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

41 North 73 West Inc. **dba Avitat Westchester** **COMPLAINANT** **v.** **Westchester County, New York** **RESPONDENT**	**Docket No. 16-07-13** Final: June 12, 2008

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.

41 North 73 West, Inc, DBA Avitat Westchester and Jet Systems (Avitat/Complainant) filed a formal Complaint pursuant to 14 CFR Part 16 against Westchester County, New York (County/Respondent), owner and operator of Westchester County Airport (HPN/Airport) in White Plains, New York.

As explained below, the County has established two classes of FBOs at the Airport. The Complainant, Avitat, is one of three of the larger, general aviation fixed-base operators (FBOs) [1] that serve the Airport. These larger-class FBOs generally serve larger corporate and commercial turbo-jet powered aircraft up to the 120,000 lbs. gross take-off weight limit of the Airport. Another class serves smaller, private general aviation aircraft, generally under 12,500 lbs., but up to 50,000 lbs., maximum gross take-off weight.

Avitat asserts that the County provides the smaller-class FBOs preferential financial treatment, as compared to Avitat, in breach of the County's Federal obligations regarding grant assurances 22, 23, 24 and Federal law regarding the collection and spending of

[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]

proceeds from an approved passenger facility charge (PFC).[2] [FAA Exhibit1, Item 1, pp. 1-2]

Based on the Director's review and consideration of the evidence submitted, the administrative record designated at FAA Exhibit 1, the relevant facts, and the pertinent laws and policy, the Director concludes that the Respondent is currently not in violation of grant assurance 22, *Economic Nondiscrimination;* grant assurance 23, *Exclusive Rights*; nor grant assurance 24, *Fee and Rental Structure*, nor Federal law regarding Exclusive Rights or Passenger Facility Charges.

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

II. PARTIES

A. Airport

Westchester County Airport is a public-use, air carrier airport owned by Westchester County, New York. The Airport has property consisting of 702 acres. The Airport is home to approximately 389 aircraft and had more than 160,000 aircraft operations in 2006. FAA records indicate the planning and development of the Airport has been financed with funds provided by the FAA under the Airport Improvement Program (AIP) authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq*. [*See* FAA Exhibit 1, Item 11] Through the County's Master Grant Agreement with the FAA, the County has accepted Federal obligations under grant assurances 22, 23, and 24. [FAA Exhibit 1, Item 1, exhibit 10] The Airport property is fully developed, creating a constrained operating environment. The FBO-leaseholds at issue in this Complaint are located in the southwest side of the airfield in proximity to each other. [FAA Exhibit 1, Item 1, exhibit 3; also, FAA Exhibit 1, Item 9, exh. 12. p. 1]

B. Complainant

Avitat is a corporation having an office and a place of business at Hangar "E" at Westchester County Airport. Avitat operates as a larger-class FBO at the Airport pursuant to two leases it has with the County. [FAA Exhibit 1, Item 1, p. 3] Avitat has been operating at the Airport under a lease since at least 1991. [FAA Exhibit 1, Item 1, exh. 4, p. 2]

[2] 49 U.S.C. § 40117 is the Federal Law creating procedures regarding PFCs. Allegations of violations of the PFC statute or regulation are outside the jurisdiction of 14 CFR Part 16. See Notice of Docketing. [FAA Exhibit 1, Item 2] The Complainant, Avitat, generally alleges that the County granted financial and economic benefits to the smaller-class FBOs that the County did not grant to Avitat. These alleged benefits include a rent that is not based on facilities used (in some cases PFC-financed facilities) by the smaller-class FBOs, but rather on revenue that they generate. [FAA Exhibit 1, Item 9, p. 15] This allegation is an appropriate allegation under Part 16 and the County's grant assurances. It focuses on alleged differences in rights, responsibilities, rents and restrictions to which the parties agreed in 1999 and 2001 for the smaller-class FBOs; and 2005 and 2006 for Avitat. This Director's Determination addresses these issues below.

III. BACKGROUND and PROCEDURAL HISTORY

County Planning for Supporting Light General Aviation at the Airport

In October 1985, Westchester County Board of Legislators (Board) passed a Statement of Airport Policy that guides Airport management in the operation and development of the Airport to this day. In this document, the County put forth its vision for the use of the Airport, stating that the Airport "has been designed for use primarily by general aviation, both private and corporate, light and heavy." [FAA Exhibit 1, Item 6, exh. U, p. 2] As far back as 1985, the County aimed to protect the 'general aviation' character of the Airport, as well as serve the interests of County residents who own and operate small aircraft, [3] designating a location on the Airport "to serve… primarily light general aviation." [FAA Exhibit 1, Item 6, exh. U, p. 4; see also, FAA Exhibit 1, Item 6, p. 10] Prior airport planning documents supported this Statement of Airport Policy's focus on light general aviation, including the Westchester County Airport Master Plan Study dated October 1980 (1980 Master Plan Study). [FAA Exhibit 1, Item 6, exhs. S & T] Specifically, the 1980 Master Plan Study called for development of apron and hangars for light general aviation. [FAA Exhibit 1, Item 6, exh. S, pp.3, 4, 7, 8]

In February 1987, the County continued to address its interest in protecting light general aviation at the Airport, in its Master Plan Update. In the Master Plan Update's Public Comments and Response section, the County stated:

> *The need for improved general aviation facilities is clear. The general aviation facilities currently include no individual hangars for privately-owned aircraft. The FBOs serving general aviation are housed in part in temporary spaces or in dilapidated buildings used for aircraft parking. Some of the apron areas have broken pavement, which could cause damage to aircraft; other aircraft are parked on the grass or dirt….*
>
> *The Master Plan analysis has shown that the two new areas designated for general aviation development will be sufficient to meet the general aviation needs of the airport in the future. It is recognized that in a free market, tie-down and hangar space at the Westchester County airport would go to the "highest bidder," i.e., that the price would increase and that the available space would go to those who are willing to pay the highest rates for these services. It is the County's desire that, to the greatest extent possible, the present mix of based aircraft and transient commercial aircraft remain the same, so as to maintain the character of a general aviation airport. It may therefore be necessary to provide economic protection for the light general aviation sector, as a matter of County policy, in order to maintain that mix.* [FAA Exhibit 1, Item 6, exh. V, p. 7-7]

On May 9, 1991, Westchester County officials circulated an Internal Memo forwarding two letters from general aviation users of HPN, complaining about conditions for general aviation at the Airport. [FAA Exhibit 1, Item 6, exh. RR]

[3] See FAA Exhibit 1, Item 6, exh. I for a list of aircraft registered in Westchester County, New York.

On April 1, 1992, Westchester County issued a Notice to Air Carriers in pursuit of a Passenger Facility Charge (PFC) application to the FAA. The County included in this Notice, a list of projects that could be funded with the proceeds of the PFC, including "Light General Aviation Infrastructure." [FAA Exhibit 1, Item 1, exh. 7, ex. b]

In July 1992, Westchester County submitted its PFC application. The County included in this application, a list of projects that could be funded with the proceeds of the PFC, including "Light General Aviation Infrastructure." [FAA Exhibit 1, Item 1, exh. 8 and Item 6, exh. CC]

On November 9, 1992, the FAA sent a letter to Westchester County approving a PFC, including approval to use PFC-collected monies in the amount of $8,383,000 for the construction of the Light General Aviation (LGA) facilities. [FAA Exhibit 1, Item 1, exh. 9, p. 6 and Item 6, exh. DD, p. 6] Subsequently, the FAA also approved a Finding of No Significant Impact with regard to the FAA's financial participation in a set of projects, including the development of sites for LGA FBOs.[4] [FAA Exhibit 1, Item 6, exh. X, p.1]

County Pursuit of LGA FBO Service Providers at the Airport

On December 8, 1997, Westchester County issued a Request for Proposals (RFP) for the Operation and Management of a Light General Aviation Fixed Base Operation at the Airport. As well as soliciting interest in two specific parcels on the Airport for the use of Light General Aviation fixed-base operators (LGA FBOs), the RFP also characterized the operations requested:

> *Improvements: Commitment from the successful respondent to construct hangar and supply necessary equipment at no cost to the County of Westchester. Services to be provided include:*
>
> *Tiedown*
> *Hangaring*
> *Aircraft Maintenance*
> *Flight School (including ground training)*
> *Charter*
> *Aircraft Management*
> *AvGas fuel and oil sales*
> *Aircraft sales* [FAA Exhibit 1, Item 1, exh.12, p. 5]

The RFP further lists light, general aviation services to be allowed and prohibited:

> *Services offered may include but are not limited to:*

[4] Both parties to this Complaint refer to the FBOs at the Airport that the County designated for light general aviation and restricted to two specific locations at the Airport as 'LGA FBOs.' However, the parties differ in their respective references to other FBOs that are free by the terms of their agreements with the County to service any aircraft at any location at the Airport. The Complainant refers to the unrestricted FBOs as 'Jet FBOs.' The Respondent refers to them as 'Larger GA FBOs.' The history and development of these distinctions are discussed more fully below.

- *Aircraft maintenance*
- *Aircraft sales*
- *Aircraft tiedown*
- *Aircraft hangar accommodation*
- *Aircraft T-hangar accommodation*
- *Pilot Shop*
- *Flight School (including ground school)*
- *Charter*
- *Aircraft management*
- *Aircraft avgas and lubricant sales*
- *Weather briefing facilities*

Services that are prohibited include:

- *Jet grade fuel sales*
- *Accommodation of aircraft over 12,500 lbs. MGTOW with the exception of aircraft managed by the successful respondent. All exceptions are subject to the prior approval of the Airport Manager.*
- *Accommodation of aircraft over 12,500 lbs., MGTOW, without the prior consent of the Airport Manager.*
- *No outside public address system is allowed.* [FAA Exhibit 1, Item 1, exh. 12, p. 6] [See Also, FAA Exhibit 1, Item 6, exh. Z]

In January and February 1998, both Westair and Panorama submitted their RFP Proposals in response to the County's solicitation. [FAA Exhibit 1, Item 6, exh. AA & BB] The County had determined to preclude existing larger FBOs at the Airport (such as the Complainant, Avitat) from participating in the RFP. [FAA Exhibit 1, Item 1, exh. 13 and Item 6, exh. II]

On June 11, 1998, Joel Russell, HPN Manager, wrote an Internal Memo to County DOT Commissioner, Eric B. Langeloh, submitting a proposed fee and rental structure for Light General Aviation (LGA) FBO Rental. The Memo stated:

> *The goal of the RFP is to meet the County's obligation*[5] *to the light general aviation community. The keystone is the establishment of a knowledgeable, viable and healthy FBO operator. The rental schedule must reflect and respect that mission. Utilizing a traditional rental based on square footage would be difficult…. A percentage of gross (receipts) scheme is proposed…. The suggested rate is low. 1) The required use of the land will not develop significant rental revenue. 2) The low rate will allow some return, but will also shield the County from the criticism for gouging the FBO operator or causing gouging to the flying public.* [FAA Exhibit 1, Item 1, exh. 14 and Item 6, exh. JJ]

In July 1999, the County executed leases with Westair Aviation (Westair Lease) [FAA Exhibit 1, Item 1, exhibit 6 and Item 6, exhibit C] and Panorama Flight (Panorama Lease) [FAA Exhibit 1, Item 1, exh. 5 and Item 6, exh. A], collectively, the LGA Leases. The 30-

[5] The FAA believes that this does not refer to the County's Federal obligations.

year LGA Leases were nearly identical to each other, excepting description of parcels, including rent and use requirements. Regarding rent, Article II of the LGA Leases state:

> *Section 2.1 For the purposes of this section, "Basic Business Segments" shall mean the individual revenue generating activities of the operation of the Premises, previously approved by the County, which contribute to the Gross Receipts of the business. Basic Business Segments shall include the following activities:*
>
> - *Aircraft Tiedown, Based and Transient*
> - *Aircraft Hangaring, Based and Transient*
> - *Aircraft Maintenance, including airframe, engine and avionics*
> - *Flight School (including ground training)*
> - *Aircraft Rental*
> - *Aircraft Charter Operations*
> - *Aircraft Management*
> - *AvGas Fuel and Lubricant Sales*
> - *Aircraft Parts Sales*
> - *Pilot Shop Sales*
> - *All other revenue producing activities except as defined in Section 2.2*
>
> *This list of approved Basic Business Segments may be modified only upon the prior written approval of the Airport Manager.*
> *Section 2.1.1 Tenant shall pay as rent a percentage of year-to-date Gross Receipts (measured from the commencement date and each anniversary thereafter) received by the Tenant from the operation of the Basic Business Segments as indicated on Exhibit C-1.*
> *Section 2.1.2 Gross Receipts shall mean all revenues, exclusive of federal, state and local taxes, including sales tax, collected by the Tenant from the operation of the Basic Business Segments.*
> *Section 2.2 For the purposes of this section, "Special Business Segments" shall mean the individual special revenue generating activities of the operation of the Premises, previously approved by the County, which contribute to the Gross Operating Profit of the business. Special Business Segments shall include the following activities:*
>
> - *Aircraft Sales*
> - *Aircraft Charter utilizing ..not based at the Leased Premises.*
> - *Management of aircraft… not based at the Leased Premises.*
>
> *This list of approved Special Business Segments may be modified only upon the prior written approval of the Airport Manager.*
> *Section 2.2.1 Tenant shall pay as rent a percentage of year-to-date Gross Operating Profit (measured from the Commencement Date and each anniversary thereafter) received by the Tenant or the Tenant's subtenants from the operation of the Special Business Segments as indicated on Exhibit C-2. Should the Commencement Date be other than January 1, the Gross Operating Profit for the initial calendar year shall be proportionally adjusted as if it was collected over a twelve (12) month period.*
> [FAA Exhibit 1, Item 1, exhs. 5 & 6, pp. 6-7]

In its Answer, the County states, "For "Basic Business Segments," which includes the required services to be provided under the leases, in years one through ten of their leases Westair and Panorama must each pay as rental: 0.50 percent of their Gross Receipts up to $10,999,000; 5.00 percent of their Gross Receipts between $11,000,000 and $15,999,000; and 8.00 percent of their Gross Receipts over $16,000,000." [FAA Exhibit 1, Item 6, p. 15] [See Also, FAA Exhibit 1, Item 1, exhs. 5 & 6, exhs. C-1 and C-2]

Regarding services, the Article III of the LGA Leases state:

> *Section 3.0 Tenant shall*[6] *occupy and use the Premises for the following purposes and for no other purpose whatsoever:*
>
> *(a) For the operation of a full service Light General Aviation Fixed Base Operation, including, but not limited to:*
>
> *I. Storage and parking of aircraft including (hangars and tie-downs).*
> *II. Aircraft maintenance….*
> *III. Aircraft engine maintenance…*
> *IV. Rental, lease, charter and management of aircraft.*
> *V. Flight instruction including ground school and flight simulation.*
> *VI. Pilot shop operation.*
> *Vll .Sale of aircraft AvGas and lubricants.*
> *Vlll. Sale of aircraft and aircraft parts…..*
>
> *(c) The Tenant agrees, as a condition of this Agreement, that it shall not base (including managed and leased) any aircraft having a maximum gross take-off weight over 12,500 lbs. at the Airport, without the prior consent of the Airport Manager. The Airport Manager hereby expressly consents that the Tenant, as part of its managed or leased aircraft fleet, may base, upon prior written notification to the Airport Manager, up to twelve (12) aircraft having a maximum gross take-off weight over 12,500 lbs. and less than 50,000 lbs.*
>
> *(d) The Tenant agrees, as a condition of this Agreement, that it shall not accommodate any aircraft having a maximum gross take-off weight over 50,000 lbs. at the Airport, without the prior consent of the Airport Manager.* [FAA Exhibit 1, Item 1, exhs. 5 & 6, pp. 11-12]

The LGA Leases emphasized the restriction on 'heavier' general aviation aircraft by citing pavement limitations at Section 24.7:

> *Tenant shall not overload any floor, structure, structural member or paved area on the Premises, or paved area elsewhere on the Airport, and shall repair at Tenant's expense any floor, structure, structural member, or any paved area damaged by*

[6] The County in its Answer considers this provision to require the LGA FBOs to offer these services. [FAA Exhibit 1, Item 6, p. 14] Also, in an internal memo of July 30, 2001, the County states that a similar list of services is required of the LGA FBOs. [FAA Exhibit 1, Item 1, exh. 37]

> *such overloading. It is understood by the parties that the ramp area has been designed for loads up to 50,000 lbs.*[7] [FAA Exhibit 1, Item 6, exhs. A & C, p. 66]

Additionally, the LGA Leases both mention the possibility of the LGA FBOs selling jet fuel. Section 3.6 of the LGA Leases state, "If the percentage of Tenant based aircraft under 12,500 lbs. that utilize jet fuel exceeds 10%, the parties agree to meet to discuss the possibility of the County granting Tenant the right to sell jet fuel." [FAA Exhibit 1, Item 1, exhs. 5 & 6, p. 13] [FAA Exhibit 1, Item 1, pp.11-13; and Item 6, pp.6-8, 13-16, 33]

Events after LGA FBOs began Operations

After the County signed its LGA Leases, on October 26, 2000, the County held a meeting with Westair. Handwritten meeting notes indicate a discussion regarding the possibility of Westair dispensing jet fuel. [FAA Exhibit 1, Item 1, exhibit 16 and Item 9, exh. 8]

In January 2001, the County passed a law authorizing a lease amendment that would begin implementing a voluntary restraint from flying program at the Airport. [FAA Exhibit 1, Item 1, exh.15] Although the law mentions that Panorama has agreed to this Voluntary Restraint From Flying (VRFF) program, Panorama's Lease states:

> *Section 24.16 Tenant shall develop, submit for County approval and abide by an aircraft parking program which incorporates safety and security considerations. As part of this program, aircraft which arrive or depart during the period of Voluntary Restraint from Flying (from 12 midnight to 6:30 a.m.) shall be parked in designated areas only. In addition, infrequent flyers shall be assigned parking spaces closest to any off-site residences.* [FAA Exhibit 1, Item 1, exh. 5, p. 69]

In any case, with regard to the Voluntary Program, the County states in its Answer:

> *When an FBO lease is up for renewal or negotiation, the County asks each FBO whether it will voluntarily include the VRFF provisions in its lease. Whether each FBO's lease has the VRFF terms is subject to the result of arms-length lease negotiations with that particular FBO. The VRFF program is completely voluntary, and each FBO may choose for itself to participate. The County offers FBOs no incentives and imposes no penalties in connection with participation in the program*. [FAA Exhibit 1, Item 6, p. 19]

More recent Larger GA FBO Leases, including Avitat's, include a VRFF provision, requiring lessees to use reasonable efforts to cause FBO customers to comply with the voluntary program and to distribute information to users expressing the need to understand the concerns of the local community. [FAA Exhibit 1, Item 6, exh. E, p. 38; exh. G, p. 21; and exh. H. pp. 24-25] The Larger GA FBO leases, including Avitat's 2005 Lease, were executed between October 2005 and September 2006.

[7] The Director notes that pavements designed for a certain weight (50,000 lbs) may reasonably be managed by an airport sponsor to accommodate some level of aircraft over the design limit, but not unlimited use above the weight-bearing capacity of the pavement.

In the Spring and Summer of 2001, Westair began reviewing their operations and operational needs with the County, including requesting permission to dispense jet fuel to tenants, as well as to retail fuel to transient operators. [FAA Exhibit 1, Item 1, exhs. 18, 20, 34-36 & Item 9, exhs 9, 10] Like Westair, on September 5, 2001, Panorama wrote to the County to request the right to sell jet fuel. [FAA Exhibit 1, Item 1, exhibit 21 and Item 6, ex. KK] [See Also Panorama Lease, FAA Exhibit 1, Item 1, exh. 5, p. 13] On September 7, 2001, Panorama wrote to Joel Russell, HPN Manager providing evidence that some of Panorama's tenants require jet fuel for their aircraft, triggering the criteria for discussion with the County regarding jet fuel sales.[8] [FAA Exhibit 1, Item 9, exh. 3] In the Summer of 2001, the County conducted some internal deliberation regarding the interest of the LGA FBOs in selling jet fuel. [FAA Exhibit 1, Item 1, exh. 19]

As a result of these conversations as set out in the LGA Leases, in Section 3.6, the County did determine to allow jet fuel sales by the LGA FBOs. The letters sent to both Westair and Panorama (2001 LGA Approval Letters), on September 20, 2001, stated:

> *Please use this letter as approval to provide jet fuel at your New Facility under the following conditions:*
>
> *1. (Panorama/Westair) will be granted jet fuel sale authority. (Panorama/Westair) will be allowed to provide jet fuel to:*
>
> - *Based aircraft with a written tiedown, hangar or T-hangar agreement with (Panorama/Westair)*
> - *Aircraft owned or leased by (Panorama/Westair)*
> - *Transient jets which are permitted on the (Panorama/Westair) ramp*[9]
>
> *2. Procedures*
>
> - *A monthly list of aircraft meeting these requirements will be sent to the Airport Manager*
> - *A current copy of the qualifying agreement between (Panorama/Westair) and the aircraft operator will be sent to the Airport Manager.*
>
> *This approval may be revoked by the County of Westchester for any reason upon sixty days notice.* [FAA Exhibit 1, Item 1, exhs. 22 & 23 and Item 6, exhs. B & D]

On March 12, 2002, Westair announced jet aircraft management at the Airport. [FAA Exhibit 1, Item 1, exh. 24]

On September 5, 2002, Joel Russell, HPN Manager, wrote to Westair, denying its request to construct an additional hangar on its leasehold. [FAA Exhibit 1, Item 6, exh. PP]

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[8] The LGA Leases both mention the possibility of the LGA FBOs selling jet fuel. Section 3.6 of the LGA Leases state, "If the percentage of Tenant based aircraft under 12,500 lbs. that utilize jet fuel exceeds 10%, the parties agree to meet to discuss the possibility of the County granting Tenant the right to sell jet fuel." [FAA Exhibit 1, Item 1, exhs. 5 & 6, p. 13]

[9] The LGA Leases refer to an aircraft weight limit of 50,000 lbs. on the LGA leaseholds. The limit to aircraft under 50,000 lbs. is mentioned as a restricted service in Section 3.0 c & d. Also, the LGA Leases refer to the design limit of the apron pavement of the LGA leaseholds as 50,000 lbs. at Section 24.7. [FAA Exhibit 1, Item 6, exhs. A & C, pp. 11, 66]

On March 10, 2003, Panorama wrote to Joel Russell, HPN Manager, to request an exemption from the prohibition of Panorama servicing transient aircraft with a MGTOW[10] of over 50,000 lbs, as prohibited by the LGA Leases without prior consent of the County; and limited by the design weight-bearing capacity of the pavement of its leasehold.[11] [FAA Exhibit 1, Item 1, exh. 25 and Item 6, exh. NN] [See Also, Section 3.0 of LGA Leases, FAA Exhibit 1, Item 1, exhs. 5 & 6, pp. 11-12]

On July 2, 2003, Peter Scherrer, Asst. HPN Manager, wrote to Panorama, denying Panorama's request to sell jet fuel to transient aircraft over 50,000 lbs. The County stated:

> *Your request was reviewed by the Westchester County Department of Transportation and Airport Administration. The requested change to your lease limitation is denied, based on the fact that the original Request for Proposal (RFP) and the Environmental Impact Statement for both Light General Aviation Facilities prohibits the parking or servicing of aircraft in excess of 50,000 lbs. MGTOW.* [FAA Exhibit 1, Item 1, exh. 26 and Item 6, exh. OO]

A year later, on May 26, 2004, Joel Russell, HPN Manager, wrote to Westair, denying a Westair request, stating:

> *We are in receipt of your letter of May 4, 2004 concerning fueling operations.*
> *We are unable to agree with your request to fuel off your ramp.*[12] [FAA Exhibit 1, Item 6, exh. QQ]

On March 14, 2005, Westair wrote to Joel Russell, HPN Manager, with an extensive proposal to modify Westair's Lease. The letter stated:

> *We would like to thank you for your efforts in allowing us to begin a process to help our operation at the airport. At the time 9-11 happened we faced losing our operation if not for County D.O.T. and your office. You realized the weak financial position Light General Aviation was in before 9-11, and reacting quickly to allow us to sell turbine fuel made it possible for [sic]to have these further conversations.…*
> *We would like to step back for a minute to recognize major financial changes to date. The events of 9-11 cost our operation almost three hundred thousand dollars in extra debt…. The number of Light G.A. aircraft based at our facility has dropped 35 aircraft since November 1999. This decline in aircraft will continue to happen since the average age of our tiedown customer is over 60 years old.* [FAA Exhibit 1, Item 1, exh. 28, p. 1 and Item 6, exh. LL, p. 1]

Westair continued by listing proposed modifications to the Westair Lease, including some discussion of rent adjustments:

[10] Maximum Gross Take-off Weight.
[11] See footnote 7.
[12] The record does not include a copy of Westair's May 4, 2004, letter.

1. *Our Master lease has provisions to limit the weight of aircraft to be based or transit at our facility. We feel the weight restriction should be lifted and aircraft should have the ability to be based at our facility without reference to being managed by Westair. …*

2. *… Our sale of turbine fuel is also limited to our leasehold. We request to have that restriction removed to allow fuel sales to be permitted anywhere at HPN. This would increase fuel sales as well as introduce other based tenants and operators to our many services.*

3. *We have asked to build an additional hangar facility. With the master lease revisions a second hangar would greatly benefit our operation. Revenues from subtenants along with added services would also increase revenues to the County. …*

5. *The addition of more T-Hangars. The demand for these units has not dropped...*

How do we do this? All of the modifications above require certain restrictions modified, or none of them will work. Our goal is to create long term financial stability. We would propose that we section off certain areas of the leasehold to accommodate these changes and in essence have a formula to pay rent for that area. This situation would allow for the majority of the leasehold to maintain Light General Aviation operations.

We realize segmenting the "facility" like this would require many sections of the master lease to need revisions as well as communications with the FAA.

[FAA Exhibit 1, Item 1, exh. 28, p. 2 and Item 6, exh. LL, p. 2]

Like Westair, on March 22, 2005, Panorama wrote to Joel Russell, HPN Manager to discuss significant LGA lease amendment proposals from Panorama. The letter stated:

As you know, much has changed in our industry and in particular our airport since we signed our Lease in 1999. The tragic events of September 11, 2001 sent Aviation Insurance Premium rates to all-time record highs and drastically increased our overall cost of doing business. With each passing month new obstacles present arduous challenges to the process of operating a service oriented General Aviation FBO Facility in a safe and viable manner. The rapidly increasing cost to maintain a qualified labor workforce at HPN, as outlined in my August 11, 2004 letter, and the sky rocketing cost of petroleum based products are just two more factors that have significantly contributed to the enormous increase in our overall cost of doing business. General Aviation operations conducted in aircraft less than 12,500 lbs MGTOW continues to steadily decline as do new student pilot enrollments. As a result of the aforementioned decline in General Aviation operations, sales for ancillary Lease mandated small aircraft services have continued to decline concurrently.

At the same time, we are witnessing a rapidly growing number of transient business jet aircraft with Manhattan bound passengers who formerly frequented [Teterboro] and are now alternatively utilizing White Plains. The total gallons of Jet A fuel pumped annually at HPN continues to grow at a substantial pace. In

order for Panorama to be able to afford the conduct of our day-to-day operations in a successful manner, increased revenues need to be generated outside of and in addition to our Lease mandated small aircraft service requirements. Increased growth in Jet fuel sales is the area that will ensure Panorama's future viability. [FAA Exhibit 1, Item 1, exhibit 29 and Item 6, exh. MM]

New Lease Agreements with Avitat

On October 1, 2005, the County executed a 10-year lease with options to renew with Avitat (2005 Avitat Lease). The 2005 Avitat Lease renewed Avitat's occupancy at the Airport on the same leasehold:

… the County and Lessee previously entered into a lease agreement dated February 1, 1991 and amended May 9, 1996 (the "Initial Lease Agreement") for space in Hangar "E" at Westchester County Airport… ("Leased Premises")… and

… the County and Lessee have agreed to terminate the Initial Lease Agreement and enter into a new Lease Agreement for the use and occupancy of the Leased Premises for the rental and upon the terms and conditions herein set forth. [FAA Exhibit 1, Item 1, exh. 4, p. 2]

Article 3 of the 2005 Avitat Lease describes Avitat's Use of Leased Premises:

3.1 County represents that the Lessee may use, and the Lessee shall occupy and use, the Leased Premises for the following purposes and for no other purpose whatsoever:

3.1.1 For entering into agreements with private owners (the "Customers") for storage, maintenance, servicing and repair of aircraft, aircraft assemblies, aircraft accessories, aircraft radio and electronic equipment and any component parts thereof; and

3.1.2 For the sale of aircraft assemblies, aircraft radio and electronic equipment and any component parts thereof; and

3.1.3 For the parking of aircraft; and

3.1.4 For business and operations offices and shops in connection with the purposes authorized hereunder…

3.2 In addition to the foregoing rights, the Lessee shall have the right to sell aviation fuel and aviation lubricants and to deliver such fuel and lubricants to and ***into aircraft at the Airport****, [emphasis added] all in accordance with the provisions of other agreements entered into or to be entered into between the County and Lessee specifically regulating such sales and deliveries and providing for the payment of fees therefore.*

3.3.1 The Lessee agrees, as a condition of this Lease, that it shall not base any aircraft having a maximum gross take-off weight over 120,000 lbs., at the Airport, without the approval of the Airport Manager, such approval not to be unreasonably withheld, delayed or conditioned.

3.3.2 The Lessee agrees, as a condition of this Lease, that it shall not operate, or cause to be operated at the Airport, any aircraft having a maximum gross take-off

> *weight of 120,000 lbs., without the prior approval of the Airport Manager, such approval not to be unreasonably withheld, delayed or conditioned.* [FAA Exhibit 1, Item 1, exh. 4, pp. 10-12]

Article 4 describes Avitat's Rental:

> *4.1.1 For use and occupancy of the Leased Premises and privileges herein granted, the Lessee agrees to pay the County an annual rent. During the initial year of this Lease, the annual rent shall be SIX HUNDRED NINETY-FIVE THOUSAND SEVEN HUNDRED TWO DOLLARS ($696,702), payable in substantially equal monthly installments. Upon completion of the improvements described in Schedule "B", the annual rent shall be EIGHT HUNDRED SEVENTY-FIVE THOUSAND ONE HUNDRED DOLLARS ($875,100), payable in substantially equal monthly installments.…*
> *4.1.2 During the Initial Term* (20 years)*, the County will perform a good faith evaluation of the market rent as of the fifth anniversary of the commencement date. During any Renewal Terms, the County will perform a good faith evaluation of the market rent as of the commencement date of the Renewal Term and the fifth anniversary of the commencement date of the Renewal Term using the standards currently in place at the Airport for determining market value, using current and future tenants located at the Airport as the basis for such evaluation. Should the County determine that Lessee is paying in excess of market value according to any such evaluation, then effective as of the date of such evaluation, Lessee will not be subject to any increase in its rent until such time as Lessee's rent no longer exceeds market value. Lessee shall have the right to dispute such evaluations and the County and Lessee shall negotiate in good faith to resolve their difference with respect to the market rent. If after such good faith negotiations, the County and Lessee are unable to resolve their differences, Lessee shall have the option to terminate this Lease by giving three (3) months prior written notice to the County of Lessee's exercise of such right.* [FAA Exhibit 1, Item 1, exh. 4, pp. 13-14; see also Item 6, exh. E]

The 2005 Avitat Lease included a VRFF provision, requiring Avitat to use reasonable efforts to cause FBO customers to comply with the voluntary program and to distribute information to users expressing the need to understand the concerns of the local community. [FAA Exhibit 1, Item 6, exh. E, p. 38] In 2005 and 2006, two other Large GA FBOs on the Airport also signed leases with the County that included similar VRFF provisions. [FAA Exhibit 1, Item 6, exhs. G, p. 21 & H, p.24]

Prior to Avitat's signing of the 2005 Avitat Lease, it had pursued the possibility of expansion at the Airport by purchasing Westair, in 2003. On May 1, 2003, Avitat wrote to Larry Salley, County Transportation Commissioner, raising the prospect that Avitat may purchase Westair and seeking 'appropriate approvals' from the County for the transaction.[13] [FAA Exhibit 1, Item 6, exh. GG] On January 30, 2006, Avitat increased its

[13] As stated by the County, the transaction never occurred. [FAA Exhibit 1, Item 6, p. 18]

leasehold significantly by assuming adjacent hangar and apron space from General Electric with the County's approval. [FAA Exhibit 1, Item 6, exh. F]

On August 29, 2006, Westair wrote to Peter Scherrer, Asst. HPN Manager, re-visiting, word-for-word the March 14, 2005 letter requesting major modifications to Westair's Lease, including expanded jet fueling ability for Westair. [FAA Exhibit 1, Item 1, exh. 30] [See Also, FAA Exhibit 1, Item 1, exhibit 28, and Item 6, exh. LL]

On January 11, 2007, Salvatore J. Carrera, County Economic Development, Real Estate, wrote to Alfred E. Donnellan, (Panorama), rejecting Panorama's repeated request to modify its lease terms to allow Panorama more freedom to sell jet fuel at any location at the Airport (like Avitat may do); to base heavier aircraft on its leasehold (like Avitat may do); to remove terms "light general aviation fixed base" from the Panorama Lease. The County expressed its answer to these requests, emphatically:

> *Panorama requests the right to fuel aircraft at the airline terminal and other prime tenant's airport locations without restriction.…*
> ***WE CANNOT AGREE TO THIS REQUEST****.…*
> *Panorama requests that (the lease term restricting to 12 the number of aircraft weighing more than 12,500 lbs. that may be based on Panorama's leasehold) be lifted.…*
> ***WE CANNOT AGREE TO THIS REQUEST****…*
> *Panorama Request: Remove from the Use Section of the Lease the words "light general aviation fixed base" and "at a minimum" from the paragraph that describes the minimum services offered.…*
> ***The County will absolutely not agree to this request****…* [FAA Exhibit 1, Item 1, exh. 31, pp. 2-3 and Item 6, exhibit HH, pp. 2-3]

Procedural History

Avitat filed its Complaint with 38 exhibits on October 19, 2007. The FAA provided Notice of Docketing to the parties on November 5, 2007. The County filed a Motion to Dismiss and Answer with 44 exhibits and 2 declarations on December 27, 2007. Avitat submitted its Reply with 12 exhibits, including an Affidavit with three exhibits, on January 14, 2008. The County filed its Rebuttal with one exhibit on February 1, 2008.

IV. ISSUES

Complainant alleges:

The County has engaged in a systemic pattern of conduct that economically discriminates against Avitat.… That pattern includes, but is not limited to,… charging substantially below market rental rates to the LGA FBOs, while at the same time allowing the LGA FBOs to service and sell jet fuel to jet aircraft over 12,500 pounds, in direct competition with the Jet FBOs …. The action by the County allowing the LGA FBOs to sell jet fuel

has created an unjustly discriminatory subsidy which unfairly and illegally, allows the LGA FBOs to undercut the price of jet fuel…,. In addition to these infractions, the County has instituted a program to add "restraint from flying" provisions into the leases of the FBOs at the Airport. Since some of the leases for the FBOs have the restraint and other (sic) do not, this has a discriminatory effect on the FBOs at the Airport.

These practices are in violation of, inter alia, 49 U.S.C. §§ 40117[14] *and 47107 and AIP Grant Assurances 22 (Economic Nondiscrimination), 23 (Exclusive Rights) and 24 (Fee and Rental Structure).* [FAA Exhibit1, Item 1, pp. 1-2]

Avitat's allegations focus exclusively on actions by the County prior to Avitat's signing of its 2005 Avitat Lease. Upon review of Avitat's allegations and the record summarized above in the Background Section, the FAA has determined that the following issues require consideration and analysis in order to provide a complete review of this sponsor's compliance with applicable Federal law and FAA policy:

1. Whether the County has provided more favorable treatment to other aeronautical service providers at the Airport with regard to retail aircraft services in a manner that unjustly discriminates against Avitat in violation Federal grant assurance 22.

2. Whether the County's alleged unjust economic discrimination with regard to retail aircraft services constructively grants an exclusive right on the Airport in violation of grant assurance 23 and Federal law.

3. Whether the County has failed to maintain an aeronautical rent schedule that makes the Airport as self-sustaining as possible under the circumstances existing at the Airport, by providing more favorable financial treatment to other aeronautical service providers at the Airport in violation of grant assurance 24.

Also, the FAA notes that the County's actions going forward may expose it to allegations of future unreasonable or discriminatory terms or conditions if it were to modify the LGA FBO Leases to narrow the differences between the services provided by the Larger GA FBOs, including fueling.

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

[14] See Footnote 2. See Notice of Docketing. As stated, allegations of a violation of Federal law regarding Passenger Facility Charges (PFCs) are not within the jurisdiction of Part 16. The FAA will consider the argument relating to PFCs as part of the allegation of unjust economic discrimination by means of preferential financial treatment.

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.

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.

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.[15] FAA Order 5190.6A, *Airport Compliance Requirements* (FAA Order 5190.6A), 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. The grant assurances relevant to the issues raised in the Complaint are the following:

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. Federal grant assurance 22, *Economic Nondiscrimination*, (Assurance 22) deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. 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:

[15] *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.

> [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).]
>
> 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, Section 4-8.]

Assurance 23, *Exclusive Rights*

Federal grant assurance 23, *Exclusive Rights*, (Assurance 23) implements the provisions of 49 U.S.C. §§ 40103(e) and 47107(a)(4), and requires, in pertinent part, that the owner or sponsor of a federally obligated airport:

> "…will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public."
>
> "…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…"

> "…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."

In FAA Order 5190.6A, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [*See* e.g. Pompano Beach v FAA, 774 F2d 1529 (11th Cir, 1985).] An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce onto the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [*See* FAA Order 5190.6A, Section 3-9 (e).]

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise will be construed as evidence of intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease. [*See* FAA Order 5190.6A, Section 3-9(c).]

FAA Order 5190.6A provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. [*See* FAA Order 5190.6A, Chapter 3.]

Assurance 24, *Fee and Rental Structure*

Federal grant assurance 24, *Fee and Rental Structure*, (Assurance 24) 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.

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 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* FAA Order 5190.6A, Section 4-14(a).]

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) (Wilson)]

Enforcement of Airport Sponsor Assurances

FAA Order 5190.6A, *Airport Compliance Requirements*, dated October 2, 1989, 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

Avitat alleges that the County has 1) unjustly discriminated against Avitat by providing economic preference to the LGA FBOs;[16] [FAA Exhibit 1, Item 1, p. 19] 2) granted an exclusive right to the LGA FBOs by imposing a significant burden on Avitat and other unrestricted FBOs; and 3) failed to make the Airport financially self-sustaining by providing financial benefits to the LGA FBOs. [FAA Exhibit 1, Item 1, p. 25]

The Respondent (County) denies that it has unjustly discriminated against Avitat, granted an exclusive right or established a fee and rental structure that violates its obligation to be as financially self-sustaining as possible. [FAA Exhibit 1, Item 6, p. 1]

This Director's Determination will directly address the allegations raised by the Complainant under Federal grant assurances 22, 23, and 24. Also, this Determination will discuss the question of access on reasonable terms.

1. Whether the County has provided more favorable treatment to other aeronautical service providers at the Airport with regard to retail aircraft services in a manner that unjustly discriminates against Avitat in violation Federal grant assurance 22.

The Complainant includes several aspects of allegedly unjust economic discrimination by the County by means of A) preferential treatment with regard to rental rates and rights for other FBOs; B) preferential treatment with regard to restrictions on operations; and C) preferential treatment with regard to a prior request-for-proposals for the LGA FBO leaseholds. Also, D) the FAA addresses the question of reasonableness under grant assurance 22.

[16] Avitat specifically discusses allegedly subsidized LGA FBO lease rates and the County's RFP for LGA FBOs. In the Facts and Background Section, Avitat also mentions the County's Voluntary Restraint from Flying (VRFF) provision as another difference in lease agreements with FBOs at the Airport. [FAA Exhibit 1, Item 1, pp. 13-14]

A) Preferential Treatment in Rental Rates, Lease Terms and Allowed Activities

Similarly Situated Argument

Avitat's Complaint states:

> *Despite any claims to the contrary,… Panorama and Westair each provide substantially the same type of services as those currently provided by Avitat, including, but not limited to, the provision of jet fuel and the provision of ramp services and parking for aircraft over 12,500 pounds. Accordingly, Avitat, Panorama and Westair are "making the same or similar uses of airport facilities."*
>
> *However, despite the federal requirement that such similarly situated FBOs be subject to the same rates, fees, rentals, and other charges, Avitat does not pay the same rent and fees as either one of the LGA FBOs.* [FAA Exhibit 1, Item 1, pp. 20-21]

The County states that Avitat is not similarly situated to the LGA FBOs:

> *Avitat's fundamental legal argument (that the County has created "an unduly discriminatory atmosphere" (Complaint at 3)) is flawed, as it is based on the incorrect presumption that Westair and Panorama are similar to the Larger GA FBOs at the Airport, and therefore should be treated similarly. The LGA FBOs and the Larger GA FBOs are not alike, thus the County's actions differentiating between the two types of FBOs are appropriate and legally permissible.* [FAA Exhibit 1, Item 6, p. 4]

The parties argue over elements that allegedly show similarity and difference. Avitat focuses on its competitors' functions in the aviation services market, especially with regard to their selling jet fuel to aircraft between 12,500 and 50,000 lbs.[17] In other words, Avitat focuses on the LGA FBOs' exercise of their 2001 contract rights to compete, to a limited degree,[18] with Avitat, stating:

> *After the County granted Panorama and Westair the right to sell jet fuel to any aircraft without regard to its weight, however, all that changed.*[19] *Panorama and*

[17] The LGA FBOs cannot service aircraft over 50,000 lbs. Avitat has no limitations.

[18] LGA FBOs only fuel on their exclusive premises, not on the entire airport, as does Avitat.

[19] This is not accurate. See the table below and the Background Section. The LGA FBOs cannot service aircraft over 50,000 lbs, or any aircraft off their leaseholds. Avitat admits this limitation, stating: *"The County states that because the LGA FBOs are limited to accommodating aircraft under 50,000 lbs, they are dissimilar from the Jet FBOs. This, however, is a distinction without any impact. The County fails to point out that 86.72% of the General Aviation fleet registered in the United States using jet fuel has a Maximum Gross Take-off Weight below 50,000 lbs. …. Thus the County's grant of the right to sell jet fuel to the LGA FBOs gave them access to 86.72 % of the general aviation jet aircraft market."* [FAA Exhibit 1, Item 9, p. 13] Again, the FAA notes that Avitat has access to 100% of the Airport's GA and commercial market. Also, the County granted the LGA FBOs a limited right to sell jet fuel in 2001, more than three years prior to Avitat's agreeing to the 2005 Avitat Lease. [FAA Exhibit 1, Item 1, exhs. 22 & 23]

> *Westair now could directly compete with Avitat in servicing and selling jet fuel to aircraft over 12,500 pounds, but could do so with the extraordinary competitive benefits of a .. rent subsidy. Not only is that activity not light general aviation, but we submit, it constitutes blatant discrimination which is causing severe harm to Avitat. Clearly the LGA FBOs should be restricted to their original purpose of servicing only light general aviation or they should pay market rent. The LGA FBOs cannot have it both ways: when they began selling jet fuel and servicing jets heavier than 12,500 lbs, they also should have started paying rent at a market rate as well.* [FAA Exhibit 1, Item 1, p. 22]

In its Reply, Avitat further argues the alleged similarity of 'function,' stating, "The LGA FBOs Consider Themselves to Be, and Function As, Jet FBOs" [FAA Exhibit 1, Item 9, p. 9] and "The LGA and Jet FBOs Are Similarly Situated on All Functional Parameters." [FAA Exhibit 1, Item 9, p. 11] However, also in its Reply, Avitat alters its argument regarding similarly situated and unjust economic discrimination, stating:

> *Avitat has never objected to the use of a different rental rate structure in the LGA FBOs' leases in order to preserve the LGA FBOs' profit margins at a less-than-fair-market rate, so long as the LGA FBOs perform different functions and the burden of the differential rate structure falls on the County, not the Jet FBOs….*
>
> *Avitat's real challenge is to the County's abandonment of the central distinction between the two categories of FBOs, in contravention of the express terms of the County's policy, its RFP, and its original leases with the LGA FBOs, while maintaining the underlying inequitable economic positions which were created to support those distinctions.* [FAA Exhibit 1, Item 9, p. 7-8]

In its Reply, Avitat discusses the Order, stating, *"FAA Order 5190.6A… provides a list of conditions that justify dissimilar treatment. This provision forms the basis for the string of FAA decisions cited by the County… finding dissimilar treatment of aeronautical uses justified."* [FAA Exhibit 1, Item 9, p. 11]

This is not accurate. Part 16 determinations and decisions are based upon airport-specific circumstances and stand on their own bases, in compliance with Federal law and the grant assurances. In any case, Avitat discusses how the Order (listing ways in which functionally-similar entities may not be similarly situated with regard to unjust economic discrimination) does not apply to its situation. [See FAA Exhibit 1, Item 9, pp. 11-14] The Director agrees that the Order does not directly apply to the circumstances in this case. Part 16 precedent is more helpful in illustrating the relative state of dissimilarity in this case, discussed below.

Avitat does not dispute differences between the rights and responsibilities of the Larger GA FBOs as compared to rights and responsibilities of the LGA FBOs at the Airport. The County presents a table showing these differences, also summarized in the Background Section:

	LGA FBOs		LARGER GA FBO
	Westair	Panorama	Avitat
LEASE TERMS			
• Required Services	* Tie-downs accommodations for based & transient aircraft * Hangaring accommodations for based & transient aircraft * T-hangar accommodations * Maintenance (airframe, engine & avionics) * Flight school (including ground training) * Aircraft rental, charter & management * AvGas and lubricant sales * Aircraft parts sales * Pilot shop sales * Aircraft sales		None
• Permitted Services	* Jet fuel sales to based aircraft or transient aircraft under 50,000 lbs. on own premises (per 9/20/2001 County authorization)		* Entering into agreements with customers for aircraft storage, maintenance, service, repair, assemblies, accessories, radio and electronic equipment and component parts * Sale of aircraft assemblies, radio and electronic equipment and component parts * Aircraft parking * Offices and shops * Sale of aviation fuel and lubricants to and into aircraft at the Airport
• Weight Restrictions	* All but 12 based aircraft must weigh under 12,500 lbs. * May not accommodate any aircraft weighing over 50,000 lbs.		No limit (may accommodate aircraft weighing up to Airport's weight limit of 120,000 lbs).
• Date Executed	July 1999	July 1999	Oct. 2005 and Jan. 2006
FACILITIES			
• T-hangar space	58,200 sq. ft.	54,876 sq. ft.	None
• Tie-down spaces	115	100	None
• Large hangar space	15,000 sq. ft.	19,950 sq. ft.	63,032 combined sq. ft. with 2 large hangars
• Apron space	35,000 sq. ft.	35,000 sq. ft.	225,527 combined sq. ft. between two leaseholds

[FAA Exhibit 1, Item 6, p. 3, See Also Item 1, exhs. 4, 5, 6, 22 and 23]

This table shows some of the differences in rights, restrictions and responsibilities established by the respective leases and the timing of the leases and the alteration to the LGA FBO Leases on September 20, 2001.[20] Avitat does not state that it was unaware of the then existing LGA FBO rights, restrictions and responsibilities, at the time that it signed the 2005 Avitat Lease or again when it entered into the 2006 lease. The Complainant also summarizes the rent differentials, stating:

> *According to its current lease for Hangar E-3, Avitat is required to pay an annual rent of $696,702 during the initial year of the Lease, and $875,100 upon completion of the improvements. Panorama and Westair, on the other hand, pay rent based on its gross revenues and gross operating profits*: *"They each pay a $100.00 a month*

[20] See FBO leases and 2001 LGA Approval Letters. [FAA Exhibit 1, Item 1, exhs. 4, 5, 6, 22 & 23]

> *permit fee, as well as a percentage of the gross revenues based on the amount of the revenues: if the revenues are between $0 and $10,999,999, Panorama and Westair must pay 0.5% of the revenues; if the revenues are between $11,000,000 and $15,999,999 then they pay 5%; and if the revenues are over $16,000,000 then they pay 8%. … In addition, Panorama and Westair must pay 3.5% of gross operating profit from aircraft sales, certain charter and non-based management fees between $0 and $1,000,000 and 4% if they are over $1,000,000."* [FAA Exhibit 1, Item 1, p. 21] [See, FAA Exhibit 1, Item 1, exhs. 5 & 6, pp. 6-7]

With regard to similarity, the Complainant argues about similarity of function, namely jet fuel sales for aircraft under 50,000 lbs.; while the Respondent argues over differences in rights under agreements.[21]

Similarly Situated Analysis

In connection with its argument of similar function, Avitat argues that the Order does not specifically list the manner in which Avitat may be determined to be dissimilar to the LGA FBOs. The County presents numerous Part 16 precedents that support the contention that the parties in this case may not be similarly situated for the purpose of determining unjust economic discrimination. Some of these cases have been upheld by the U.S. Court of Appeals. [Penobscot, Wilson and SMAA]

The County discusses Adventure Aviation v Las Cruces, FAA Docket No.16-01-14 (August 7, 2002) (Director's Determination, upheld) (Adventure). The County states:

> *Complainant's related allegation, that the LGA FBO rental structure somehow creates an unjustly discriminatory subsidy and a "sweetheart deal," is nothing more than sour grapes over the lease terms that Avitat negotiated in its most recent leases with the County. Complaint at 3. The FAA has stated that "[t]he purpose of assurance 22(c) . . . is to protect the public interest in the operation of federally obligated airports. The purpose is not to provide alternative or supplemental rights to those normally available to commercial tenants in disputes with their landlords..."* [Adventure, DD p. 13] … *Additionally, the FAA will not entertain a complaint about the reasonableness of a fee set by agreement when filed by a party to the agreement. See Policy Regarding Rates and Charges. 61 Fed. Reg. 32018 (June 21, 1996); Adventure Aviation.* [Adventure, DD, p. 13, fn. 12]*; see also Aerodynamics of Reading. 2001 WL 1085346, at *13. Moreover, an FBO cannot negotiate a rental agreement that requires a particular payment and rate schedule, commence doing business and earning profits, and then complain that the deal was unfair. Penobscot Air Services, Ltd. v. F.A.A.. 164 F.3d 713, 727 (1" Cir. 1999); see also Aerodynamics of Reading. 2001 WL 1085346, at *12-13 (FAA will not entertain complaints regarding lease rates when the rates were established by agreement of Complainant). Here, Avitat negotiated its two leases with the County as recently as*

[21] Also, the FAA notes that the LGA FBOs are limited to providing services, including fueling, on their respective leaseholds while Avitat may provide FBO services, including fueling, on and off its leased premises on the Airport. [FAA Exhibit 1, Item 6, p. 3]

> *January 2006 and October 2005, well after the ink was dry on the LGA FBO leases (See Exhs. A, C), but is only now asserting that its rental rate is unfair. Despite a seemingly opportune moment to discuss rental rates with the County in 2005, Avitat instead chose to stay silent*. [FAA Exhibit 1, Item 6, pp. 30-31]

The County is correct in its application of FAA policy and precedent. Adventure is particularly applicable here. The complainant in Adventure, like Avitat, agreed to terms that differed from those of a competitor already on the airport. In fact, Adventure summarizes prior FAA policy regarding similar situation in circumstances of past negotiated agreements. Long-standing FAA policy and precedent that has withstood judicial challenge establish that grant assurance 22 does not require that airport sponsors charge all FBOs identical lease rates in order to avoid unjust economic discrimination. [Adventure, DD p. 12]

First, it is the fundamental position of the FAA that the issue of rates and charges is best addressed at the local level by agreement between users and airports. Consequently, it is the FAA's policy to encourage direct negotiations between airport users and airport sponsors. [*Policy Regarding Airport Rates and Charges*, 61 Fed. Reg. 31944, 32017 (June 21, 1996)][22] In these circumstances, it is probable that negotiations between an airport sponsor and different airport users, over varying periods of time, with differing business strategies will not likely result in the same lease terms and rates. Furthermore, the FAA will not entertain a complaint about the reasonableness of a fee set by agreement when filed by a party to the agreement. [See, *Policy Regarding Rates and Charges*, 61 Fed. Reg. 31944, 32018 (June 21, 1996) and Adventure, Footnote 12. See also, e.g., Aerodynamics of Reading, Inc. v. Reading Regional Airport Authority, FAA Docket No. 16-00-03, (July 23, 2001) (Final Decision and Order), p. 20, (Aerodynamics)]

Aerodynamics, states that it is "incumbent upon the Complainant to prove its allegations of unjust discrimination by providing evidence that similar terms and conditions were requested and were subsequently denied without adequate justification." [Aerodynamics, FAD, p. 16] The Complainant makes no showing here that it requested terms or conditions in its lease that are similar to the terms and conditions contained in the LGA FBOs. Agreeing to a term offered or negotiated, and then complaining later about dissimilar terms, does not fulfill this principle. Absent any evidence to demonstrate that the Complainant objected to the terms of the lease or was denied access to pertinent information during negotiations, the Director concludes that there can be no unjust discrimination under the principles in Aerodynamics. [Adventure, DD, p. 13] The Director explains:

> *The complainant agreed to, apparently without objection, terms that differ significantly from those that* [its competitor] *accepted four and one-half years earlier. …Many of those terms might confer a competitive advantage upon* [the

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

> complainant]. *Negotiation and agreement to lease-terms and the time-frame of these activities are highly relevant factors in this case.* [Adventure, DD, p. 14]…
>
> *Consequently, we are not persuaded that the complainant requested similar treatment to* [the competitor] *and was denied. Nor can we conclude that* [the complainant] *did not accept these terms willingly, some of which are potentially, arguably beneficial to* [the complainant]. [The complainant] *has not established a record of objection to terms to which it agreed, until well after the relative benefit of such terms could be tested by the relative success of* [the complainant's] *business plan.* [Adventure, DD, p. 15]…

The County's application of Part 16 precedent is appropriate. Most applicable to a determination is the long-standing concept, applied in Adventure that a party cannot sustain a complaint about differences agreed by the party, as is the case here. In an early Part 16 Director's Determination, Penobscot Air Service v. Knox County, FAA Docket No. 16-97-04 (September 25, 1997) (Director's Determination) (Penobscot), the FAA summarized this long-standing concept:

> *In a 1994 FAA record of decision involving a similar rent disparity issue, the Agency made it clear that,"The purpose of the grant assurances is to protect the public interest in the operation of Federally obligated airports. The purpose is not to provide alternative or supplemental rights to those normally available to commercial tenants in disputes with their landlords, i.e. negotiation or commercial litigation under applicable state and local laws. The FAA does not consider that Congress intended grant assurances and the FAA compliance process to provide a device by which a commercial aeronautical tenant can abrogate an otherwise valid commercial lease with a sponsor because the operations under the lease are less profitable than the tenant anticipated."*[23]

The County is aware of this precedent by means of the judgment of the U.S. Court of Appeals. The County cites this finding:

> *In Penobscot Air Services, the First Circuit Court of Appeals reviewed the* [FAA's] *finding that charging one FBO higher rent than another was not a violation of the Grant Assurance 23. 164 F.3d 713. The Penobscot Air Services court reiterated that the imposition of disparate rates for comparable premises "**may** (but need not) constitute a grant of an exclusive right." Id at 725 (emphasis in original). The court found that the "mere fact that lease payments are not identical does not necessarily constitute unjust discrimination in prices or the grant of an exclusive right." Id at 726 (internal quotations omitted).* ***The court reasoned that a commercial enterprise cannot negotiate a rental agreement that requires a particular payment and rate schedule, commence doing business and earning profits, and then complain that the deal was unfair.*** *(emphasis added) Id at 727.* [FAA Exhibit 1, Item 6, p. 38]

[23]Penobscot at page 24, citing to Sky East Services. Inc. v. Suffolk County, Complaint Nos. 13-88-06 and 13-89-01

This concept that rent and lease discrimination cannot be unjust if the complaining party agreed to differing rights, restrictions and responsibilities in negotiations is present in early FAA decisions and in more recent FAA decisions. The FAA refers to SMAA v. Santa Monica, FAA Docket No. 16-99-21 (February 4, 2003) (Final Agency Decision) In SMAA, the Associate Administrator upheld a prior Director's Determination. In SMAA, the Associate Administrator cites Penobscot, stating:

> *The Director's Determination goes on to list further differences between the FBOs on the airport, including differences in financial ability and business risk-taking. The FAA has long recognized these differences among potential aeronautical service providers as reasonable distinctions for the sponsor to make. See Penobscot Air Services LTD v FAA, 164 F.3d 713,726 (1st Cir, 1999).*
>
> *…An airport sponsor's Federal obligations do not provide a complainant a second chance at opportunities at an airport that a competitor was better positioned to take advantage of, or was simply more aggressive in obtaining. Consequently, the Associate Administrator finds that the Director did not err in concluding that* [the complainants]*, as limited-service FBOs operating from leaseholds on the south side of the Airport, are not similarly situated to the north side FBOs.* [SMAA, FAD, p. 21]

SMAA acknowledged that differences in business model, strategy, negotiation choices and aggressiveness can, alone, result in dissimilarity, citing Penobscot as a basis.

As with Adventure, the application of the Aerodynamics, Penobscot and SMAA precedent is appropriate here. All actions by the County that allowed some limited access to the jet-fuel market by the LGA FBOs were already in place at the time that Avitat signed its 2005 Avitat Lease or 2006 lease. The County has not altered any rights, restrictions or responsibilities of the LGA FBOs since 2001 [See FAA Exhibit 1, Item 1, exh. 31] Avitat does not provide any evidence or argument regarding active deception by the County to induce Avitat to agree to the terms of the 2005 Avitat Lease. In fact, the record shows that Avitat had investigated purchasing one of the LGA FBOs (WestAir), presumably exercising due diligence in determining the LGA FBOs' lease terms. [FAA Exhibit 1, Item 6, exh. GG] FBOs negotiate terms to enhance their competitive advantage. There is no dispute that Avitat accepted terms in its 2005 Avitat Lease that imposes no restrictions on the type of aircraft that it can service (up to the Airport's 120,000 lb. Maximum gross take-off weight limitation) and allows Avitat to provide services, including fueling, over the entire Airport on areas not subject to another lessee's leasehold. In contrast, the LGA FBOs may only provide FBO services, including fueling, from their exclusive leased premises and are limited to serving aircraft under 50,000 lbs. maximum gross take-off weight. As discussed, the County continues to deny the LGA FBOs the right to service aircraft off of their leaseholds.

The grant assurances do not protect aeronautical service providers from the consequences of anticipated or un-anticipated competition or lack of due-diligence.

The original 1999 LGA FBO Leases themselves offered the possibility of allowing the LGA FBOs to service heavier aircraft and to sell jet fuel. [FAA Exhibit 1, Item 1 exhs. 5 & 6, p. 13] Also, the LGA FBO Leases not only allow the possibility that the County may consent to allowing the LGA FBOs to house aircraft weighing up to 50,000 lbs; the leases expressly *do* provide consent for up to twelve (12) of such aircraft. Also the 1999 LGA FBO Leases allow the possibility that the County might grant consent for the LGA FBOs to service aircraft over 50,000 lbs. This language has been plainly stated in the LGA FBO Leases, since 1999:

> *(c) The Tenant agrees, as a condition of this Agreement, that it shall not base (including managed and leased) any aircraft having a maximum gross take-off weight over 12,500 lbs. at the Airport, without the prior consent of the Airport Manager. The Airport Manager hereby expressly consents that the Tenant, as part of its managed or leased aircraft fleet, may base, upon prior written notification to the Airport Manager, up to twelve (12) aircraft having a maximum gross take-off weight over 12,500 lbs. and less than 50,000 lbs.*
> *(d) The Tenant agrees, as a condition of this Agreement, that it shall not accommodate any aircraft having a maximum gross take-off weight over 50,000 lbs. at the Airport, without the prior consent of the Airport Manager.* [FAA Exhibit 1, Item 1, exhs. 5 & 6, p. 12]

So, in the LGA FBO Leases themselves, the County raises the possibility of granting consent and, then actually does grant such consent. As stated, all rights, restrictions, responsibilities and rent that Avitat complains about herein, existed prior to the 2005 Avitat Lease agreement. Finally, the County has forcefully declined to expand the LGA FBOs' right since Avitat's 2005 Lease, even with the LGA FBOs offer, generally, to pay higher rents. The County states:

> *The County's January 11, 2007 letter to Panorama's counsel, rejecting Panorama's requests to modify its lease, is illustrative of the County's commitment to maintaining the LGA distinction at* [the Airport]. *The County rejected Panorama's request to sell jet fuel outside its leasehold…. The County rejected Panorama's request to base more aircraft over 12,500 lbs…. The County "absolutely" rejected Panorama's request to remove the words "light general aviation fixed base" from its lease….. In sum, the County recognized that these lease modifications "would run directly counter to the County's goal of maintaining and supporting Light General Aviation" at the Airport. Ex. HH at 3.* [FAA Exhibit 1, Item 6, p. 18-19]

Equitable Treatment

Regarding Avitat's argument about equitable treatment, the FAA observes that the same concepts from the above analysis apply. In fact, Avitat did accept differences in rights, restrictions, responsibilities and rent in 2005 and 2006. The fact that these differences have turned out less advantageous than Avitat hoped is not unjustly discriminatory, nor does it make the agreed-to differences inequitable.

Avitat's 'equity' argument in its Reply concedes that the differences in use-terms, agreed to by Avitat, might show dissimilarity:

> *Even if the LGA and Jet FBOs are not viewed as essentially similar as a result of the County's granting permission to the LGA FBOs to sell jet fuel, and even if the differences in treatment by the County were therefore acceptable, that differential treatment must still be equitable. FAA Order 5190.6A, § 4-14d(2)(c).* [FAA Exhibit 1, Item 9, p. 4] …
> *But even if the LGA FBOs and Jet FBOs are viewed to have dissimilar requirements, the County's actions have resulted in substantial inequity in two ways – by providing the LGA FBOs with economic benefits that the Jet FBOs do not receive and by allowing the LGA FBOs to sell jet fuel to aircraft over 12,500 lbs. in excess of County policies and the authority granted by the LGA FBO leases.* [FAA Exhibit 1, Item 9, pp. 14-15]

Adventure is applicable to this question of equity, as well. In Adventure, the complainant also altered its focus from 'similarly situated' and moved more to an argument of inequitable differences. The Director observed:

> *Despite the fact that the Complainant did not raise the issue of unjustified differences in its Complaint, it has the burden to present evidence that the difference in treatment is unreasonable considering the circumstances.* [Adventure, DD, p. 14]
> *If one FBO accepts, without objection, an obligation to remit a fuel flowage fee, under certain business and economic circumstances, whereas another FBO accepts a different fee schedule, without a fuel flowage fee, at a later date, under different business and economic circumstances for a facility which provides a different level of service, it is reasonable and equitable for other rates and charges to differ between the FBOs….* [Adventure, DD, p. 15]

In the Adventure appeal of the Director's Determination, the Associate Administrator directly addressed the complainant's 'equity' argument. The Associate Administrator upheld the Director, even when the complainant provided a mathematical analysis of the alleged inequitable differences, stating:

> *[T]he Complainant takes issue with the Director's finding that the two lease rates for FBO facilities are not as disparate because* [the competitor] *pays additional expenses, such as utilities, that the Complainant is not required to pay.*
> *… The Complainant argues that even recalculating these rates to account for differences in the lease terms, the Respondent is still subsidizing* [the competitor] *and FAA should recognize that the lease rates are unfair and "acknowledge that this disparity is not consistent with the same rate requirement of 8 C(22)(c)." [See FAA Exhibit 1, Item 21, p. 12]*
> *The Director's Determination notes that the record reflects that the Complainant agreed, apparently without objection, to terms that differ significantly from those that* [the competitor] *accepted four and one-half years earlier….* [Adventure, FAD (September 9, 2003) pp. 24-25]

In fact, it appears that Avitat enjoys a greater 'right to aeronautical markets' over the LGA FBOs at its home airport than Adventure enjoyed over its competitor at Las Cruces. In Adventure, the competitor's more limited right to access aeronautical customers was not an issue. However, the rent differential in Adventure was alleged to be quite significant:

> *The Complainant attempts to rebut this finding by factoring such additional expenses into* [the competitor's] *lease rate of two cents per square foot (equating to 5 cents per square foot) and subtracting costs the Respondent assumes for the Complainant from its $10.00 a square foot lease rate (equating to $7.10 per square foot).* [Adventure, FAD, p. 25]

Despite the complainant's analysis of alleged inequity, the Associate Administrator dismissed the notion that the entities were similarly situated and dismissed the allegation that the sponsor had unjustly discriminated.

Similarly Situated and Equity Findings

Avitat's argument-- that the LGA FBOs' focus on competing with Avitat, functionally-- makes them similarly situated is unconvincing and unsupported by Part 16 precedent. Rather, Part 16 precedent supports the conclusion that lease terms, negotiations, agreements and timing of agreements matter when determining similarly situated competitors. As stated in Aerodynamics, Adventure, Penobscot and SMAA, agreeing to differences in rights, restrictions, responsibilities and rents in agreements among existing FBOs necessarily supports the conclusion that that the parties are not similarly situated for the purposes of finding unjust economic discrimination. This is an important concept, because no grant assurance protects an aeronautical service provider from more effective competition.

In any case, the Complainant does not argue that the County provided unjustly discriminatory terms to the LGA FBOs since the 2005 Avitat Lease. It does not argue that it was deceived in 2005. Finally, Avitat does not argue that it requested similar treatment with regard to rights, restrictions and responsibilities and was unreasonably denied by the County. Clearly, Avitat chooses to continue a different business strategy under its leases as a Larger GA FBO from the LGA FBOs.[24]

Avitat agreed to differences in rights, restrictions, responsibilities and rent between the two different classes of FBOs at the Airport in its 2005 Avitat Lease. This agreement makes these differences sufficient to make Avitat dissimilarly situated to the LGA FBOs, in part, because Avitat has not and is not requesting similar treatment to the LGA FBOs from the County, and is not seeking access to additional aeronautical business, but is only seeking a limitation on existing aeronautical businesses (the LGA FBOs) whose agreements existed before the Complainant's current agreement.

[24]Avitat admits that its lease permits Avitat to offer all services offered by the LGA FBOs, but it voluntarily refrains from offering those services. [FAA Exhibit 1, Item 9, p. 7]

For similar reasons, the question of inequitable differences in rent, based on differences in rights, restrictions and responsibilities is not convincing. Again, Avitat agreed to operate in this environment, accepting some advantages and some disadvantages. Also, FAA precedent supports differences in rents, based upon differences in terms of use, physical and temporal differences.

B) Preferential Treatment with regard to voluntary operational restrictions

Avitat states, "The selective implementation of the 'voluntary' curfew has a discriminatory impact on FBOs at the Airport, since some FBOs have the VRFF[25] clause in their lease and others do not." [FAA Exhibit 1, Item 1, p. 14]

As stated by the County, these provisions are voluntary. The County states:

> *This program, as the name clearly states, is voluntary…*
> *The County offers FBOs no incentives and imposes no penalties in connection with participation in the program*. [FAA Exhibit 1, Item 6, p. 19]

Avitat does not mention the VRFF program in its Reply or state that the County has enforced any sanction on Avitat pursuant to the VRFF program. In BMI v MDAD, FAA Docket No. 16-05-16 (July 25, 2006) (Director's Determination) (BMI), the Director found that the sponsor's lack of enforcement of a prior permission rule for heavier aircraft negates a claim of unjust discrimination:

> [The Complainant] *does not contradict the assertion that MDAD has never refused entry of heavier aircraft. … Since there appears to have been no enforcement of the provision upon BMI, the FAA finds no discrimination.*
> *Consequently, the Director finds that the record is insufficient to determine that MDAD violated grant assurance 22 with regard to this issue.* [BMI, DD, p. 15][26]

This determination rests in part on the fact that the FAA considers an airport sponsor's actions, not the verbiage of leases or rules. In Self Serve Pumps v. Chicago Executive Airport, FAA Docket No. 16-07-02, (March 17, 2008) (Director's Determination, not appealed), (Self Serve), the Director stated:

> *the FAA does not judge an airport sponsor simply by the plain language of agreements or minimum standards, since such documents are rarely so perfectly crafted as to avoid all possibilities for inconsistency over time, changing circumstances and interpretations. Rather, the FAA judges compliance by an airport sponsor's actions or inactions with respect to those agreements or minimum standards.* [Self Serve, DD, pp. 31-32]

[25] Voluntary Restraint from Flying (VRFF).

[26] Prior-permission-required finding was not appealed. See *BMI v. FAA*, No. 07-12058 (11th Cir, Apr. 8, 2008), reversed on other grounds and remanded with instructions.

However, it is the LGA FBOs that are subjected to mandatory restrictions on their businesses. The County has emphatically re-enforced its intent to restrict the LGA FBOs from expanding their business and rights to do business outside their respective leased premises on the Airport. [FAA Exhibit 1, Item 1, exh. 31]

It would appear that the VRFF program has not been a significant burden upon Avitat. Also, inserting provisions in leases, as they come due for renewal is not necessarily unreasonable or unjustly discriminatory under the grant assurances. Finally, the VRFF program can be applied differently to Avitat than the LGA FBOs, because the LGA FBOs only control limited leased premises. Avitat enjoys a larger right to service over the entire Airport and, therefore, may bare a larger role in the VRFF program.

C) Preferential treatment regarding a prior request-for-proposals for the LGA FBOs

Avitat alleges:

> *The RFP process instituted by the County was unjustly discriminatory…. Since the successful bidder would not be allowed to sell jet fuel, the County barred the Jet FBOs from bidding on the RFP…. Thus, the Jet FBOs were unjustly discriminated against by not being allowed to bid on the RFP.* [FAA Exhibit 1, Item 1, p. 24]

However, in its Reply, Avitat states:

> *Avitat does not challenge the RFP by which the LGA FBOs were awarded their positions on the airport, nor the RFP's principal purpose of ensuring services oriented toward LGA aircraft. Rather, Avitat relied, and continues to rely, on the express terms of the RFP… which prohibits the successful bidder from selling jet fuel.* [FAA Exhibit 1, Item 9, p. 2]

The County makes two arguments. First the County states that the FAA pursues current compliance and that the decisions made from the RFP were over 10 years ago and that Avitat is now complaining nearly 10 years later. [FAA Exhibit 1, Item 6, p. 26]

The second argument from the County is that its RFP process from the 1990s was not unjustly discriminatory:

> *Even if Avitat's RFP claims were not time barred, the County's RFP process was reasonable and not unjustly discriminatory because the FAA has recognized "an airport sponsor's ability to use an available parcel of land to open the airport to competition and prevent complete saturation of the airport by a single enterprise, rather than for the expansion of the incumbent FBO." Director's Determination, Corporate Jets. Inc. v. City of Scottsdale. Docket No. 16-01-12, 2002 WL 475257, at *8 (FAA Mar. 15, 2002). In Corporate Jets, the Director upheld the airport sponsor's decision to exclude one of two incumbent FBOs "from responding to a request for proposal, based on the sponsor's desire to create competition or add further competition at the airport and to provide more choice and services for the*

> *public users." Id. The Director determined that excluding an incumbent FBO from the responding to the RFP was not unreasonable, or unjustly discriminatory so long as the airport sponsor's actions were "justified, uniformly applied and meant to promote competition, public airport use and the interest of civil aviation overall." Id.* [FAA Exhibit 1, Item 6, p. 27]:

The County's application of Corporate Jets is appropriate and accurate. A sponsor may reasonably pursue new entrant aeronautical service providers to "add further competition at the airport and to provide more choice and services for the public users." [Corporate Jets, DD, p. 10] In any case, due to the time elapsing, the FAA is unable to determine, ten years later, that the RFP process in 1997 was based on any unreasonable or discriminatory premise.

In its Reply, Avitat states, "*Avitat relied, and continues to rely, on the express terms of the RFP… which prohibits the successful bidder from selling jet fuel."* [FAA Exhibit 1, Item 9, p. 2]

RFPs are not controlling documents, under the grant assurances. The FAA does not enforce past policies, practices or interests of airport management, as expressed in an RFP. RFP's are solicitations to interested parties to conduct a business on an airport.[27] The FAA expects airport sponsors to change and evolve to address the best interests of the aeronautical public. The FAA is unable to determine that the County is responsible for Avitat's own choice to rely on the language of an 10-year old RFP, instead of relying on the obviously known and transparent practices of the County and of the LGA FBOs on the airfield in 2001, 2002, 2003, 2004 and in 2005 when Avitat agreed to the 2005 Avitat Lease.[28] Any lack of due-diligence on Avitat's part is Avitat's responsibility, not the County's responsibility. Avitat's reliance on the 1997 RFP was and is ill-advised. As stated above, and repeated here, the FAA:

> *does not judge an airport sponsor simply by the plain language of agreements or minimum standards, since such documents are rarely so perfectly crafted as to avoid all possibilities for inconsistency over time, changing circumstances and interpretations. Rather, the FAA judges compliance by an airport sponsor's actions or inactions with respect to those agreements or minimum standards.* [Self Serve, DD, pp. 31-32]

In the same way that Avitat's reliance on the RFP to direct the County's actions is ill-advised, so is its reading of the LGA FBO Leases. [FAA Exhibit 1, Item 9, pp. 19-23] As stated above, the LGA FBO Leases expressly contemplated the possibility of the

[27] Disputes between the parties, involving procurement issues are a matter of State law. See Consolidated Services Engineers & Constructors v. Palm Springs, 16-03-05 (June 10, 2004), Boca Airport, Inc., D/B/A Boca Aviation v. Boca Raton Airport Authority, FAA Docket No. 16-00-10 (April 26, 2001) and Morris Waller, and M &M Transportation, LLC., v. The Wichita Airport Authority, the City of Wichita, Kansas and Castle Rock Construction Company, FAA Docket No. 16-98-13 (March 12, 1999).

[28] Lease specifically contemplated that if the LGA FBOs based aircraft under 12,500 lbs. that utilize jet fuel exceeds 10%, the parties agreed to meet to discuss the possibility of the County granting the LGA FBOs the right to sell jet fuel. [FAA Exhibit 1, Item 1, exhs. 5 & 6, p. 13]

County's consent to change the LGA FBOs' restrictions on their own leased premises. In fact, the LGA FBO Leases stated the possibility of granting consent to change restrictions, and DID actually loosen restrictions upon the LGA FBOs in the LGA FBO Leases. [FAA Exhibit 1, Item 1, exhs. 5 & 6, pp. 11-13] All of the changes in restrictions occurred years before Avitat agreed to the terms of the 2005 Avitat Lease.[29] To this moment, Avitat has not requested to be subject to the same rights, restrictions and responsibilities of the LGA FBOs, as expressed in the 1997 RFP, or the 1999 FBO LGA Leases or the 2001 LGA FBO Approval Letters. [FAA Exhibit 1, Item 1, exhs. 22 & 23] In this case, the sponsor has made no changes to the competitive environment on the airfield since 2001 and has forcefully denied LGA FBO requested changes to expand their premises and scope of operations, including proposals to pay the County more, as recently as 2007. [FAA Exhibit 1, Item 1, exh. 31]

D) The Question of Reasonableness and Grant Assurance 22

The 2005 Avitat Lease does not restrict Avitat's activities on the Airport, as compared to the LGA FBOs.[30] The LGA FBOs are confined to their leased premises to conduct business while Avitat is not. Therefore, there is no specific allegation that the County has unreasonably denied access to Avitat. The Complainant re-enforces that it does not allege that the County's actions to support LGA at the Airport are in violation of the County's grant assurances. In fact the Complainant states:

> *Avitat does not challenge.. (the "County's") policy calling for differential financial treatment for LGA FBOs, the purpose of which is to encourage their continued economic viability and service to the Light General Aviation ("LGA") community. On the contrary, Avitat strongly supports it.…*
>
> *Avitat's challenge, however, is to the County's abandonment of the distinctions and the attendant responsibilities embodied in these documents.* [FAA Exhibit 1, Item 9, pp. 1-2]

In its Reply, the Complainant specifically acknowledges the reasonableness of the County's actions to preserve the economic viability and services offered by the LGA FBOs. What Avitat objects to is the right granted the LGA FBOs in 2001 to fuel some jet aircraft on their leased premises. Avitat seeks to have the County revoke this limited right for the LGA FBOs to fuel jet aircraft notwithstanding the fact that this practice

[29] Avitat focuses on the County's allowing the LGA FBO to retail jet fuel in the 2001 LGA FBO Approval Letters, citing a provision in the RFP prohibiting the sale of jet fuel [FAA Exhibit 1, Item 1, exh. 12, p. 6] and the LGA FBO Leases that suggest the possibility of allowing the LGA FBO's retailing of jet fuel. The LGA FBO Leases state that the County will discuss allowing jet fuel sales by an LGA FBO if "the percentage of Tenant based aircraft under 12,500 lbs. that utilize jet fuel exceeds 10%, the parties agree to meet to discuss the possibility of the County granting Tenant the right to sell jet fuel." [FAA Exhibit 1, Item 1, exhs. 5 & 6, p. 13] Avitat disputes that the LGA FBOs met the 'discussion' requirement of 10% jet fuel-use by based-aircraft. However, the Director notes that the County granted the LGA FBOs permission to retail jet fuel on September 20, 2001, after the changes in the market in part due to the aftermath of the attacks of 9/11, and more than three years prior to Avitat agreeing to the terms of the 2005 Avitat Lease. The LGA FBO Leases do not state that the County will never allow the LGA FBOs to retail jet fuel.

[30] Avitat admits it can offer all services offered by the LGA FBOs, but chooses not to.

commenced before Avitat accepted its lease agreements in 2005 and 2006. The County addresses the question of reasonability:

> *…the County's actions have not limited or restricted Avitat in any manner. … Avitat has presented no evidence that the County has acted to restrain Avitat or its operations, rather it alleges that County actions have benefited another category of Airport users. The County is not required to develop Airport land in a manner consistent with Avitat's desires or business objectives; rather, the County may exercise its rights and powers to develop and administer the Airport in a manner consistent with the public's interest.* [FAA Exhibit 1, Item 6, p. 24]

An allegation of unreasonable denial of access by means of an unreasonable term, as discussed in this sub-section, also falls on the basis that Avitat agreed to the competitive situation at the Airport, in existence since 2001, in its 2005 Avitat Lease and again in 2006.

E) Findings and Conclusions regarding Unjust Economic Discrimination

For the reasons discussed above and based upon FAA precedent, the Director finds that the County has not provided more favorable treatment to other aeronautical service providers at the Airport with regard to retail aircraft services or rent terms in a manner that unjustly discriminates against Avitat in violation Federal grant assurance 22.

As stated, and as supported by FAA precedent, Avitat is not similarly situated to the LGA FBOs because Avitat agreed to differences in rights, restrictions, responsibilities and rent in its 2005 Avitat Lease and Avitat has never requested similar treatment in terms of rights, restrictions, responsibilities and rent terms to the LGA FBOs.[31] Therefore, the County's choice not to change the payment terms of the LGA FBO Leases is not unjustly discriminatory.

As stated, and as supported by FAA precedent, the County's Voluntary Restraint from Flying (VRFF) Program is not unjustly discriminatory in that it is voluntary. The simple inclusion of the provision in some FBO leases and not in others is not sufficient to warrant a finding of unjust economic discrimination especially if one party controls only limited premises on the Airport and another controls much larger premises that service a majority of the aircraft that the VRFF program is directed toward.

The FAA is unable to determine that the County's RFP process from 1997 was unjustly discriminatory or unreasonable, because Avitat has not shown that the County's pursuit of additional competition or more choice for aeronautical users by excluding incumbent FBOs from submitting proposals was unreasonable.

Also, grant assurance 22 does not protect a complainant from terms and circumstances to which it has previously agreed. In the same way that the rights, restrictions,

[31] That is, Avitat has not requested to become an LGA FBO with reduced premises, rights and payment terms similar to the LGA FBOs.

responsibilities and rents are not unjustly discriminatory, they are not unreasonable in that Avitat agreed to accept a certain set of rights and responsibilities in exchange for certain rents and restrictions. It is not unreasonable for the County to allow tenants to compete according to the terms of agreements previously agreed to. The Director determines that the County has not violated grant assurance 22 and has not imposed unreasonable terms of use upon Avitat.

2. Whether the County's alleged unjust economic discrimination with regard to retail aircraft services constructively grants an exclusive right on the Airport in violation of grant assurance 23 and Federal law.

Avitat's entire Exclusive Rights argument in its Complaint is:

> *The courts have held that where an airport places a significant burden on one or more competitors, but not on others, the airport has effectively granted an exclusive right. Pompano Beach v. FAA, 114 F.2d 1529, 1542 (11th Cir. 1985). In this matter, the County has imposed a significant burden on the Jet FBOs by allowing the LGA FBOs the right to sell jet fuel while not paying market rent. It is a significant burden since the Jet FBOs have not received, among other things, the PFC subsidies and the substantially below market rent. This allows the LGA FBOs to sell their jet fuel at price much lower than the Jet FBOs. Thus, because of all of the financial benefits that the LGA FBOs have received from the County, they have effectively received an exclusive right: the County's financial benefits allow the LGA FBOs to price their jet fuel at an uncompetitively low rate in violation of the Airport's Grant Assurance 23, Exclusive Rights.* [FAA Exhibit 1, Item 1, p. 25]

The Complainant further links its allegation of unjust economic discrimination to a constructive granting of an exclusive right it its Reply, stating, "Moreover, it is a short step from economic discrimination to the grant of an exclusive right where, as here, 'a significant burden has been placed on one competitor that is not placed on another.' *The Aviation Cent v. City of Ann Arbor*…" [FAA Exhibit 1, Item 9, p. 5] In any case, Avitat's allegation of a granting of an exclusive right is that "*the County has imposed a significant burden on the* [Avitat] *by allowing the LGA FBOs the right to sell jet fuel while not paying market rent*." [FAA Exhibit 1, Item 1, p. 25]

In rebutting the County's argument regarding exclusive rights applying only when there is just one operator, Avitat further links its exclusive rights argument to a construction of unjust economic discrimination. The FAA believes that that is the basis of Avitat's argument:

> *By allowing the LGA FBOs to compete with the Jet FBOs for the jet fuel business while supplying*[32] *the LGA FBOs with substantial subsidies, the County has created unfair competition on the Airport that is "noxious to the anti-trust laws." … Since*

[32] The Director notes that the County in 2001 loosened the LGA FBOs' ability to serve some of the aeronautical market, but only on their exclusive premises in 2001, years before Avitat agreed to the 2005 Avitat Lease or again in 2006.

> *Grant Assurance 23 prohibits the County from "any standard that is applied in an unjustly discriminatory manner" and from imposing a "significant burden" on an aeronautical user of the airport, the County has effectively granted and exclusive right to the LGA FBOs.* [FAA Exhibit 1, Item 9, p. 26]

Here, as above, Avitat's argument fails on the fact that the County did not impose a significant burden on Avitat. Rather Avitat agreed to a wholly different set of rights, restrictions, responsibilities and rents in the 2005 Avitat Lease while the LGA FBO Leases had existed for years prior to 2005. The LGA Leases had not changed since 2001. Grant assurance 23, and the laws regarding exclusive rights, do not protect an entity from more effective competition emerging under pre-existing rights. In fact, the Penobscot precedent, subsequently and repeatedly applied with regard to grant assurance 22, and discussed above with regard to Adventure, Aerodynamics and SMAA emerges from an allegation of a violation of exclusive rights. As the County states:

> *The Penobscot Air Services court reiterated that the imposition of disparate rates for comparable premises "**may** (but need not) constitute a grant of an exclusive right." Id at 725 (emphasis in original). The court found that the "mere fact that lease payments are not identical does not necessarily constitute unjust discrimination in prices or the grant of an exclusive right." Id at 726 (internal quotations omitted). The court reasoned that a commercial enterprise cannot negotiate a rental agreement that requires a particular payment and rate schedule, commence doing business and earning profits, and then complain that the deal was unfair. Id at 727.* [FAA Exhibit 1 Item 6, p. p.38]

This concept was further applied in Wilson. Here, the Director stated:

> In light of the above findings that the Respondent has not unjustly discriminated against WAC, the FAA concludes that the Sponsor has not instituted unreasonable restrictions on WAC to constitute the constructive granting of an exclusive right. Furthermore, the Complainant has failed to show that it has been excluded from offering general aviation FBO services. The fact that the Complainant does not enjoy… terms it deems sufficiently advantageous.. does not constitute the granting of an exclusive right to its FBO competitor. [Wilson, DD p. 28][33]

In light of the analysis above, the FAA is unable to determine a violation of grant assurance 22, or a related constructive granting of an exclusive right.

3. Whether the County has failed to maintain an aeronautical rent schedule that makes the Airport as self-sustaining as possible under the circumstances existing at the Airport, by providing more favorable financial treatment to other aeronautical service providers at the Airport in violation of grant assurance 24.

[33] The FAA has since recognized that providing dual analysis of unjust economic discrimination and a constructive granting of an exclusive right is redundant. [See Skydive Paris v. Henry County, TN, FAA Docket No. 16-05-06, Director's Determination, p. 19.]

Avitat states:

> *By allowing the LGA FBOs to pay their rent through a percentage of their gross revenues and their gross operating profits, the Airport has created a huge economic disparity of rates between the LGA FBOs…*(and Avitat)*…. This has the effect of improperly reducing the LGA FBOs' operating costs and creating an enormous economic advantage for the LGA FBOs, in violation of Grant Assurance 24.* [FAA Exhibit 1, Item 1, p. 26]

The allegation appears to be a restatement of an allegation of unjust economic discrimination. In its Reply, Avitat again presumes of a finding of unjust economic discrimination, stating: *"It is also a short step from economic discrimination to a violation of Grant Assurance 24."* [FAA Exhibit 1, Item 9, p. 5] Also, in its Reply, Avitat argues FAA precedent, citing Jet 1 Center, Inc. v Naples Airport Authority, FAA Docket No. 16-04-03 (January 4, 2005) (Director's Determination, upheld in FAD July 15, 2005) (Jet 1). However, a larger excerpt from Jet 1 undermines the applicability of that precedent:

> *[I]f the Authority is losing potential revenue by not collecting the allowable fuel flowage fee, … it could be in violation of Assurance 24, Fee and Rental Structure, which requires the airport to maintain a fee and rental structure for facilities and services that will make the airport as self-sustaining as possible under the existing circumstances. If, on the other hand, the Authority is making up that lost revenue by spreading the associated cost among the remaining tenants, it could be in violation of the FAA's Policy Regarding Airport Rates and Charges, which states:*
>
> > *"Common costs (costs not directly attributable to a specific user group or cost center) must be allocated according to a reasonable, transparent and not unjustly discriminatory cost allocation methodology that is applied consistently, and does not require any aeronautical user or user group to pay costs properly allocable to other users or user groups."* [Jet 1, DD, pp. 29-30]

The Jet 1 Director's Determination did not find of a violation of grant assurance 24. Furthermore, the Director was discussing the possibility of assessing an airport-wide fuel-flowage fee: a **common cost**, not a percentage of the gross receipt of an FBO's business or an FBO's exclusive-use rent. In fact, this circumstance is expressly recognized with the whole quote above by its reference to the *Rates and Charges Policy*, specifically alluding to a fuel-flowage fee type of 'reasonable, transparent and not unjustly discriminatory cost allocation methodology that is applied consistently.' Fuel-flowage fees traditionally provide a cost-allocation for the common-use of the airfield. They are assessed on the per gallon flow of fuel of all aeronautical users. Avitat makes no argument regarding the assessment of fuel-flowage fees at the Airport.

Exclusive-use of airport property necessarily involves specific rights, restrictions and responsibilities. In fact, as discussed above, the simple occupancy of airport property is not at issue here. Avitat does not present any argument regarding comparative square-footage rents. This Complaint is about rights, restrictions and responsibilities to market

fuel and to provide aeronautical services, with Avitat having fewer restrictions and significantly more rights, to serve aeronautical customers than do the LGA FBOs.

The County also cites FAA precedent, stating:

> *Avitat's claim that the County is losing revenue by not charging market rates, even if true, ignores the FAA's long standing interpretation of self-sustainability "that there is no requirement to charge aeronautical service providers market rates."* [Adventure, DD, p. 24] [FAA Exhibit 1, Item 10, p. 19]

This citation to Adventure is accurate. In fact, this precedent is further supported by Ashton v Concord III, FAA Docket No. 16-02-11 (August 22, 2003) (Director's Determination, upheld in FAD February 27, 2004) (Ashton III), which states:

> *The Complainants present evidence of… some alleged local subsidy of the airport budget… Moreover, a sponsor is not obligated to structure airport concession and land use to maximize revenue.* [Ashton III DD p. 31]

In light of the analysis above, the County's below-market rental rates for specific rights and access to facilities under the LGA FBO Leases to ensure service to a segment of the aeronautical community is not a violation of grant assurance 24. The County disputes that the rent for the LGA FBOs is below fair-market value, but long-standing FAA precedent does not require market rates for aeronautical use property as a condition of complying with grant assurance 24. Aeronautical users pay for airport improvements through FAA grants, and the assurances connected to those grants are for the purpose of protecting the right of access to grant obligated airports for all of these aeronautical users, large jet and small piston aircraft operator alike.

VII. FINDINGS and CONCLUSIONS

Upon consideration of the submissions and responses by the parties, the 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 County is not currently in violation of grant assurances 22, *Economic Nondiscrimination;* 23, *Exclusive Rights*; or 24, *Fee and Rental Structure*, by maintaining an existing differential in rights, restrictions, responsibilities and rents between the two classes of FBOs at the Airport.

However, the Director notes that the County has taken action to create two distinct classes of FBOs to serve the Airport. Three Larger GA FBOs primarily serve larger corporate and turbo-jet powered aircraft under specific lease terms; and two LGA FBOs primarily serve smaller private aircraft under different lease terms.[34] In light of changing aeronautical demands of Airport users, the County is urged to carefully consider future changes to rights, restrictions, responsibilities and rents to the two classes of FBOs. To

[34] See County's Answer for planning documents that support its choice to establish 2 classes of FBOs. [FAA Exhibit 1, Item 6, exh. I, J, K, L, M, N, S, T, U, V, W]

date, the record is clear that the County continues the FBO distinction by denying the LGA FBOs' requests to expand their rights and access to business on and off their leaseholds at the Airport. As recently as January 11, 2007, the County emphatically stated:

> *Panorama requests the right to fuel aircraft at the airline terminal and other prime tenant's airport locations without restriction….*
> ***WE CANNOT AGREE TO THIS REQUEST****….*
> *Panorama requests that (the restriction to no more than 12 aircraft weighing more than 12,500 lbs. on Panorama's leasehold) be lifted….*
> ***WE CANNOT AGREE TO THIS REQUEST****…*
> [FAA Exhibit 1, Item 1, exh. 31, pp. 2-3 and Item 6, exhibit HH, pp. 2-3]

Going forward, the County is encouraged to continue this distinction, and not blur the differences between the two classes of FBOs to the extent to which one class is unjustly discriminated against by new rights given to the other class without changes to rents and terms of the FBO leases. Such action may also create an unreasonable term of tenancy.

ORDER

Accordingly, it is ordered that:

1. The Complaint is dismissed.

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

RIGHT OF APPEAL

This Director's Determination, FAA Docket No. 16-07-02, is an initial agency determination and does not constitute a final agency decision and order subject to judicial review. [14 CFR § 16.247(b)(2)] A party to this proceeding 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.

June 12, 2008
Date: _____

_____
Michael J. O'Donnell
Director, Office of Airport
Safety and Standards