Complainant had met earlier with Authority staff to talk about ensuring Complainant's plan would be included in the EIR. [FAA DD Exhibit 1, Item 3, exhibit 11, pages 55, 72-74.] The record indicates it was not. [*See* FAA DD Exhibit 1, Item 3, exhibit 2, page 5.]

[24] The revision of the Airport Layout Plan is discussed above under *Issue 3*.

[25] Ms. Lee Burdick, Director of Government Affairs and General Counsel for Jimsair Aviation Services, and Jack Monger, President and founder of The Monger Company. [FAA DD Exhibit 1, Item 3, exhibit 11, page 71 and 74.]

- July 18, 2005, Complainant met with Authority staff to review the proposed design and layout of the airport support areas of the proposed Airport Master Plan, but argues its input was not incorporated into the presentation. [FAA DD Exhibit 1, Item 3, exhibit 2, page 6.]

- August 2005, Complainant retained an industry expert[26] to represent the Complainant in matters regarding the Airport Master Plan. This industry expert had access to and analyzed the Notice of Preparation of a Draft Environmental Impact Report (NOP), the revised NOP, drawings of available land, and an analysis of Complainant's proposed expansion project benefits. This industry expert represented Complainant at Authority staff and board meetings. [FAA DD Exhibit 1, Item 3, exhibit 3, #3.]

- September 26, 2005, Complainant's industry expert made a presentation on behalf of the Complainant to the Authority's Operations and Facilities Committee arguing that a single fixed-base operator is not *per se* in violation of the sponsor's federal obligations. [FAA DD Exhibit 1, Item 3, exhibit 3, #5.]

- At the November 21, 2005,[27] Operations and Facilities Committee Meeting, Complainant addressed the legal and factual issues raised by the Authority's presentation regarding fixed-base operations at the Airport. [FAA DD Exhibit 1, Item 3, exhibit 2, page 8.]

- January 19, 2006, another consultant[28] made a presentation to the Operations and Facilities Committee on behalf of the Complainant resulting in numerous questions and answers, but not leading to the Complainant's intended goal of having the Authority negotiate an agreement with Complainant outside of any request for proposals (RFP) process. [FAA DD Exhibit 1, Item 3, exhibit 3, #7.]

- February 6, 2006, Complainant's representative[29] made a presentation at the Authority Board Meeting encouraging Authority staff to extend Complainant's existing lease and provide for relocation of Complainant's fixed-base operator site. [FAA DD Exhibit 1, Item 3, exhibit 15, pages 71-77.] At this meeting, several fixed-base operator representatives from other companies opposed the motion to resume good faith negotiations with Complainant. [*See* FAA DD Exhibit 1, Item 3, exhibit 2, page 9; and Item 3, exhibit 17.]

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[26] Mr. Jeff A. Kohlman, principal in Aviation Management Consulting Group, Inc. (AMCG). [FAA DD Exhibit 1, Item 3, exhibit 3.]

[27] The record lists the date as November 21, 2006. However, the document in which this date was listed was executed on April 9, 2006. In addition, this Complainant was filed in April 2006. Therefore, we concluded the actual date was intended to be shown as November 21, 2005. [*See* FAA DD Exhibit 1, Item 3, exhibit 2, page 8.]

[28] Mr. Kevin Kennedy, a former airport compliance officer for the FAA, was hired by AMCG to represent Complainant's interests. [FAA DD Exhibit 1, Item 3, exhibit 3, #7.]

[29] Ms. Burdick [FAA DD Exhibit 1, Item 3, exhibit 15, page 71.]

Complainant alleges that while the current Airport Master Plan process appears to be addressing the Airport's long-term needs, the Authority is failing to address general aviation's current unmet demand and short-term needs. [FAA DD Exhibit 1, Item 3, page 3; and Item 11A, page 5.] Complainant argues it was not consulted in developing a detailed map of a proposed location for a fixed-base operator facility. As a result, the parcel included on the map would not accommodate the Complainant's future expansion plans. [FAA DD Exhibit 1, Item 3, exhibit 2, page 5.]

Complainant's objection to the Airport Master Plan process is that the process is taking longer than the Complainant believes is appropriate and is being used as an excuse to defer entering into negotiations with the Complainant to expand its fixed-base operator business. [*See* FAA DD Exhibit 1, Item 3, exhibit 2, page 3.] In addition, the process may result in Complainant having to compete with other interested providers for a fixed-base operator site. Complainant wanted the Airport Master Plan process environmental impact review (EIR) to include Complainant's site, but it did not. [FAA DD Exhibit 1, Item 3, exhibit 2, page 5.]

Grant Assurance 8, *Consultation with Users*, does not obligate the airport sponsor to bend to the will of one or more airport tenants.[30] Rather, its states the airport sponsor must undertake "reasonable consultation with affected parties using the airport…" The record shows complainant had many opportunities to participate in the planning process. The fact that the Authority did not embrace the Complainant's wishes is not a grant assurance violation.

Director's conclusion on Issue 5:
The Director finds the Authority is not currently in violation of grant assurance 8, *Consultation with Users*, by failing to undertake reasonable consultation with affected airport users during the development o the Airport Master Plan.

E. Requirements on Complainant's Business

Issue 6: Whether Respondent is in violation of grant assurance 22, *Economic Nondiscrimination*, by imposing unreasonable requirements on the Complainant. [FAA DD Exhibit 1, Item 3, page 33, "count four."]

Complainant argues Respondent has imposed unreasonable and irrelevant conditions on it, including (1) establishing unwarranted concession and fueling fees, (2) initiating price controls on both aeronautical and nonaeronautical services, (3) changing requirements after construction had begun, and (4) requiring an economic benefits analysis. [FAA DD Exhibit 1, Item 3, page 33.]

[30] A sponsor is not required to develop any and all parcels of land in a manner consistent with the wishes of any one party, but rather may exercise its proprietary rights and powers to develop and administer the airport's land in a manner consistent with the public's interest. [*See* Santa Monica Airport Association, Krueger Aviation, Inc. and Santa Monica air Center v. City of Santa Monica, FAA Docket No. 16-99-21 (February 4, 2003) (Final Decision and Order).]

(1) Concession and Fuel Flowage Fees

(a) Concession Fees

Complainant alleges it was assessed a concession fee for third-party companies operating on the Complainant's premises and already paying a concession fee themselves. This concession fee was assessed as part of an audit in May 2001 when the Port District was the airport sponsor. [FAA DD Exhibit 1, Item 3, page 10.] The deficiency was disputed; the matter has since been resolved. [FAA DD Exhibit 1, Item 9, page 10.] Complainant does not state that the Authority is currently assessing such a fee or that concession fees assessed by the Authority currently are unreasonable or discriminatory.

(b) Fuel Flowage Fees

Complainant alleges the Authority assessed a higher fuel flowage fee on the Complainant than on other tenants on the Airport. The fuel flowage fee has been five cents ($.05) per gallon. Complainant states it has paid that amount to the Authority. However, Complainant alleges that since Complainant is operating under a lease and not under a fuel permit, the Authority determined Complainant should pay a ten percent (10%) concession fee on fuel sales rather than the standard five cents ($.05) per gallon fuel flowage fee. [FAA DD Exhibit 1, Item 3, page 12.]

The Authority admits its internal auditors explored whether Complainant should pay ten percent (10%) of its gross revenues on fuel sales as a concession fee under its lease. Both parties agree this change would have cost the Complainant more than $1 million per year. The Authority states it agreed to accept the five cents ($.05) per gallon fuel flowage fees and considers the matter resolved. [FAA DD Exhibit 1, Item 9, page 11; and Item 3, page 12.]

In the end, Complainant has not paid a higher fuel flowage fee than other tenants on the Airport.

(2) Price Controls

Complainant states the Port District "attempted to amend [Complainant's] lease, without [Complainant's] consent to incorporate price controls" in 2002. [FAA DD Exhibit 1, Item 3, page 11.] Complainant states it did not sign the lease amendment that would have added these price controls. [FAA DD Exhibit 1, Item 11A, page 16.]

The Authority states the proposal to insert price control provisions was added when Complainant proposed an amendment of its own to increase a buy-out provision. [FAA DD Exhibit 1, Item 9, page 10.] It is not unusual for both parties to a lease amendment to propose additional provisions. Nonetheless, Complainant rejected the Port District's proposal. The Authority states Complainant's lease has never contained price control provisions. [FAA DD Exhibit 1, Item 9, page 11.]

(3) Changing Requirements

Complainant states the Authority changed requirements after construction had begun on (a) Complainant's fuel farm and (b) Complainant's terminal/restaurant construction efforts. [FAA DD Exhibit 1, Item 3, page 33.]

(a) Fuel Farm

Complainant states it received permission to build and operate its own fuel storage facility in 1995. Then, three months after construction was completed, the Port District granted a consortium of airlines the exclusive right to operate a fuel farm. Complainant was informed it would need to store all its fuel in this facility. [FAA DD Exhibit 1, Item 3, page 9.]

The FAA intervened, citing a violation of grant assurance 23, *Exclusive Rights.*[31] As a result, Complainant was permitted to continue using its own fuel storage tanks. [FAA DD Exhibit 1, Item 3, page 10.]

The Complainant's fueling operation was not adversely affected. Complainant continues to operate its fuel storage facility.

(b) Terminal/Restaurant Construction

In 1997, Complainant proposed the private construction and operation of a new combined fixed-base operation and cargo facility. [FAA DD Exhibit 1, Item 3, exhibit 1, page 4.]

In 1999, Complainant proposed to upgrade and expand its fixed-base operator facilities only. The combined upgrade proposal and expansion plan proposed to build a new terminal facility, restaurant, hangars, vehicle parking and aircraft ramp area and to incorporate three additional acres. [FAA DD Exhibit 1, Item 3, exhibit 1, page 4.] Later,[32] the Port District asked Complainant to separate the upgrade proposal (encompassing the new terminal and restaurant facility) from the expansion project (which was adding three new acres for three new hangars). [FAA DD Exhibit 1, Item 3, exhibit 1, page 7.]

The record reflects that lease negotiations related to this construction plan had not begun in earnest as of September 2000. [FAA DD Exhibit 1, Item 3, exhibit 1, page 5.]

On March 29, 2001, Complainant was asked to provide a facility business plan to support the proposed upgrade and expansion. [FAA DD Exhibit 1, Item 3, exhibit 1, page 6.]

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[31] The FAA noted that in establishing the centralized fuel farm, the Port District also agreed to reimburse Complainant for the expenses it incurred in 1994 to improve and relocate its 15,000-gallon fuel storage tank on its leasehold. As a result, the FAA determined the Port District was not in violation of grant assurance 22, *Economic Nondiscrimination*. [*See* FAA DD Exhibit 1, Item 3, exhibit 6, page 2.]

[32] June 14, 2001.

On July 20, 2001, the Port District acknowledged Complainant had submitted a proposal to remodel the existing restaurant and office facilities. The proposed project was expected to have no fiscal impact on the Port District and was to be accomplished within the existing leasehold property. [FAA DD Exhibit 1, Item 9, exhibit 5; and Item 9, exhibit 7.] On July 24, 2001, the Port District Board granted concept approval to the upgrade project. [FAA DD Exhibit 1, Item 9, exhibit 7; and Item 9, exhibit 8.]

On February 5, 2002, the Port District amended Complainant's lease at Complainant's request to incorporate approximately 19,000 square feet of land previously covered by a short-term tideland use and occupancy permit to accommodate the construction improvements in the upgrade project. [FAA DD Exhibit 1, Item 9, exhibits 9, 10, and 11 and exhibit 6.]

On February 19, 2002, Complainant began demolition of its terminal and restaurant building. [FAA DD Exhibit 1, Item 3, exhibit 1, page 7.] No lease extension had been negotiated at this time.

The record reflects lease discussions proceeded until April 3, 2002, when the Complainant was informed it would not be getting a lease extension for the upgrade construction. [FAA DD Exhibit 1, Item 3, exhibit 1, page 7.] As a result, Complainant ceased construction on its terminal and restaurant facility. [FAA DD Exhibit 1, Item 3, exhibit 1, page 8.]

On July 31, 2002, the Port District noted Complainant had, in fact, requested changes to its lease to accommodate the proposed remodel. These included a request to add one-third acre of land to their existing leasehold, which was approved by the Port District Board, and a lease modification to increase the buyout clause to cover the additional investment, which was also approved. The Port District noted it was unable to provide clean Estoppel Certificates for the lender because Complainant had an unresolved audit deficiency. [FAA DD Exhibit 1, Item 9, exhibit 6.]

The Port District indicated on July 31, 2002, that it would begin negotiations for Complainant's expansion project, which was the second phase of the proposal, as soon as the audit deficiency was resolved. [FAA DD Exhibit 1, Item 9, exhibit 6.]

Lease negotiations resumed when the Authority took over the Airport from the Port District in January 2003. [FAA DD Exhibit 1, Item 3, exhibit 1, page 8.] The Authority acknowledged lease negotiations for the proposed upgrade and expansion plans had been put on hold pending the transition of the Airport from the Port District to the Authority and while waiting for the Authority to revisit the Airport Master Plan. [FAA DD Exhibit 1, Item 9, exhibit 18.] However, by March 13, 2003, the Authority advised Complainant that the unresolved audit issue needed to be resolved before Complainant's expansion plan and lease negotiation could move forward. [FAA DD Exhibit 1, Item 3, exhibit 1, page 11.] Again, on August 21, 2003, the Authority

advised Complainant that the unresolved audit deficiency needed to be addressed. [FAA DD Exhibit 1, Item 9, exhibit 18.]

The audit deficiency was not resolved until January 2006.[33] [FAA DD Exhibit 1, Item 3, page 11.]

The record does not support Complainant's contention that the Authority changed requirements after construction had begun on the new terminal and restaurant facility. Rather, the record shows the Complainant planned the demolition of its terminal and restaurant building before a lease extension had been negotiated and before it had secured financing for the entire project cost. [*See* FAA DD Exhibit 1, Item 9, exhibit 9.] Demolition began in February 2002, five months before the Port District indicated it would resume negotiation pending resolution of the audit deficiency[34] and nearly four years before the audit deficiency was resolved. [FAA DD Exhibit 1, Item 3, exhibit 1, page 7.]

(4) Economic Benefits Analysis

Complainant states the Authority required it to submit an economic benefits analysis for its proposed expansion, but did not require the same analysis from other commercial aeronautical tenants. [FAA DD Exhibit 1, Item 3, page 11.]

The Authority admits it requested the economic benefits analysis from Complainant and not from other aeronautical tenants. The Authority states that no similarly situated tenant had proposed a comparable lease extension that might warrant a comparable benefit-cost analysis. [FAA DD Exhibit 1, Item 9, page 11.]

Whether or not to require an economic benefits analysis is an airport business decision. The FAA does not normally intervene in the business decisions of the airport sponsors where grant assurance violations are not at issue. [*See* Jet 1 Center, Inc. v. Naples Airport Authority, FAA Docket No. 16-04-03, (January 4, 2005) (Director's Determination); and also M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board, FAA Docket No. 16-06-06, (January 19, 2007) (Director's Determination).]

[33] Complainant states it had been told that the audit issue was resolved as early as January 28, 2005, and again on March 21, 2005, but then learned the issue was being continued to the Authority's 2006 audit agenda. [FAA DD Exhibit 1, Item 3, exhibit 1, pages 11-12.] Complainant states it has received no written confirmation that the audit has been resolved. [FAA DD Exhibit 1, Item 3, page 11.] Respondent states in its Answer that is "considers this matter to have been resolved." [FAA DD Exhibit 1, Item 9, page 10.]

[34] The Authority points out that Complainant could not have reasonably relied on the July 31, 2002, Port District letter indicating negotiations would resume once the audit deficiency was resolved when demolishing buildings February 19, 2002, five months before that letter was written. [FAA DD Exhibit 1, Item 17, page 3.]

The FAA becomes involved where one tenant is treated substantially differently from another similarly situated tenant. Complainant does not state how other tenants that have not been required to submit an economic benefits analysis are similarly situated to the Complainant. In fact, Complainant states "there are no 'similarly situated' tenants at the Airport to propose a comparable lease extension." [FAA DD Exhibit 1, Item 11A, page 22.]

Grant assurance 22, *Economic Nondiscrimination*, states, in relevant part:

> 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-base operators making the same or similar uses of such airport and utilizing the same or similar facilities. [Assurance 22(c).]

There is only one fixed-base operator on the Airport – that is the Complainant. Complainant states it has been the only fixed-base operator on the Airport since 1978. [FAA DD Exhibit 1, Item 3, exhibit 1, page 1.] The administrative record does not support the contention that Complainant was treated differently from other similarly situated airport tenants with regard to requiring the economic benefits analysis.

Complainant also argues that its economic benefit analysis cost $35,000 and revealed Complainant's proposed expansion would create 75 additional jobs and result in $432,000 in additional revenue annually to the Authority. [35]

The cost of the economic benefit analysis is irrelevant to this determination. Complainant engaged whatever firm and used whatever method it so chose to prepare the economic benefits analysis. The cost was a business decision and a business expense of the Complainant.

After viewing Complainant's economic benefits analysis presentation, the Authority elected not to move forward with negotiations for the expansion project. [FAA DD Exhibit 1, Item 3, page 11.] The Authority states the analysis showed Complainant would pay far less than other tenants have paid or are paying for comparable airport land, but does not elaborate further on its decision regarding the economic benefits analysis. [FAA DD Exhibit 1, Item 9, page 11.]

The Authority's federal obligations do not require it to accept the economic benefits analysis or to make a predetermined decision based on its results. Grant assurance 22 obligates the airport sponsor to treat similarly situated aeronautical tenants in a comparable manner. Complainant has not demonstrated that it has been treated differently from the treatment afforded another similarly situated airport tenant with regard to the economic benefits analysis.

[35] A slide show presentation of the Economic Benefits Analysis is included in the administrative record at FAA DD Exhibit 1, Item 3, exhibit 18.

Director's conclusion on Issue 6:
The Director finds the Authority is not currently in violation of grant assurance 22, *Economic Nondiscrimination*, by imposing unreasonable requirements on the Complainant regarding (1) concession and fueling fees, (2) price controls, (3) construction requirements, and (4) economic benefits analysis.

Complainant did not pay concession fees or fueling fees in excess of what other tenants paid. Price controls were not inserted into Complainant's lease. While the Port District did change requirements concerning a centralized fuel farm after Complainant had constructed it own fuel facility, Complainant prevailed in retaining its own fueling operations. The Port District and Authority did not change requirements after negotiating an agreement with the Complainant for its upgrade proposal and expansion project. On the contrary, Complainant demolished its terminal and restaurant building before finalizing negotiations on the lease adjustments it needed to proceed with the upgrade proposal and expansion project. Complainant acknowledges there are no similarly situated airport tenants that proposed a comparable lease extension, which was the catalyst for the economic benefits analysis.

Complainant cites Cardinal's Pilot Shop v. Chesapeake Airport Authority, FAA Docket No. 16-01-06 (October 22, 2002) (Director's Determination), to support that an airport sponsor may not impose unreasonable and irrelevant conditions. [FAA DD Exhibit 1, Item 3, page 33.] Complainant has not demonstrated, however, that the Authority has effectively imposed unreasonable requirements.

F. Ground Handling Services and Self-sustainability

Issues 7 and 8 are discussed together.

Issue 7: Whether Respondent is in violation of grant assurance 22, *Economic Nondiscrimination*, by allowing non-tenant aeronautical service providers to engage in ground handling and related aeronautical services in direct competition with the Complainant without requiring those entities to meet applicable terms and conditions as imposed on the Complainant. [FAA DD Exhibit 1, Item 3, page 34, "count five."]

Issue 8: Whether Respondent is in violation of grant assurance 24, *Fee and Rental Structure*, by allowing non-tenant aeronautical service providers to engage in ground handling and related aeronautical services without entering into agreements with the Airport or paying fees to the Airport. [FAA DD Exhibit 1, Item 3, page 34, "count five."]

Complainant states the Authority allows several non-tenant aeronautical service providers[36] to engage in ground handling and maintenance services in direct competition

[36] In this Complaint, Respondent uses the term "through-the-fence" operators to refer to non-tenant private aeronautical service providers that perform services on the Airport, including the under-the-wing ground handling and related services. [*See* FAA DD Exhibit 1, Item 9, page 23; Item 17, page 11.] A through-the-fence arrangement generally refers to an agreement that permits access to the public landing area by independent entities or operators offering an aeronautical activity or to owners of aircraft based on land

with Complainant – and at times on Complainant's leasehold[37] – without paying rents or concession fees. [FAA DD Exhibit 1, Item 3, page 12.] Complainant argues this places Complainant at an economic disadvantage. In addition, Complainant argues this practice directly decreases the Airport's potential revenue stream. [FAA DD Exhibit 1, Item 3, page 34.]

The Authority admits it has permitted private aeronautical service providers that are not tenants of the Airport to provide the under-the-wing ground handling[38] and related services to (a) scheduled carriers that are tenants of the Airport and, on occasion, to (b) non-tenant, itinerant aircraft operators that are sponsored by a tenant carrier without requiring these non-tenant aeronautical service providers to enter into agreements with the Airport or pay fees to the Airport. [FAA DD Exhibit 1, Item 9, pages 22-23.]

The Authority argues, however, that Complainant also pays no additional fees to the Airport when it provides the same under-the-wing ground handling and related services as provided by these non-tenant aeronautical service providers to scheduled carriers and non-tenant itinerant aircraft operators sponsored by a tenant carrier. [FAA DD Exhibit 1, Item 9, page 23.]

Grant assurance 22, *Economic Nondiscrimination*, obligates the airport sponsor to make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities. If the Airport sponsor agrees to allow access to these non-tenant aeronautical service providers, then grant assurance 22 obligates the airport sponsor to treat similarly situated aeronautical service providers in the same manner.

In this case, Complainant is a fixed-base operator under contract with the Authority to provide a variety of services, including the under-the-wing ground handling services that are also being offered by the non-tenant aeronautical service providers. For purposes of providing the under-the-wing ground handling and related services referred to in this Complaint, the entities are similarly situated. Both the Complainant and the non-tenant

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adjacent to, but not a part of, the airport property. [*See* FAA Order 5190.6A, *Airport Compliance Requirements*, October 2, 1989, paragraph 6-6.] The Complainant characterizes the non-tenant aeronautical service providers referenced in this Complaint as operating on the Airport and not operating from property adjacent to the Airport. [FAA DD Exhibit 1, Item 11A, page 23.] It may be that these non-tenant private aeronautical service providers are more appropriately classified as Specialized Aviation Service Operators (SASOs). SASOs are sometimes known as single-service providers; they typically offer only a specialized aeronautical service as opposed to the full services offered by a fixed-base operator, such as the Complainant. [*See* FAA Advisory Circular (AC) 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities*, dated August 28, 2006, page 14.] In this determination, we simply describe the referenced entities – whether through-the-fence operators or SASOs – as non-tenant aeronautical service providers.

[37] Although Complainant alleges these non-tenant aeronautical service providers have at times operated from Complainant's leasehold, Complainant provides no documentation to support this allegation.

[38] The "under-the-wing" ground handling service generally includes ground accessed support equipment – such as tow trucks, ground power units, fuel trucks, and lavatory cleaning trucks – specifically to provide service to aircraft.

aeronautical service providers should be expected to meet comparable minimum standards and rules and regulations and be assessed comparable fees for providing the same type of service to scheduled carriers and non-tenant, itinerant aircraft operators sponsored by a tenant carrier.

The FAA recommends the Authority establish minimum standards and rules and regulations that non-tenant aeronautical service providers must meet to be granted access to the Airport to conduct a business. For example, the FAA recommends airport sponsors have a licensing or permitting process in place that provides a level of regulation and compensation satisfactory to the airport for such aeronautical service operators. [*See* Advisory Circular (AC) 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities,* August 28, 2006.]

The non-tenant aeronautical service providers in this case are contractors of the scheduled carriers and non-tenant, itinerant aircraft operators; they have no agreement with the Authority to conduct business on the Airport. The Complainant, on the other hand, is a contractor of the Authority providing a variety of fixed-base aeronautical services to aeronautical users of the Airport. The Complainant is required by its fixed-base operator contract with the Authority to meet Airport minimum standards and rules and regulations in order to conduct its business on the Airport. The non-tenant aeronautical service providers, on the other hand, and at the time this Complaint was filed, are not required to have a contract with the Authority to conduct a business on the Airport and are not required to meet Airport minimum standards and rules and regulations. Both provide the under-the-wing ground handling and related services to scheduled carriers and non-tenant, itinerant aircraft operators sponsored by a tenant carrier. The disparity in requirements each must meet places the Complainant at a competitive disadvantage for providing these services.

Therefore, based on the administrative record, the Director finds the Authority is in violation of grant assurance 22, *Economic Nondiscrimination*, by allowing non-tenant aeronautical service providers to engage in ground handling and related services in direct competition with the Complainant without requiring those entities to meet comparable minimum standards and rules and regulations for providing services on the Airport.

The Director notes the Authority has identified proposed corrective actions for this violation in its pleadings. These actions include:

- Requiring all non-tenant aeronautical service providers to sign an agreement with the Authority before providing services on the Airport.

- Requiring all non-tenant aeronautical service providers to meet all applicable Airport rules and regulations.

- Requiring all non-tenant aeronautical service providers to meet reasonable insurance and indemnification requirements.

- Requiring all non-tenant aeronautical service providers to pay the Authority a specified percentage of the gross revenue derived from designated services provided at the Airport.

[FAA DD Exhibit 1, Item 9, pages 23-24.]

The Director notes that these corrective actions would appear to resolve this issue.

The Authority states it has already begun to implement the voluntary measures proposed regarding this violation. [FAA DD Exhibit 1, Item 17, page 11.] The Authority issued a letter dated July 13, 2006, advising that any person who engages in any business or commercial activity on any facility under the Authority's jurisdiction must have a valid grant, franchise, lease, certificate, or permit from the Authority. The letter further states the Authority "soon" will require business operators who provide aeronautical support services…to execute a license…." [FAA DD Exhibit 1, Item 17, exhibit 36.] The Authority provided a copy of this letter to the FAA in this proceeding, but only the copy addressed to the Complainant. The administrative record does not show that all – or, in fact, any – non-tenant aeronautical service providers received this same letter. In addition, the letter does not provide a date by which these corrective actions will be implemented.

Complainant objects to these corrective measures. Complainant argues it has been allowed to offer these services without rendering an additional fee to the Airport for more than 18 years and, under the terms of its lease, it is not obligated to pay these fees. [FAA DD Exhibit 1, Item 11A, pages 43-44.]

The Authority agrees it has, in the past, allowed Complainant to provide the under-the-wing ground handling and related services that are the subject of this Complaint to tenant airlines or itinerant aircraft at the Airport without paying separate fees to the Airport, even when the Complainant provided such service outside its leased premises. [FAA DD Exhibit 1, Item 17, page 11.]

Complainant's lease, dated June 14, 1988, identifies the Complainant's rights and obligations to provide aeronautical and related services on its leased premises. Those rights and obligations specify ground-handling services including baggage handling, travel services, and aircraft cleaning. The Complainant's lease also states, "Nothing in this lease shall be construed to permit or authorize Lessee to conduct any activities other than on the leased premises or to use any portion of [the Airport] other than the leased premises." [*See* FAA DD Exhibit 1, Item 3, Exhibit 4, pages 8 and 29.]

The Authority indicates in its Rebuttal that it would apply the corrective measures to all non-tenant aeronautical service providers and to the Complainant for "designated service they provide at the Airport on land they do not lease from the Authority." [FAA DD Exhibit 1, Item 17, page 11.] The Authority states Complainant is currently providing the under-the-wing services to at least one tenant airline on ramp space removed from Complainant's leased premises. [FAA DD Exhibit 1, Item 17, page 11.]

Through this Part 16 action, the Complainant brought to our attention the fact that the Authority was allowing competing non-tenant aeronautical service providers to conduct business on the Airport without meeting comparable minimum standards for the type of service conducted. This placed the Complainant at an economic disadvantage for providing those services in violation of grant assurance 22, *Economic Nondiscrimination*. At the same time, the Complainant argued that the Airport was receiving no revenue for allowing these non-tenant aeronautical service providers to conduct business on the Airport.

Grant assurance 24, *Fee and Rental Structure*, obligates the Authority to establish a fee schedule that will make the Airport as self-sustaining as possible under the circumstances at the Airport. The FAA does not determine the appropriate fee schedule to be established and applied to aeronautical service providers at airports. In cases where airport property is leased to a *nonaeronautical* tenant, the FAA may require an appraisal to determine the fair market value of the ground rent. In this case, the non-tenant aeronautical service providers are not leasing Airport property. Rather, the Authority is allowing them to provide the under-the-wing ground handling and related services on the Airport at the request of scheduled carriers and non-tenant, itinerant aircraft operators sponsored by a tenant carrier. Establishing the appropriate fee schedule for this aeronautical activity is an Airport business decision. The FAA does not establish airport fee schedules. While we encourage the Authority to establish minimum standards for non-tenant aeronautical service providers on the Airport, we defer to the Authority to determine what fees to collect for this service and how to structure those fees. As such, the Director finds the Authority is not currently in violation of grant assurance 24.

The Authority has identified proposed corrective actions to the violation of grant assurance 22 and also to Complainant's concern that the Airport receives no revenue from the activities of non-tenant aeronautical service providers on the Airport. With the correction, however, the Complainant finds itself in the position of having to meet additional financial requirements consistent with those being required of all non-tenant aeronautical service providers offering the same type of service conducted from premises not leased by the service provider. The Complainant objects to these additional requirements being applied to it. Complainant pays fees under its contract to the Airport for conducting business on its leased premises on the Airport, including the same types of services offered by the non-tenant aeronautical service providers. In addition, the Complainant notes a history of being allowed to conduct this type of business without paying additional fees both on and off of its leased premises on the Airport.

For the purpose of providing the under-the-wing ground handling and related services, the Complainant has presented a convincing case that it is similarly situated to non-tenant aeronautical service providers offering these same services. Because these competing aeronautical businesses were offering the same services as the Complainant without meeting comparable minimum standards and Airport rules and regulations, we found the Authority in violation of grant assurance 22. Having established that it is similarly situated with these non-tenant aeronautical service providers for purposes of providing

ground handling and support services, Complainant cannot now claim that it is not similarly situated for purposes of having to pay the same fees for the same activities under the same circumstances when they occur off Complainant's leased premises.

For those fixed-base operator services conducted on Complainant's leased premises and specified under its contract with the Authority, the FAA would agree the Complainant is already paying a fee for the right to perform those services. For those aeronautical services not specified by the terms of its lease and performed off Complainant's leased premises and under the same circumstances as the non-tenant aeronautical service providers, the FAA would endorse a plan to equalize fees. The Authority's existing practice has been not to charge a concession fee for those aeronautical service providers of under-the-wing ground handling and related services. Under the proposed corrective action identified in these pleadings, the Authority now proposes to charge a concession fee for these services. As noted earlier, the FAA neither sets nor establishes airport fees for aeronautical services. What fee schedule an airport establishes is an airport business decision. We would endorse any plan that treats all similarly situated providers of this aeronautical service in the same manner.

Director's conclusion on Issues 7 and 8:
The Director finds the Authority is in violation of grant assurance 22, *Economic Nondiscrimination*, by allowing non-tenant aeronautical service providers to engage in ground handling and related services in direct competition with the Complainant without requiring those entities to meet comparable requirements imposed on the Complainant. As noted above, the Complainant and the non-tenant aeronautical service providers are similarly situated in regard to providing the same under-the-wing aeronautical services under the same circumstances. The Authority must treat each party in the same manner for providing these services. The Director notes the Authority has identified proposed corrective actions in the pleadings to resolve this violation.

The Director encourages the Authority to establish minimum standards for non-tenant aeronautical service providers, including a licensing or permitting process. The Director notes the fee structure for aeronautical activities is an airport business decision. As such, the Director finds the Authority is not currently in violation of grant assurance 24, *Fee and Rental Structure.*

In addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. The FAA will consider the successful action by the Airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [*See* Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, (August 30, 2001) (Final Decision and Order).] The Director notes the Authority has identified in the pleadings proposed corrective actions to resolve the violation cited under *Issue 7*. Submission of a corrective action plan that addresses this finding to the satisfaction of the Director within 20 days of receipt of this determination will resolve the matter and the Director will find the violation to be cured.

VII. FINDINGS and CONCLUSIONS

Upon consideration of the submissions and responses by the parties, the entire record herein, applicable law and policy, and for the reasons stated above, the Director of the FAA Office of Airport Safety and Standards finds and concludes as follows:

> The Authority is in violation of grant assurance 22, *Economic Nondiscrimination*, by allowing non-tenant aeronautical service providers to engage in ground handling and related services in direct competition with the Complainant without requiring those entities to meet comparable requirements imposed on the Complainant.

The Director notes the Authority has identified proposed corrective actions in the pleadings to resolve the violation cited. As noted below, submission of a corrective action plan that addresses this finding to the satisfaction of the Director within 20 days of receipt of this determination will resolve the matter and the Director will find the violation to be cured.

The Director finds the Authority is not currently in violation of the remaining seven grant assurances related to allegations in this Complaint.

ORDER

Accordingly, it is ordered that:

1. The Respondent, San Diego County Regional Airport Authority, is required to submit a corrective action plan consistent with the principles discussed herein within 20 days from the date of this Order to the Director, Airport Safety and Standards that explains how the Respondent intends to eliminate the violation cited above and providing a date by which the actions will be accomplished.

2. Failure to submit an acceptable corrective active plan as specified in Ordering paragraph No. 1 may result in the FAA withholding approval pursuant to 49 U.S.C. § 47106(d) of any applications submitted by the Respondent San Diego County Regional Airport Authority, California, for amounts apportioned under 49 U.S.C. § 47114(c) and (d), and/or authorized under 49 U.S.C. § 47115.

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

RIGHT OF APPEAL

If the Authority fails to submit a corrective action plan acceptable to the Director, Office of Airport Safety and Standards, within twenty (20) days after service of the Director's Determination, and the FAA decides to withhold approval pursuant to 49 U.S.C.

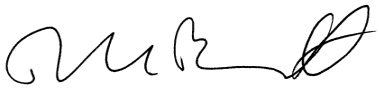
§ 47106(d) of any applications submitted by the Respondent San Diego County Regional Airport Authority, California, for amounts apportioned under 49 U.S.C. § 47114(c) and (d), and/or authorized under 49 U.S.C. § 47115, the FAA will issue an Order to that effect and will offer the San Diego County Regional Airport Authority the opportunity for a hearing under subpart E of Part 16 at such time. Alternatively, pursuant to 14 CFR Part 16, San Diego County Regional Airport Authority may appeal this 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.

The Complainant, if 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.

In the alternative, the Authority and Complainant may submit jointly with an FAA attorney a proposed consent order within twenty (20) days after service of the Director's Determination. [14 CFR § 16.243.]

An extension of time for a reasonable time period to make good faith efforts at resolution may be granted.

This Director's Determination is an initial agency determination and does not constitute a final agency action subject to judicial review under 49 U.S.C. § 46110. [*See* 14 CFR § 16.247(b)(2).]



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

Date: April 12, 2007