

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

RDM, LLC.,

Complainant

v.

Ted Stevens Anchorage International Airport
(ANC),

Respondent



FAA Docket 16-09-14

DIRECTOR'S DETERMINATION

I. INTRODUCTION

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

RDM, LLC, (RDM/Complainant) has filed this Complaint against the Ted Stevens Anchorage International Airport (ANC/Respondent)¹. RDM alleges that the State of Alaska, Department of Transportation and Public Facilities (DOT and PF), as sponsor of the Ted Stevens Anchorage International Airport, has engaged in activity contrary to its federal obligations.

The Complainant alleges that the Respondent has violated Title 49 United States Code (U.S.C.) § 47107(a), *General Written Assurances*, and specifically has failed to comply with Federal Grant Assurance 22, *Economic Nondiscrimination*, and Grant Assurance 23, *Exclusive Rights*. [FAA Exhibit 1, Item 1, page 7.] Specifically, the Complainant alleges ANC gave more favorable terms and/or treatment to competitors CargoPort, United Parcel Service (UPS), and Federal Express (FedEx) in lease agreements. [FAA Exhibit 1, Item 1, page 9.]

The Respondent denies these allegations and states, *"This matter is the unfortunate story of an investor, RDM, that became involved in a big-dream project being pursued by individuals who, though fairly competent in many respects, turned out to have bitten off more than they could chew."* [FAA Exhibit 1, Item 3, page 2.]

¹ In RDM's Complaint, the Ted Stevens Anchorage International Airport is referred to as "ANC." The Respondent has referred to itself as "ANC" in its responses to the Complaint. For reasons of consistency, the Director will refer to the Respondent as ANC.

The Respondent also states, “*The project, which never even started substantial physical development, failed to meet its performance obligations and, after multiple extensions, Respondent terminated the lease.*” [FAA Exhibit 1, Item 3, Answer, page 2.]

Based on the Director’s review and consideration of the evidence submitted, the administrative record designated as FAA Exhibit 1, the relevant facts, and the pertinent laws and policy, the Director concludes that the Respondent is not currently in violation of grant assurance 22, *Economic Nondiscrimination*, or grant assurance 23, *Exclusive Rights*.

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

II. PARTIES

A. Respondent

The Ted Stevens Anchorage International Airport is a public-use airport (Airport) owned and operated by the State of Alaska. The Airport’s FAA Location Identifier is ANC. The FAA recognizes the State of Alaska as being the sponsor of the Airport and thereby the Respondent herein. The Airport, consisting of approximately 4500 acres, is classified as a commercial service airport with more than 160 based aircraft and more than 289,000 annual operations.² The Airport has 3 runways and an air traffic control tower. The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.* Since 1984, \$458,533,589.57 in federal AIP grants has been made to the Airport. [FAA Exhibit 1, Item 10.]

B. Complainant

RDM³ was a member of AGLAD Postmark, LLC⁴ (AGLAD) who, until February 4, 2009, had a long-term, 55 year ground lease with ANC. AGLAD was developing 40 acres at the Airport that would have consisted of air-cargo and logistics facilities at the AGLAD site. RDM states that the AGLAD facilities would have generated revenue by leasing building space and providing ramp parking positions known as hardstands⁵ for all air-cargo and maintenance companies. Development was anticipated to be in three phases. [FAA Exhibit 1, Item 1, page 2.]

² The Airport’s Airport Layout Plan (ALP) boundary encompasses the Lake Hood Seaplane Base (LHD) and Lake Hood Strip (Z41) facilities. Notwithstanding, the statistics for these two facilities are not included in this paragraph.

³ RDM, LLC was a 31.8% owner of AGLAD Postmark, LLC with a 51% percentage interest in the Company for voting purposes. [FAA Exhibit 1, Item 3, page 2]

⁴ AGLAD means Alaska Global Logistics Airpark Development, Inc.

⁵ Hardstands are paved areas on the airport that allow aircraft refueling, de-icing, etc.

III. BACKGROUND AND PROCEDURAL HISTORY

RDM initially filed a Part 16 complaint dated September 25, 2009, against the Respondent. It was assigned the FAA docket number of 16-09-11. The complaint was dismissed without prejudice on October 16, 2009, because the complaint did not certify, in accordance with 14 CFR §16.21(b), that informal resolution was attempted; it did not describe, in accordance with 14 CFR §16.23(a), how RDM was directly and substantially affected by the Respondent's action; it did not show that RDM had standing to file the complaint; and the complaint failed to allege, in accordance with 14 CFR §16.23(b)(2), how specific provisions of each Act were violated.

On October 27, 2009, RDM filed a second complaint against ANC. It was received on November 3 and docketed as FAA Case No. 16-09-14 on November 12, 2009. As described below, RDM cured the defects in its initial complaint. This second complaint (hereinafter, "Complaint") now provides the basis for this Determination.

In its Complaint RDM states that a total build-out of all three phases of its proposed development would have included 12 hardstands and over 125,000 square feet of building space with a value of more than \$100 million. RDM alleges this was a development ANC identified in their long range planning as being critical to meeting long-term demand for parking hardstands and building space. [FAA Exhibit 1, Item 1, page 2.]

In its Complaint, RDM provides a timeline of the AGLAD development:

1. November 18, 2005, a land lease for 55 years was signed between ANC and AGLAD with the following benchmarks:⁶
 - a. July 31, 2006: Written assurance from bond issuer that Bond Sale is on track to close by October 31, 2006.
 - b. October 31, 2006: Evidence that the Bond Sale has closed.
 - c. November 18, 2007: Substantially complete Phase I.
 - d. May 18, 2013: Substantially complete Phase II.
2. November 9, 2007: Supplement 2 to Land Lease.
 - a. April 1, 2008: Confirmation for a commitment for financing.
 - b. December 31, 2008: Substantially complete Phase I. Improvements must be at least \$10 million.
 - c. June 30, 2009: Substantially complete Phase II. Improvements must be at least \$15 million.

⁶ The lease agreement dated November 18, 2005, (lease agreement ADA-31179) states in part, "Both parties have entered into this Lease with the understanding that the Lessor retains the right to terminate this lease, at the Lessor's sole discretion, if the Lessor does not receive (1) written assurance from the bond issuer by July 31, 2006, that the Bond Sale is on track to close by October 31, 2006, and (2) evidence thereafter that the Bond Sale has closed by October 31, 2006."

- d. June 30, 2010: Substantially complete Phase IIA.
3. May 9, 2008: Supplement 3 to Land Lease.
 - a. June 16, 2008: Proof of financial security.
 - b. December 31, 2008: Proof of financing commitment for Phase I.
 - c. December 31, 2010: Proof of financing commitment for Phase II.
 - d. December 31, 2010: Substantially complete Phase I. Improvements must be at least \$10 million.
 - e. December 31, 2012: Substantially complete Phase II. Improvements must be at least \$15 million.
 - f. December 31, 2012: Substantially complete Phase IIA.
4. November 25, 2008: Letter by AGLAD requesting an extension of December 31, 2008, deadline for Phase I financing.
 - a. Extension was requested to allow time to bring in interested investment groups (including Native Corporations) due to poor economic conditions and world-wide recession leading to the inability of AGLAD to secure timely financing.
5. December 4, 2008: Letter from ANC denying the request for an extension.
6. January 2, 2009: Notice of default from ANC for not complying with Dec. 31, 2008, deadline for proof of Phase I financing.
7. January 29, 2009: Letter from AGLAD requesting stay of default due to poor economic conditions.
8. January 30, 2009: Letter from ANC denying stay of default.
9. February 4, 2009: Letter from ANC canceling AGLAD land lease.
10. February 24, 2009: Letter from AGLAD protesting cancellation of land lease.
11. March 12, 2009: Letter from ANC affirming canceling of lease. [FAA Exhibit 1, Item 1, pages 4-6.]

RDM states that as of February 4, 2009, when ANC cancelled it's ground lease with AGLAD, AGLAD had worked relentlessly ("*through millions of invested dollars and thousands of man hours*") to achieve the following milestones with respect to the project:

- "Signed leases: There were signed/pending tenant leases for 100% of the Phase 1 building and 73% of the Phase 1 ramp space. These leases included companies such as Kalitta Air, Pegasus Aircraft Maintenance, Evergreen International Airlines, Trailboss Enterprises, Hot Wings, and Atlas Polar.

- Strong tenant interest in the remaining ramp space. Cathay Pacific was in final negotiations with AGLAD on filling the remaining ramp space.
- Solid Phase 2 interest. Many more companies were extremely interested in Stage 2. These companies included Aeromag-Contega, Atlas Air, Trailboss Enterprises, DHL, Alaska Snow Removal, Polar Air Cargo, Qantas Airways, and EVA.
- Submitted permits. Permits had been submitted to the City of Anchorage for approval.
- Army Corps Permit. The Army Corp wetlands permit had been secured.
- Preliminary Site Improvements. The site had been dewatered and arrangements had been made to use soil “fill” from the airport to fill the site.
- General Contractors Selected. The general contractors for both the building and the ramp had been selected and were ready for the immediate start of the construction.
- Design. Design of the building, hardstands and taxi lane extensions were nearly complete.
- Invested Money. Over \$3,000,000 was spent to progress the project to the milestones invested above.
- Invested Time. Over four years of full-time work was spent by numerous AGLAD personnel to progress the project.” [FAA Exhibit 1, Item 1, page 6.]

RDM alleges ANC violated Grant Assurance 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*. Specifically, RDM alleges ANC has afforded more favorable treatment to competitors CargoPort, UPS and FedEx. Below is a list of twelve areas where RDM alleges ANC violated its grant assurances by granting favorable treatment to competitors that was not afforded to AGLAD.

FAA Exhibit 1, Item 1, page 9.]

1. Financing Requirement – AGLAD should not have had a financing requirement in their lease with ANC.
2. Unmet Lease Obligations – AGLAD’s lease should have been extended.
3. Time to Complete Improvements – AGLAD should have received a much longer initial period to complete improvements due to AGLAD’s large project size.

4. Conditions for Default – AGLAD should only have been defaulted on their Phase I lots and not their Phase II lots.
5. Rent Deferral – AGLAD should have received deferment of rent until improvements were substantially completed. Additionally, AGLAD should have been able to repay deferred rent over two years.
6. Material Use Permit – AGLAD should have been granted free “fill” material.
7. ANC Ownership Assistance – ANC should have assisted with AGLAD financing by agreeing to buy back AGLAD improvements.
8. Right of First Refusal – AGLAD should have been granted use of First Right of Refusals for their development.
9. Use of ANC Owned Hardstands – AGLAD should have been granted “preferential use” of hardstands P-1, P-2, and P-3, or AGLAD should have been granted the right to exclusively rent P-1, P-2, and P-3 at a low rate with seven or eight years of free rent.
10. ANC Improvements – AGLAD should not have had to pay for the construction, use, maintenance, and operation of taxiways. AGLAD should have received reimbursement from ANC for site improvement costs. AGLAD should not have had to pay for construction of an aircraft hangar.
11. Parking Hardstand Price Undercutting – AGLAD should not have had to compete against ANC in soliciting aircraft to use AGLAD’s hardstands.
12. Army Corps of Engineers Wetlands Permit – AGLAD should have received from ANC the money AGLAD spent to obtain the Army Corps of Engineers wetlands permit.

[FAA Exhibit 1, Item 1, page 21.]

On December 8, 2009, ANC filed its Answer to the Complaint and sought dismissal of the Complaint, stating that the Complainant was less than a one-third member of AGLAD Postmark, LLC and lacked standing to file a Complaint under Part 16. [FAA Exhibit 1, Item 3, page 1.]

ANC states, “...AGLAD first approached ANC⁷ management in 1999 or 2000 with the idea of developing an enormous top-of-the-line air cargo facility for ANC. AGLAD, Inc. wanted to develop a very large air cargo facility ‘under the radar’ to seize what they perceived to be a huge air cargo servicing market on the horizon. Initial meetings with airport management were actually requested to be held away from the airport so as not to arouse competition.” [FAA Exhibit 1, Item 3, page 2.]

⁷ ANC means Anchorage International Airport

ANC goes on to state, *“Ultimately...AGLAD focused on some 40 acres of what was commonly known as Postmark Bog, prime-location land along the airport’s north-south runway. Postmark Bog was also the subject of a wetland fill permit issued to ANC by the Corps of Engineers to facilitate private development at ANC.”* Additionally, *“Airport management agreed that there was likely a market for the proposed project, but it was uncertain whether the size of the market was as large as the scale of the project. AGLAD, Inc.’s main difficulty seemed to be documenting its financial capacity, termed ‘financial responsibility’ under applicable airport regulations, and pin down just how it would finance its dream. Nevertheless, airport management has worked with the group since 2002, with an interruption during that period due to a lawsuit over the wetland fill permit obtained by the airport and covering the subject parcel...In October 2003, however, ...AGLAD Inc. resumed discussions with the airport. AGLAD decided to move ahead while an initially favorable ruling remained on appeal. The appeal would ultimately result in cancellation of the wetland fill permit. Respondent, however, allowed [AGLAD] to rely on the wetland ‘credits’ that ANC had earned through acquisition and preservation of off-airport wetlands, in part, to facilitate development of this parcel, to help [AGLAD] get its own permit.”* [FAA Exhibit 1, Item 3, page 3-4.]

ANC goes on to state, *“AGLAD’s apparently limited financial responsibility remained a concern of airport management, which did not want to tie-up this prime location long-term with an entity that would prove incapable of developing it...Airport management also had to consider its regulatory obligations, the public interest and the precedent that might be set if an under-capitalized group could tie-up a large and valuable portion of the airport, preventing alternative development, while failing to produce a product.”* [FAA Exhibit 1, Item 3, page 4.]

ANC issued a number of extensions to AGLAD, stating, *“Once airport management decided to issue AGLAD a lease, management was committed to giving them plenty of opportunity to succeed. When things did not progress as quickly as promised, management repeatedly gave AGLAD more time – both in three lease supplements, and less formally by letter.”* [FAA Exhibit 1, Item 3, page 5.] A review of cited documents shows that ANC granted extensions to AGLAD on October 11, 2006, November 14, 2007, and May 9, 2008. Additionally, in a letter dated March 21, 2008, from ANC to AGLAD, ANC stated, *“The proposed relief that allows a cumulative two years beyond the original one-year deadline for securing financing, and four years beyond the current contract commitment date for completion of the entire project constitutes a material amendment to the lease under 17 AAC 42...”* [FAA Exhibit 1, Item 3, exhibit 1, page AGLAD-0188.]

ANC stated, *“In October, 2008, the airport finally issued a notice of default. It had been nearly three years since AGLAD had first committed to sell bonds within one year and complete construction within two years. Although these deadlines had been extended, final financing was still unknown and the bog looked pretty much as it had before the lease was signed...As the December 31, 2008, financing deadline loomed, AGLAD again requested extension. By this time, however, AGLAD had missed virtually every deadline and every extended deadline, and continued to request extensions at every turn. AGLAD*

appearing to be no closer to success, with the subleases so far in hand growing stale, and having established a remarkably consistent pattern of failure to perform, airport management had finally decided it was time to draw the line. The extension request was denied.” [FAA Exhibit 1, Item 3, page 6.]

On December 16, 2009, RDM replied to ANC’s Answer and stated, *“As evidenced in RDM’s complaint, ANC, for several years, has willfully engaged in preferential treatment of tenants as determined by what tenants ‘bring to the table.’ These years of abuse have created an alleged culture of corruption that imperils the public’s interest. Tenants need to be confident that ANC must comply with Federal Law as it pertains to all tenants, not just the select few.”* RDM goes on to state, *“The complaint was filed by RDM to ensure that ANC is held responsible for its violations of grant assurances. It was the violation of these rights that directly lead to the failure of the AGLAD development.”* [FAA Exhibit 1, Item 4.]

On January 11, 2010, ANC filed its Rebuttal to RDM’s Answer and reiterates its earlier arguments that, *“RDM has no standing under Part 16 because RDM has not demonstrated that either RDM or AGLAD are, or proposed to be, an aeronautical user or provider of aeronautical services. RDM is a real estate developer and AGLAD proposed to be a real estate developer.”* ANC also argues, *“Contract terms not prohibited by law or grant assurances, but agreed to by AGLAD as a matter of contract, are not proper subjects for review under Part 16; RDM has not carried its burden of proof that AGLAD was similarly situated to FedEx, UPS or CargoPort, which it was not; RDM has not carried its burden of proof that the terms and treatment AGLAD received from the Alaska DOT & PF were not reasonably justified, which they were; the specific statement[s] in RDM’s Reply do not provide material support for its allegations.”* [FAA Exhibit 1, Item 5, page 1-2.]

On April 14, 2010, RDM submitted an amendment to its Complaint and further alleged that ANC breached the public interest and inconsistently applied public airport lease policies. Specifically, RDM stated, *“It must be viewed in the light of how other similarly situated parties were dealt with by the ANC, that held a similar function and service potential we were developing for local aviation stakeholders [sic]. In our analysis, this policy issue is perhaps the most relevant aspect of how ANC lease policy was inconsistently applied to our detriment and insures that ‘beneficial competition’ for the public interest has been stifled and discouraged in Alaska.”* [FAA Exhibit 1, Item 6, page 3.]

RDM also states, *“Specifically, if ANC policy has not held to the same level of accommodation and flexibility offered others in the recent past and as outlined in several public disclosures, the following two main elements would not have been forced upon RDM:*

- 1. The ANC would never have placed such draconian demands for performance standards as noted in the opening negotiations of our lease terms. A reasonable person can only construe that: since ANC had never demanded these difficult*

terms of others as public policy in the past, to demand such now of RDM, is in fact an unattainable demand.

2. *Such ANC policy demands do define significant and divergent terms offered to RDM. In fact, an inflection point must be recognized in the clear and unyielding fact that: other airport lease-holders have been granted wide latitude from such public policy standards and lease elements by ANC, yet RDM has been held to a much higher standard of performance and demand. This unique ANC demand does define the policy failure where RDM has never been offered [or] even allowed the consideration offered all others.”⁸ [FAA Exhibit 1, Item 6 page 4-5.]*

On April 27, 2010, ANC submitted a Motion to strike RDM amendment, stating that the amendment was untimely, there was no motion submitted for leave to file untimely amendment, and that the amendment presented no new evidence that was not obtainable at the time that the Complaint was filed. [FAA Exhibit 1, Item 16]

On April 29, 2010, RDM answered ANC’s Motion to Strike Untimely Amendment and requested that the Director strike the Motion because, *“The purpose of the Amendment was to indicate that not only were AGLAD’s rights brutally violated but...ANC’s policy failures threaten the larger public interests as well.”* [FAA Exhibit 1, Item 7, page 1.]

On April 29, 2010, RDM also replied to ANC’s Answer to Amendment to strike the amendment, stating, *“Contrary to ANC’s assertions found in these paragraphs, RDM has consistently asked the FAA to judge its complaint based upon ANC’s failed leasing policy as applied to AGLAD and exhaustively explained in RDM’s filings. RDM feels that its rights were violated and it is precisely for this reason that Part 16 is made available by the FAA.”* [FAA Exhibit 1, Item 8, page 3.]

On May 18, 2009, ANC rebutted RDM’s Reply to the Answer to the Amendment and argued that RDM’s Amendment *“just rehashes the unsupported allegations of the original Complaint.”* ANC also stated, *“RDM has never shown that it or AGLAD, both real estate developers with no airport development experience or plans to provide aeronautical services, were aeronautical users entitled Grant Assurance protection or Part 16 recourse at all.”* [FAA Exhibit 1, Item 9, page 2.]

ANC goes on to argue, *“Nor has RDM shown that AGLAD, unable either to post a development guarantee for its expensive ‘pull-through’ B-747 hardstand development or to meet development deadlines – much less RDM, its less than one-third investor – was similarly situated in 2005-2009 to:*

⁸ RDM goes on to argue that ANC’s “failed public policy” must be the defining issue in this instant complaint, stating, *“While our complaint does define our harms, it also stands as a clear example of how all aviation users suffer. This must serve as the focus [of] your recognition, investigation, and adjudication, concerning our claim and by extension the violation of the ‘written grant assurances.’”*

The Director notes it is not the role of the FAA to identify and correct a failed public policy by a state. The role of the FAA in this complaint is to determine whether the airport sponsor is in noncompliance with its federal airport grant assurances. Therefore, the Director will not engage in analysis or discussion on the relative merits or failure of public policy by the State of Alaska.

1. *FedEx or UPS, both world-class cargo airlines with airport project experience and deep financial capacity, constructing facilities, including "push-back" hardstands, for their own use beginning in 1988 and 1990 respectively, and meeting every deadline in the process, or*
2. *Alaska CargoPort, an LLC consisting of an experienced airport cargo facility developer and an oil company, ANC's primary jet fuel supplier, they put up a \$10 million guarantee for CargoPort's "push-back" hardstands and facilities beginning in 1997 and receiving only minor extension to later phase work after completing its original project within its original deadline."*

[FAA Exhibit 1, Item 9, page 2.]

ANC concludes by stating, "Nowhere in this Part 16 action has RDM ever requested restoration of the AGLAD lease (indeed, RDM appears to have no authority to make such a request on AGLAD's behalf). RDM has never indicated any interest in having ANC entertain a new lease application from AGLAD or RDM. What RDM has said, in a June 22, 2009 letter to then-Deputy Commissioner Klein, is that 'any settlement with ANC would have to include a monetary settlement to compensate AGLAD (and thus RDM) for their damages.'" [See FAA Exhibit 1, Item 1; exhibit B, p.4 of the June 22, 2009 letter.] [FAA Exhibit 1, Item 9, page 3.]

IV. ISSUES

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

- Issue 1:** Determine whether the Complainant has standing to file a Part 16 Complaint and whether RDM/AGLAD were similarly situated to other cargo entities currently located on the Airport.
- Issue 2:** Determine whether the Respondent is in violation of Grant Assurance 22, *Economic Nondiscrimination*, by terminating AGLAD's lease prematurely or preventing AGLAD from securing financing which resulted in the termination of AGLAD's lease.
- Issue 3:** Determine whether the Respondent is in violation of Grant Assurance 23, *Exclusive Rights*, by treating other entities that were developing land more favorably than Respondent treated AGLAD.

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 airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

The following is a discussion pertaining to (a) the Airport Improvement Program, (b) Airport Sponsor Assurances, (c) the FAA Airport Compliance Program, (d) enforcement of Airport Sponsor Assurances, and (e) the complaint process.

A. The Airport Improvement Program

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

B. Airport Sponsor Assurances

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

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.⁹ FAA Order 5190.6B, *FAA Airport Compliance Manual* (Order 5190.6B or Order), issued on September 30, 2009, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to compliance with federal obligations of airport sponsors. 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.

Two federal grant assurances apply to the circumstances set forth in this Complaint:

⁹ 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.

(1) Grant Assurance 22, *Economic Nondiscrimination*; and (2) Grant Assurance 23, *Exclusive Rights*.

(1) Grant Assurance 22, *Economic Nondiscrimination*

The owner of an airport developed with federal assistance is required to operate the airport for the use and benefit of the public. 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. Grant Assurance 22 of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a) (1) through (6), and requires, in pertinent parts:

- a. *[The airport owner/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.*
- b. *In any agreement, contract, lease or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to*
 - i. *Furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and*
 - ii. *Charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchases.*
- h. *The airport owner/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.*
- i. *The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport as such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.*

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. [See FAA Order 5190.6B, Sections 8.8.a; and 14.3.]

FAA Order 5190.6B describes the responsibilities under Assurance 22 assumed by the owners or sponsor of public use airports developed with federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. [See FAA Order 5190.6B at Chapter 9.]

The owner of an airport developed with federal assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination. [See FAA Order 5190.6B at Section 9.1.a.]

(2). Grant Assurance 23, *Exclusive Rights*

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 5190.6B 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 5190.6B; Section 11.2 .]

An exclusive rights violation can occur through the use of leases where, for example, all the available airport land and/or facilities suitable for aeronautical activities are leased to

a single aeronautical service provider who cannot put it into productive use within a reasonable period of time, thereby denying other qualified parties the opportunity to compete to be an aeronautical service provider at the airport. . [See FAA Order 5190.6B; Section 8.11]

FAA Order 5190.6B 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 5190.6B, Chapter 8.]

C. The FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their federal obligations through its Airport Compliance Program. Sponsor obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving federal grant funds or when accepting the transfer of federal property for airport purposes. The FAA incorporates these obligations in grant agreements and instruments of conveyance to protect the public's interest in civil aviation and to ensure compliance with federal laws.

The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe and properly maintained public-use airports that airport sponsors operate in a manner consistent with their 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 that airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that airport sponsors serve the public interest.

FAA Order 5190.6B, *Airport Compliance Manual*, dated September 30, 2009, 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 interpreting and administering the various continuing commitments airport owners make to the United States as a condition for receiving Federal funds or Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports, and facilitates the interpretation of grant 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 of whether an airport sponsor currently is 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 an applicable Federal obligation to be grounds for dismissal of such allegation. [See Wilson

Air Center v. Memphis and Shelby County Airport Authority, FAA Docket 16-99-10 (Director's Determination Issued August 2, 2000) (Final Agency Decision Issued August 30, 2001)(Wilson); upheld in Wilson Air Center, LLC v. FAA, 372 F.3d 807 (C.A. 6, June 23, 2004)]

D. Enforcement of Airport Sponsor Assurances

The Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The federal role in encouraging and developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport owner or sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport owners or sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their federal grant assurances.

E. The Complaint Process

Pursuant to 14 CFR § 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant(s) shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint(s) shall also describe how the complainant(s) directly and substantially has/have been affected by the things done or omitted by the respondent(s). [See 14 CFR § 16.23(b)(3-4).]

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the Complaint. In rendering its initial determination, the FAA may rely entirely on the Complaint and the responsive pleadings provided. Each party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [See 14 CFR § 16.29.]

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedures Act (APA) and Federal case law. The APA provision [See 5 U.S.C. § 556(d)] states, "(e)xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." [See also, Director, Office Worker's Compensation Programs, Department of Labor v. Greenwich Collieries, 512 US 267, 272 (1994) and Air Canada et al. v. Department of Transportation, 148 F3d 1142, 1155 (DC Cir, 1998).] Title 14 CFR § 16.229(b) is consistent with 14 CFR § 16.23, which requires the Complainant to submit all documents

then available to support his or her complaint. Similarly, 14 CFR § 16.29 states that, “(e)ach party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance.”

VI. ANALYSIS AND DISCUSSION

Issue 1: Whether the Complainant has standing to file a Part 16 Complaint and whether RDM/AGLAD is similarly situated to other cargo entities currently located on the airport.

Standing

The Respondent challenges the Complainant’s standing to file this Part 16 Complaint. In its Memorandum In Support of Motion to Dismiss, ANC argues that RDM lacks standing to file a Part 16 Complaint, stating, “*RDM has no direct relationship with ANC. RDM has never had a direct relationship with ANC. RDM has never, on its own behalf, sought, received or been denied any right or privilege to do anything at ANC. ANC has never made any decision or done anything directed at RDM or having applicability to RDM. None of the alleged wrongful conduct by ANC affected RDM in any direct way.*” [FAA Exhibit 1, Item 3.]

ANC goes on to state, “*All of RDM’s allegations of wrongful treatment by ANC...relate to the treatment of AGLAD, not treatment of RDM. RDM is not and was not AGLAD. RDM was not and is not even a manager of AGLAD. As an investor, RDM may well have been directly affected by AGLAD’s business failure, and that business failure, may, in turn, have related to AGLAD’s loss of its lease at ANC, and AGLAD’s loss of its lease due to its failure to satisfy the lease requirements, may, in turn, have related to ANC’s decision to deny AGLAD yet another extension of time to fulfill the lease requirements. But that puts RDM several steps of affect away from being directly and substantially affected by ANC’s direct decision with respect to AGLAD to deny yet another extension of time to satisfy the lease requirements.*” [FAA Exhibit 1, Item 3, page 3.]

ANC also states, “*RDM has not shown, and cannot show, that it was ‘directly and substantially affected’ by any action alleged or actually done by the State of Alaska, Department of Transportation and Public Facilities, Ted Stevens Anchorage International Airport, as is required for standing under 14 [CFR] § 16.23; and at root, the complaint challenges contract terms agreed to by the company in which RDM was a minority investor, which terms are not a proper subject for review under Part 16.*” [FAA Exhibit 1, Item 2, Memorandum in Support of Motion to Dismiss, page 1.]

The Complainant disputes the Respondent’s claim that it lacks standing. RDM argues it was directly and substantially affected by actions taken by ANC, stating, “*Not only is RDM, LLC a 31.8% owner of AGLAD Postmark, LLC but they are also ‘deemed to have a 51% Percentage Interest in the Company for voting purposes.’*” RDM goes on to supplement this argument by stating, “*Although RDM initially was not the ‘contact*

person' with ANC, RDM was a very active member of AGLAD Postmark, LLC and worked closely with Lee Nunn and Carol Meyers on the AGLAD development. Additionally, in the fall of 2008 RDM took a very active role in the AGLAD development when they secured an Option to purchase all of AGLAD, Inc.'s interest in AGLAD Postmark, LLC. RDM met several times with TASIA...to discuss extending AGLAD's lease deadline and ANC help with financing." [FAA Exhibit 1, Item 3, page 2.] RMD states, *"The assertion that RDM is a minor partner with minor input is simply wrong."* [FAA Exhibit 1, Item 3, page 2.]

In an Option Agreement between RDM and AGLAD, RDM agreed to purchase AGLAD's Member Interest in the Company on November 18, 2008. In the Agreement, RDM agreed to purchase AGLAD's remaining 67.72% interest¹⁰ for \$400,000 payable with \$50,000 upon exercising the option, \$150,000 a year later, and \$200,000 another year after that. It states in the Agreement, *"...RDM shall make an effort to bring the project out of default by paying the back lease payments, paying the November and December rent payments when they come due and fulfilling the 'financial security' requirements, regarding site civil work for Stage 1 of the Ted Stevens International Airport or its successor...If RDM determines, in its sole discretion, that it is unable to fulfill such requirements of the Airport, RDM is under no obligation to continue making ground lease payments."* [FAA Exhibit 1, Item 3, Exhibit B, page 1.]

To buttress its argument, RDM cites *Jim Martyn v. Port of Anacortes, Washington* FAA Docket No. 16-02-03, (Director's Determination)(April 14, 2003), (Martin). RDM argues that this case supports its arguments that it has been directly and substantially affected by ANC actions, stating, *"The FAA states here that in order to have standing, the Complainant needs only to meet the requirements of § 16.23(b)(4) by providing a brief description of how he was affected. RDM has met this standard. On pages 9-20 of the Complaint, RDM describes how they were 'directly and substantially' affected by ANC's grant assurance violations."* [FAA Exhibit 1, Item 3, page 4.]

RDM asserts that it was directly and substantially affected by actions taken or not taken by ANC. RDM identifies twelve (12) items it states should have been granted to AGLAD because they were granted to other tenants on the airport. These items include:

1. Financing requirement
2. Unmet Lease Obligations
3. Time to Complete Improvements
4. Conditions for Default
5. Rent Deferral
6. Material Use Permit
7. TSAIA Ownership Assistance
8. First Right of Refusal
9. Use of TSAIA Owned Hardstands
10. TSAIA Improvements

¹⁰ RDM already owned 32.28% interest in AGLAD. By exercising the option to purchase the remaining 67.72% held by AGLAD, RDM then owned 100% of AGLAD's interest.

11. Parking Hardstand Price Undercutting
12. Army Corps of Engineers Wetlands Permit

In this case, RDM has provided arguments and documentation that support how it was affected by decisions made by ANC regarding AGLAD's performance under its lease with ANC. For example, RDM alleges that ANC should have only been defaulted on their Phase I lots and not their Phase II lots. Additionally, RDM alleges that AGLAD should not have had to pay for the construction, use, maintenance, and operations of taxiways.

Originally as a minority partner in the enterprise, RDM contributed assets, and had 51% voting rights in AGLAD. At one point, RDM purchased the remaining shares held by AGLAD and was the de facto principal to the lease agreements. Additionally, RDM had an option agreement with AGLAD that irrevocably granted to RDM an option to purchase all of AGLAD's Member Interest in the company. This option was exercised by RDM on or about November 16, 2008 during a Board of Director's meeting. [FAA Exhibit 1, Item 4, exhibit B, page 1-12.]

The fact that AGLAD, as an entity, did not file a Complaint against ANC does not necessarily preclude RDM from filing a Complaint. RDM has met the initial burden of supporting its allegations that it was directly and substantially affected by actions taken by ANC.

RDM has provided evidence in the record necessary to conclude that its ownership of AGLAD was sufficient for it to act in behalf of the corporation. RDM was, therefore, affected by the Respondent's actions towards AGLAD. The Director finds the Complainant does have standing to file this Part 16 Complaint.

C. Economic Nondiscrimination

Similarly Situated –

RDM and ANC argue over elements that allegedly show similarity and difference in the context of whether RDM was similarly situated to other tenants on the Airport. RDM focuses on how AGLAD was similar to FedEx, UPS, and CargoPort. ANC argues that there is *"a rough similarity in location...[but] denies that the similarity in size is sufficient that they are similarly situated..."* [FAA Exhibit 1, Item 3, page 19.]

In its Complaint, RDM states there are two principle reasons why these three ANC tenants (FedEx, UPS, and CargoPort) are similar to AGLAD. The first is location and size, and the second is use. [FAA Exhibit 1, Item 1, page 7.]

Specifically, RDM argues that, *"All four developments¹¹ ...are located along the east side of the north/south runway. As such all sites have similar topography and soil conditions.*

¹¹ FedEx, UPS, CargoPort, and AGLAD.

All sites are relatively level and have up to 14 feet of organic matter requiring the developer to dig out the organics and replace it with suitable soil. Historically, this 'fill' has been provided by the airport. Additionally, all four developments are similar in size.” [See Table XX, Development Location and Size, below.]

Table 1: Development Location and Size

<u>Developer</u>	<u>Location</u>	<u>Size of the Development</u>
FedEx	East side of north/south runway	2,774,385 square feet
UPS	East side of north/south runway	989,350 square feet
CargoPort	East side of north/south runway	1,486,580 square feet
AGLAD	East side of north/south runway	1,764,186 square feet

RDM states that in addition to all four developments being similar in location and size, all four developments have similar uses.

- FedEx Use: Construction and operating of aircraft parking, aircraft de-icing, maintenance, fuel distribution, ground handling, air cargo transfer, short term air freight build-up and break down, storage, and office support.
- UPS Use: Construction and operating of aircraft parking, aircraft de-icing, maintenance, fuel distribution, ground handling, air cargo transfer, sorting and clearance.
- CargoPort’s Use: Construction and operating of aircraft parking, aircraft deicing, maintenance, fuel distribution, ground handling, air cargo transfer, short term air freight build-up and break down, storage and office support.

RDM states, “All four developments involve constructing and using aircraft parking positions and a building facility where office, warehouse, and cargo transfer/sorting can occur. The only difference between [developers] CargoPort and AGLAD [when compared to] UPS and FedEx is that CargoPort [and] AGLAD built the aircraft parking positions and building facility for the purpose of leasing to others, whereas UPS [and] FedEx built their aircraft parking positions and building facilities to use for their company’s own use only.”¹² However, in all four cases, the development process and the

¹² According to ANC, AGLAD did not actually construct facilities but intended to construct them under the terms of the lease. In its Answer, ANC states, “Respondent admits that UPS and FedEx built their aircraft parking positions and building for their own use, but denies that no other differences distinguish the UPS and FedEx developments from the CargoPort development and the obligations that AGLAD never fulfilled. Respondent admits that CargoPort built its aircraft parking positions and building facilities for leasing to others, and that the lease obligations that AGLAD never fulfilled also called for the construction of aircraft parking positions and building facilities for leasing to others, but denies that no other differences distinguish the UPS and FedEx developments from the CargoPort development and the obligations that AGLAD never fulfilled.” [FAA Exhibit 1, Item 3, pages 22-23.]

end product are the same: aircraft parking positions and building facilities.” [FAA Exhibit 1, Item 1, page 8.]

As RDM points out in the statement above, AGLAD’s purpose in pursuing the lease was to build aircraft parking positions and building facilities to lease to other entities. This is similar to how CargoPort proceeded; the Respondent admits this similarity. Respondent denies any other similarity sufficient to establish the entities as similarly situated. Table 2, *Respondent’s Assessment of Developer Similarity to AGLAD*, shows ANC’s position. TSAIS states, “Respondent...admits that there is a rough similarity in location among CargoPort, FedEx, UPS and AGLAD, denies that the similarity in size is sufficient that they are similarly situated, denies that there is similarity of use among FedEx, UPS and AGLAD, and admits that there is a similarity in use between CargoPort and AGLAD.” [FAA Exhibit 1, Item 3, Exhibit A, page 19.]

Table 2: Respondent’s Assessment of Developer Similarity to AGLAD

<u>Developer</u>	<u>Similarity in Location</u>	<u>Similarity in Size</u>	<u>Similarity in Use</u>
FedEx	Yes	No	No
UPS	Yes	No	No
CargoPort	Yes	No	Yes

Specifically, ANC identifies several areas where it disputes similarities between AGLAD and FedEx, UPS, and CargoPort, and details these differences. [See FAA Exhibit 1, Item 3, pages 23 through 27.] Some of the differences cited are:

1. *FedEx and UPS were signatory airlines at ANC.*¹³
2. *FedEx and UPS were experienced developers and operators of air cargo facilities – AGLAD has never developed an air cargo facility or done any other airport business.*
3. *FedEx and UPS were major national and international corporations with strong financial track records and ready access to both major debt and equity markets for financing – AGLAD was formed for this project and had no financial track record or ready access to financial markets.*

[FAA Exhibit 1, Item 3, page 23.]

In determining whether two or more entities are similarly situated, the Director looks at various factors.

FedEx and UPS are signatory airlines with ANC. This entitles them to different terms and conditions from what may be offered to nonsignatory airlines. In this case, AGLAD was not operating as an airline or cargo operator, but rather was a real estate developer

¹³ FAA Order 5190.6B (section 9-2). This section talks about signatory and non-signatory air carriers

with the intent to construct and lease cargo facilities to other entities. AGLAD has not stated that it wished to operate as an airline cargo operator and be under a signatory agreement with ANC. AGLAD is not similarly situated to FedEx or UPS.

ANC argues that “ CargoPort’s development in 1997 was for an unproven third-party developer concept by an entity with proven experience and financial capacity pursuant to a competitively bid lease...with fixed and substantially non-negotiable terms. AGLAD’s 2005 lease was negotiated...for a proven third-party development concept by an entity with no experience of demonstrated financial capacity.” [FAA Exhibit 1, Item 2, exhibit A, page 18-19.]

ANC has admitted that there were some similarities between AGLAD and CargoPort in size, location and nature of proposed physical facilities among the comparison projects. [FAA Exhibit 1, Item 9, page 2] However, the fact that AGLAD and CargoPort share some similarities does not necessarily make the two companies similarly situated for the purposes of Grant Assurance 22.

Even when aeronautical tenants propose the same or similar use of the airport, if the level of investment and the business aspects are dissimilar, as is case with AGLAD and CargoPort, the FAA may appropriately find the aeronautical users are not similarly situated. [See Skydance Helicopters, Inc. d/b/a Skydance Operations, Inc. v. Sedona Oak-Creek Airport Authority and Yavapai County, Arizona, FAA Docket No. 16-02-02, (March 7, 2003) (Director’s Determination) pages 27-28.]

The Director is persuaded that enough differences existed between AGLAD and CargoPort,¹⁴ and enough time had elapsed between signing the respective leases, that ANC was under no obligation to duplicate its treatment of CargoPort’s lease with AGLAD.¹⁵

Issue 2: Determine whether the Respondent is in violation of Grant Assurance 22, *Economic Nondiscrimination*, by terminating AGLAD’s lease prematurely or preventing AGLAD from securing financing.

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*, deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Specifically, Grant Assurance 22, *Economic Nondiscrimination*, and 49 U.S.C.

¹⁴ It is important to note that CargoPort, unlike AGLAD, obtained its lease with ANC through a competitively bid lease, via a request for proposals. [FAA Exhibit 1, Item 3, page 40]. AGLAD, on the other hand, approached ANC with proposed lease terms.

¹⁵ The Director will consider the similarity of AGLAD to CargoPort in analyzing the issues, but will not provide an analysis of allegations that alleged disparate treatment between AGLAD and FedEx and UPS, which have been determined not to be similarly situated to Complainant.

§ 47107 (a)(1) through (6), require the airport sponsor to make the Airport available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination.

RDM asserts ANC violated Grant Assurance 22 by treating other developments more favorably than AGLAD; by rescinding AGLAD's lease for not obtaining financing, even though evidence showed AGLAD had made substantial progress in spite of severe failing economic conditions; and by economically undercutting AGLAD to prevent AGLAD from securing financing and developing the project, which directly caused AGLAD to lose millions of dollars. [FAA Exhibit 1, Item 1, page 22.]

RDM alleges seventeen (17) points where ANC engaged in economic discrimination and a violation of the grant assurances. [FAA Exhibit 1, Item 1, pages 22-23.]

RDM additionally states, *"Financing is the specific term upon which ANC took back AGLAD's lease. Although a financing requirement should never have been in AGLAD's lease (because it was not in other ANC tenant leases), AGLAD still would have been able to meet this requirement if even a part of the above-referenced¹⁶ favorable factors had been granted by ANC. It appears ANC did everything possible to obstruct AGLAD's ability to satisfy the financing deadline and construct their development."* [FAA Exhibit 1, Item 1, page 23.]

In its Memorandum In Support of Motion to Dismiss, ANC states, *"Every agreement term between Respondent and AGLAD was entered into voluntarily and without reserved objection by AGLAD. AGLAD's Land Lease Agreement ADA-31170 and its supplements substantially framed and governed the relationship between Respondent and AGLAD. Although RDM asserts that the terms to which AGLAD agreed were less favorable than the terms of Respondent's lease agreements with certain other tenants, it ignores the fact that AGLAD voluntarily became bound by those terms by contract."* ANC goes on to state, *"Had AGLAD believed the terms to be in violation of the Grant Assurances, AGLAD should have challenged them in advance, whether before the FAA or by the State of Alaska's administrative process...RDM should not now be permitted to seek to hold Respondent accountable under the Grant Assurances for terms AGLAD was comfortable entering into, and RDM was comfortable authorizing AGLAD to enter into."* [FAA Exhibit 1, Item 2, page 5.]

ANC goes on to argue, *"Because it was AGLAD's failure, not specific actions by ANC that directly affected RDM, RDM's allegations also suffer from RDM's inability to demonstrate that it was the Airport's allegedly improper actions that directly caused AGLAD to fail. RDM makes no causal connection between the alleged discriminatory treatment of AGLAD and AGLAD's failure. Indeed, the allegations are not so much that the Airport mistreated AGLAD, but that the Airport gave more favorable treatment to others. The better treatment to others did not injure AGLAD in any way."* [FAA Exhibit 1, Item 2, page 4.]

¹⁶ Refers to the 17 points below. [See FAA Exhibit I, Item 1, Exhibit 1, pages 22-23.]

ANC defends its actions in the 17 points raised by RDM as follows:

RDM Allegation point 1. Inserting a financial obligation into AGLAD's lease, which had not been included in other ANC tenant leases.

RDM objects to having a financing requirement in the AGLAD lease.

In its Answer, ANC stated that "in lieu of other evidence of the financial responsibility ordinarily required, Airport management worked out terms with AGLAD to give AGLAD the opportunity to prove itself capable of the prompt financing and construction that it had promised." ANC also stated, "Once airport management decided to issue AGLAD a lease, management was committed to giving them plenty of opportunity to succeed. When things did not progress as quickly as promised, management repeatedly gave AGLAD more time – both in three lease supplements, and less formally by letter." [FAA Exhibit 1, Item 3, page 5]

RDM states, "*A lease without a financing requirement would have allowed AGLAD the time to wait out the economic downturn and secure financing for construction. Also, because the prospective tenants were tentative to sign leases with AGLAD because of the financing commitment, AGLAD would have been able to sign up tenants quicker.*" [FAA Exhibit 1, Item 1, page 9.]

ANC states, "*Respondent denies that it inserted a 'financial' obligation into AGLAD's lease that had not been included in other ANC tenant lease[s], except to the extent AGLAD's dissimilar business model (not an airline), financial (incompatibility to post a bond or otherwise show financial responsibility) and experience (having never developed an airport cargo facility) situation and circumstances (competitive demand for the subject property) substantially justified the difference.*" [FAA Exhibit 1, Item 3, page 69.]

Supplement 3 of the Lease between AGLAD and ANC shows there was a financing requirement in the agreement. Language in AGLAD's Lease (ADA-31170) Supplement No. 3, states in part, "*The Lessee and Lessor acknowledge that the Lessee's proposed Stage One Improvements development is contingent upon financing, a commitment expected to come from financial institutions to finance the Lessee's proposed Stage One Improvements construction obligations. Both parties have entered into this lease with the understanding that the Lessor retains the right to terminate this Lease, at the Lessor's sole discretion if: (a) Lessor does not receive proof of financial security by no later than June 16, 2008, in the form of (1) a bond by an industry recognized surety firm, a letter of credit from a federally or state chartered financial institution, or a fully secured personal guarantee... (b) the Lessor does not receive proof that financing is in place for 100% of the estimated cost of Stage One by December 31, 2008.*" [FAA Exhibit 1, Item 1, exhibit C, page 4 and FAA Exhibit 1, Item 2, exhibit 1, page AGLAD -0071.]

On December 4, 2008, Christine E. Klein, Deputy Commissioner for Aviation and Acting Airport Director, sent a letter to Carol Meyers, AGLAD Postmark, LLC stating, "In

response to your letter dated December 1, 2008, requesting a three month extension of the current deadline (December 31, 2008) for proof of financing, the State will not approve another extension to AGLAD. If the condition of proof of financing is not in place by December 31, 2008, the lease will terminate." [FAA Exhibit 1, Item 2, exhibit 1, page AGLAD -0346.]

ANC stated in its Answer, "As the December 31, 2008, financing deadline loomed, AGLAD again requested extension. By this time, however, AGLAD had missed virtually every deadline and every extended deadline, and continued to request extension at every turn. AGLAD appearing to be no closer to success, with the subleases so far in hand growing stale, and having established a remarkably consistent pattern of failure to perform, airport management had finally decided it was time to draw the line. The extension request was denied." [FAA Exhibit 1, Item 3, page 6.]

The owner of any airport developed with federal airport grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms and without unjust discrimination. However, no federal obligation requires a sponsor to forgo improved business practices or efficient allocation of airport property in order to avoid differing terms and conditions among users of the airport. The airport sponsor can pursue agreements that more nearly serve the changing interests of the public with the more recent leaseholders. [Wilson, at pp. 30-31]

In addition, the prohibition on unjust discrimination does not prevent an airport proprietor from making reasonable distinctions among aeronautical users (e.g., signatory and nonsignatory carriers, tenants and nontenants, commercial and noncommercial users) and assessing higher fees on certain categories of aeronautical users based on those distinctions (e.g., higher fees for nonsignatory carriers, as compared to signatory carriers).

An airport sponsor does not engage in unjust discrimination simply by imposing different lease terms on carriers and users whose leases have expired or on new entrants. FAA recognizes rate differences based partly on differences in other lease terms and facilities. In these circumstances, it is probable that negotiations between an airport sponsor and different airport users with differing business strategies will not likely result in identical 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 Adventure Aviation v. City of Las Cruces, New Mexico, FAA Docket No. 16-01-14 (August 17, 2001) (Director's Determination); See also FAA Docket No. 16-00-03, Aerodynamics of Reading, Inc. v. Reading Regional Airport Authority, FAA Docket No. 16-00-03 (July 23, 2001) (Final Decision and Order), page 20.]

RDM has not presented any evidence in the Complaint that RDM, as part of AGLAD, objected to the terms of the agreements that were signed. Although not signatory to the leases, it can be assumed that RDM gave de facto agreement as a voting member of

AGLAD. Even though RDM did not actually sign the lease agreements with ANC, it does not have a right to object after the fact to the terms of the leases.

The Director finds no violation with Grant Assurance 22, *Economic Nondiscrimination*, by having a financial obligation in AGLAD's lease, which was agreed to by AGLAD, whether or not that same financial obligation had been included in other ANC tenant leases.

RDM Allegation point 2. Not ignoring or substantially extending AGLAD lease obligations to the degree that CargoPort received extensions. [FAA Exhibit 1, Item 1, page 22]

RDM states that ANC "...routinely either ignored or extended *unmet lease obligations* by CargoPort while simultaneously signing new lease agreements with them. AGLAD and its lease obligations/deadlines did not receive such leniency. ANC took back AGLAD's entire lease even though their development was significantly leased-up, designed and permitted. The required financing was hampered because the country/world was suddenly spiraling into the worst economic recession since the Great Depression. ANC should have extended AGLAD's lease as they did for CargoPort." [FAA Exhibit 1, Item 1, page 10.]

In its Answer, ANC stated, "Respondent admits that the terms of the CargoPort, UPS and FedEx leases all differed in some respects from one another and from the AGLAD lease, and that the Respondent's decision regarding each differed, as well, in some respects. Respondent denies that AGLAD's lease terms or treatment were materially less favorable on the whole than the treatment of the other three tenants, and particularly denies that the terms or treatment accorded to the other tenants was materially more favorable in ways not justified by differing circumstances and times." [FAA Exhibit 1, Item 3, page 27.]

ANC also notes "CargoPort obtained its lease by competitive sealed bid with no ability to negotiate the terms of the land lease agreement that required up-front payment of a year's rent and a mandatory performance bond in the amount of \$10 million." ANC goes on to state, "...AGLAD applied in 2002 for virtually all of the remaining land suitable for development, ultimately leasing substantially all of the remaining strategically-located land on the east side of the north-south runway in 2005 under terms it negotiated with Respondent without any proof of financial responsibility, and substituting a stipulated timeline for being on track for and securing financing for performance bond." [FAA Exhibit 1, Item 3, page 26.] Additionally, ANC states, "RDM now alleges, incorrectly, that ANC treated other tenants differently in the past. But ANC's mere enforcement of the lease contract AGLAD voluntarily entered into cannot be a proper basis for a claim that ANC thereby violated federal obligations that directly and substantially affected RDM." [FAA Exhibit 1, Item 3, page 4.]

FAA does not adjudicate the relative merits of lease agreements that were agreed to by the parties to the lease. In this case, RDM compares its lease provisions and extensions

AGLAD. Even though RDM did not actually sign the lease agreements with ANC, it does not have a right to object after the fact to the terms of the leases.

The Director finds no violation with Grant Assurance 22, *Economic Nondiscrimination*, by having a financial obligation in AGLAD's lease, which was agreed to by AGLAD, whether or not that same financial obligation had been included in other ANC tenant leases.

RDM Allegation point 2. Not ignoring or substantially extending AGLAD lease obligations to the degree that CargoPort received extensions. [FAA Exhibit 1, Item 1, page 22]

RDM states that ANC “...*routinely either ignored or extended unmet lease obligations by CargoPort while simultaneously signing new lease agreements with them. AGLAD and its lease obligations/deadlines did not receive such leniency. ANC took back AGLAD's entire lease even though their development was significantly leased-up, designed and permitted. The required financing was hampered because the country/world was suddenly spiraling into the worst economic recession since the Great Depression. ANC should have extended AGLAD's lease as they did for CargoPort.*” [FAA Exhibit 1, Item 1, page 10.]

In its Answer, ANC stated, “*Respondent admits that the terms of the CargoPort, UPS and FedEx leases all differed in some respects from one another and from the AGLAD lease, and that the Respondent's decision regarding each differed, as well, in some respects. Respondent denies that AGLAD's lease terms or treatment were materially less favorable on the whole than the treatment of the other three tenants, and particularly denies that the terms or treatment accorded to the other tenants was materially more favorable in ways not justified by differing circumstances and times.*” [FAA Exhibit 1, Item 3, page 27.]

ANC also notes “*CargoPort obtained its lease by competitive sealed bid with no ability to negotiate the terms of the land lease agreement that required up-front payment of a year's rent and a mandatory performance bond in the amount of \$10 million.*” ANC goes on to state, “*...AGLAD applied in 2002 for virtually all of the remaining land suitable for development, ultimately leasing substantially all of the remaining strategically-located land on the east side of the north-south runway in 2005 under terms it negotiated with Respondent without any proof of financial responsibility, and substituting a stipulated timeline for being on track for and securing financing for performance bond.*” [FAA Exhibit 1, Item 3, page 26.] Additionally, ANC states, “*RDM now alleges, incorrectly, that ANC treated other tenants differently in the past. But ANC's mere enforcement of the lease contract AGLAD voluntarily entered into cannot be a proper basis for a claim that ANC thereby violated federal obligations that directly and substantially affected RDM.*” [FAA Exhibit 1, Item 3, page 4.]

FAA does not adjudicate the relative merits of lease agreements that were agreed to by the parties to the lease. In this case, RDM compares its lease provisions and extensions

to those that may have been offered to UPS, FedEx and CargoPort. ANC admits that the leases all differed in some respects; this is acceptable under Grant Assurance 22, *Economic Nondiscrimination*.

Most applicable to this issue is the long-standing concept that a party cannot sustain a complaint about differences agreed to by the parties, as is the case here. The FAA summarized this long-standing concept in a 1994 record of decision involving a similar rent disparity issue. In that case, the FAA 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."* [*Penobscot Air Service v. Knox County*, FAA Docket No. 16-97-04 (September 25, 1997) (Director's Determination).¹⁷]

AGLAD did accept differences in rights, restrictions, responsibilities and rent in its leases with the Airport from that which had been offered to FedEx, UPS, and CargoPort. The fact that these differences have turned out less advantageous than AGLAD may have hoped is not unjustly discriminatory, nor does it make the agreed-to differences inequitable.

The Director finds ANC was not obligated by Grant Assurance 22, *Economic Nondiscrimination*, to extend AGLAD's lease obligations even though ANC may have given extensions to CargoPort. The fact that AGLAD or RDM was unable to meet the terms of the leases it signed with ANC does not burden ANC with the responsibility of the success of AGLAD or RDM's venture.

RDM Allegation point 3. Failing to extend AGLAD's lease significantly in light of the terrible world/national recession.

RDM alleges CargoPort received lease concessions that were denied to AGLAD. RDM states in the Complaint, *"AGLAD should have received 1) a much longer initial time to consider Phase 1 improvements due to the large size of their Phase 1 development and 2) equal treatment on extension requests."* [FAA Exhibit 1, Item 1, page 11.]

ANC does not deny that CargoPort received some lease extensions, stating, *"Although ANC ultimately gave CargoPort seven years to complete the last of the hardstands, CargoPort had spent more than the required \$1.5 million and completed two hardstands within the first three-and-a-half years.... It should also be noted that these extensions were all granted to a tenant dissimilarly situated from AGLAD in that CargoPort had*

¹⁷ See also *Sky East Services, Inc. v. Suffolk County*, complaint Nos. 13-88-06 and 13-89-01.

timely completed over \$10 million in improvements...proving its ability to successfully finance and complete its projects.” [FAA Exhibit 1, Item 1, page 37.]

ANC is under no obligation to treat every tenant, however similarly situated, in exactly the same way. Allowances can, and should, be made to allow an airport operator to continue to refine and improve how it conducts business with its tenants and to meet the realities of a particular environment or timing. This is especially true when there have been a number of years between tenants attempting the same or a similar type of development. In this case, CargoPort became a tenant on the Airport on July 1, 1997; AGLAD signed its lease with the Airport on November 18, 2005. It can be readily understood that ANC was operating in a somewhat different environment in terms of land quality and availability and in terms of operational needs between 1997 and 2005.

The Director finds ANC is not obligated by Grant Assurance 22, *Economic Nondiscrimination*, to extend AGLAD’s lease, regardless of the world or national economic situation.

RDM Allegation point 4. Failing to grant a longer initial term to complete Phase I improvements, which was a concession granted to CargoPort.

RDM states, “[In] July 1, 1997, CargoPort signed a land lease that required construction of a cargo facility building and five wide body aircraft parking positions. Construction was to be substantially complete no later than three years from the beginning term of the lease. In an October 28, 2008, meeting between ANC and Shaun Debenham, Rich Wilson (from ANC) stated that ANC gave CargoPort a one year extension due to the recession that was affecting global markets in 1998. We could not find any formal extension between ANC and CargoPort but it appears that CargoPort received an ‘unofficial’ extension of the financing obligation in their lease due to the poor market conditions in 1998.” [FAA Exhibit 1, Item 1, page 10.]

ANC states, “Although RDM argues that by the time [ANC] finally drew the line and declined to grant additional extension[s], the project was on the verge of success, that is precisely what AGLAD had been telling ANC staff on a regular basis for years. Ultimately a judgment call was required. RDM may believe it was poor judgment, but [ANC] personnel had to consider the propriety of allowing itself to be strung along, keeping the subject land unavailable to any more capable aeronautic user or developer in the meantime. Staff even allowed as the lease could be allowed to lapse and RDM could reapply, retain all the value of its development effort, but establish new terms more to its liking, while also exposing the land to potential competitive interest to resolve concerns about the propriety of allowing a private party to retain a lease of public land despite such a pattern of performance failures and waivers. RDM declined. The Debenham family also declined an opportunity to put their own resources behind RDM.”

ANC cites an email communication between Shaun Debenham (RDM) and Jeanette Allred Luckey (Alaska Department of Transportation) dated November 4, 2008. In this

email, Mr. Debenham had requested an extension of one year in light of the economic situation. Ms. Luckey responded:

"We understand that in this economic situation financing is a major concern. Because the Airport has extended the lease several times it is difficult for Leasing to justify or obtain approval for another extension. That being said, we are willing to broach the question with the acting director when she returns this week, but are not optimistic we will receive approval. Should an extension be considered it would be a material change to the lease and therefore subject to public notice for competition. If you were to let the lease lapse on November 18th and apply for a new lease on November 19th, the application process would put you at mid March (if no competing application were received) for executing a new lease, assuming similar terms are negotiated, construction deadlines would end up in the 2010 and 2011 construction season with substantial completion due mid March 2011. This allows additional time to secure financing and obtain commitment from sublessees. Regardless, we are still looking at a public notice for competition. We do have some concerns regarding the information we have been provided to date regarding demonstrating financial responsibility for the entire project and experience with air cargo facility marketing, development and management. The Airport is willing to work with you if your firm can demonstrate to the State's satisfaction its capability to meet all requirements. Given the short period of time since the current lessee indicated a willingness to assign its interest in the lease, and the complexity of this project in the current financial and economic market, we are concerned that your firm's ability to meet State requirements by November 18, 2008 could jeopardize the opportunity for success [sic]." [FAA Exhibit 1, Item 5, ANC-AGLAD 0378.]

There is no evidence presented in the record that indicates that RDM sought a new lease with ANC in order to realign time frames to better suit its financial needs. The Director finds no violation for failing to grant a longer initial term for Complainant to complete Phase I improvements. Grant Assurance 22, *Economic Nondiscrimination*, does not protect a lessee who fails to renegotiate when the opportunity arises, and then complains that the lease terms originally agreed to are too onerous and relief is needed.

RDM Allegation point 5. Failing to allow AGLAD to default on only one of its parcels instead of all the parcels when AGLAD was found in default for not providing proof of financing for Phase I. CargoPort's and FedEx's parcels were treated individually not collectively.

RDM alleges that on March 22, 2000, ANC combined two of CargoPort's parcels and stated that a default on one parcel did not constitute a default on the other parcel. [FAA Exhibit 1, Item 1, page 12 and exhibit F.]

In its Answer, ANC states, "*A requirement to construct CargoPort Hardstand 7 was added to ADA-30816...and [required] completion by August 1, 2005, but providing for only deletion of the subject portion of the Premises, not default, in the event of failure of timely completion.*" ANC also argues, "*Unlike AGLAD, which had never even achieved*

financing, let alone even one hardstand, CargoPort had already invested over \$10 million in a facility and six hardstands under ADA-30816 and another \$1.5 million and two more hardstands under ADA-31043.” [FAA Exhibit 1, Item 3, page 34.]

The Director has consistently concluded that Grant Assurance 22, *Economic Nondiscrimination*, does not require a sponsor to offer lease rates and terms that are identical to other leases negotiated at different points in time. [See Aerodynamics of Reading, Inc. v Reading Regional Airport Authority, FAA Docket No. 16-00-03 (July 23, 2001) (Final Agency Decision).]

In this case, CargoPort was well into its lease term with ANC, with an original signing date of 1997. CargoPort had already met its investment requirements and it appears as if they were adding more development. From the record, it appears as though RDM had not met the goals identified for its initial investment. ANC was within its rights to tailor lease terms that were different; different lease terms are not necessarily unjustly discriminatory.

The Director finds ANC was not obligated by Grant Assurance 22, *Economic Nondiscrimination*, to allow AGLAD to default on only one of its parcels instead of all the parcels when AGLAD was found in default for not providing proof of financing for Phase I.

RDM Allegation point 6. Not giving AGLAD rent deferral until improvements were substantially complete. CargoPort and FedEx received this concession.
RDM Allegation point 7. Not granting AGLAD the ability to pay back deferred rent over two years. FedEx received this concession.

RDM argues, “*Rent deferral was not granted to AGLAD when they signed their lease with ANC in 2005. ANC eventually gave AGLAD three months of rent deferral in early 2008 but would not allow any additional rent deferral. Additionally, AGLAD was not granted the ability to pay back the three months of deferred rent over two years, like CargoPort and FedEx.*” RDM additionally states, “*AGLAD paid just under half a million dollars in lease payments to ANC before construction even started. If ANC would have granted rent deferral and a favorable repayment of deferred rent similar to that offered to CargoPort and FedEx, AGLAD could have used the hundreds of thousands of dollars to help secure financing and progress the project.*” [FAA Exhibit 1, Item 1, pages 12-13.]

In its Answer, ANC admits the CargoPort lease provided for certain rent deferral, but denies that all rent was deferred for CargoPort for the first three years of ADA-30816. Additionally, ANC states, “*Respondent affirmatively states that CargoPort paid the first year’s rent in advance in the form of a bid deposit applied to the first years rent. Only after that first year was rent deferred until the earlier of substantial completion of required improvements or three years, at which time one-half of the deferred amount was payable immediately. Respondent affirmatively states that CargoPort’s deferral payment was made on October 25, 2001 which covered rent from October 1, 1998 to September*

20, 2000...Respondent further affirmatively states that these terms were part of a bid lease that allowed for a little advance planning or design and required a \$10 million performance bond.” [FAA Exhibit 1, Item 3, page 44-45.]

ANC also states, “...absent a performance bond or other demonstration of financial responsibility, which AGLAD either could not or would not provide, it would have been completely inappropriate to allow AGLAD to tie-up 40.5 acres of prime ANC land, deferring all rent.” [FAA Exhibit 1, Item 3, page 45.]

FAA notes ANC is not obligated to offer the same contractual terms or concessions to every Airport tenant, especially when the tenants signed their respective leases years apart and negotiated different terms. In this case, it is evident that CargoPort largely met the requirements of its lease; AGLAD was not able to meet the requirements of its lease. This failure to perform on AGLAD’s part does not require ANC to accommodate AGLAD outside the terms of the lease to the point where it no longer benefits the Airport.

The Director finds ANC was justified in holding AGLAD to the terms of the lease AGLAD willingly signed, and ANC was not required under the federal grant assurances to offer a rent deferral or to be allowed to pay back deferred rent over a two year period.

The following allegations will be discussed together:

- **RDM Allegation point 8. Failing to provide AGLAD with free “fill” material for its site development. FedEx and UPS received this concession.**

RDM Allegation point 11. Denying AGLAD “Preferential Use” of hardstands

P-1, P-2, and P-3. UPS received this concession.

- **RDM Allegation point 12. Not giving AGLAD the right to rent the P-1, P-2, and P-3 hardstands at a low rate. FedEx received this concession.**
- **RDM Allegation point 14. Making AGLAD pay for site civil work for their development. FedEx received this concession.**
- **RDM Allegation point 15. Making AGLAD pay for hangar construction. FedEx received this concession.**

As previously noted, ANC was not obligated to treat AGLAD in the same or similar manner to FedEx and UPS. These two entities are signatory airlines with ANC and are not similarly situated to AGLAD or RDM. It is acceptable under the grant assurances for ANC to have different terms for signatory and nonsignatory carriers or entities.

Also as previously noted, no federal obligation requires a sponsor to forgo improved business practices or efficient allocation of airport property in order to avoid differing

terms and conditions among users of the airport. The airport sponsor can pursue agreements that more nearly serve the changing interests of the public with the more recent leaseholders. The Director will not provide an analysis of allegations comparing AGLAD, as a nonsignatory entity, to FedEx and UPS, which are signatory air carriers at the Airport. AGLAD was not operating as an airline or cargo operator, but rather was a real estate developer with the intent to construct and lease cargo facilities to other entities. AGLAD has not stated it wished to operate as an airline cargo operator and be under a signatory agreement with ANC.

The Director finds no violation with Grant Assurance 22, *Economic Nondiscrimination*, with regard to allegations of disparate treatment involving FedEx and UPS. AGLAD and RDM are not similarly situated to either FedEx or UPS because they do have signatory status with ANC.

RDM Allegation point 9. Failing to provide AGLAD the ability to sell its improvements to ANC and lease back the improvements as a mechanism to receive favorable financing. Cargo Port received this concession.

RDM alleges that on “May 1, 2001, ANC and CargoPort signed Supplement No. 3 to CargoPort’s existing lease. The reason for the supplement was to provide a mechanism by which ANC was able to assist CargoPort in securing financing for the improvements required in CargoPort’s lease. Supplement No. 3 obligates ANC to buy back from CargoPort the improvements once constructed and lease back the improvements to CargoPort for \$1/month for the duration of the initial lease period.” [FAA Exhibit 1, Item 1, page 14.]

In its Answer, ANC states, “In consideration for CargoPort’s conveyance of the improvements to the Respondent for effectively no charge, Supplement No. 3 did provide for the lease-back of the Conveyed Improvements for \$1.00 per year for the duration of the initial lease period, but not beyond the first 80% of the projected useful life of the improvements. By this mechanism, Respondent received full title to the improvements at no charge and a right to charge fair market rent for 20% of their useful life of, which [sic] contrasts with standard leasing practice at ANC whereby tenants retain marketable title to the permanent improvements the[y] construct.” [FAA Exhibit 1, Item 3, page 48.]

ANC goes on to argue, “Respondent has no record of AGLAD ever requesting Respondent for financing assistance, did not help CargoPort secure financing to build its improvements or obligate itself to buy improvements from CargoPort. Respondent affirmatively states that Respondent did accept title to CargoPort’s improvements which Respondent believes may have reduced the interest rates for CargoPort’s post-construction long-term financing.” [FAA Exhibit 1, Item 3, page 48.]

ANC added, “AGLAD never requested, and not having constructed improvements to convey, was never in a position to request Respondent’s participation in long-term, ‘take-out’ financing.” [FAA Exhibit 1, Item 3, page 49.]

The Director reiterates here, ANC was under no obligation to offer AGLAD any terms, concessions, or extensions that were not negotiated by AGLAD in its lease agreement with ANC. The grant assurances do not guarantee an entity leasing land on an airport that the entity will be successful in its venture, nor do the assurances guarantee the airport sponsor will offer additional terms in the event financial or other difficulties arise. In any case, it is unknown whether ANC would have been open to a lease back agreement with AGLAD because there were no improvements to lease back. It was incumbent upon AGLAD to negotiate for such a provision in its lease negotiations with ANC.

The Director finds ANC is not in violation of Grant Assurance 22, *Economic Nondiscrimination*, for failing to include a lease back provision in its agreement with AGLAD.

RDM Allegation point 13. Making AGLAD pay for taxiway construction, maintenance and operation. CargoPort, UPS, and FedEx received this concession.

In its Complaint, RDM states, “...ANC signed a lease with CargoPort...in which ANC agreed to construct a tug road on the North side of Taxiway S. Additionally, ANC does not obligate CargoPort to pay for the use of Taxiway S.” [FAA Exhibit 1, Item 1, Page 7.]

In its Answer, ANC states, “...Respondent agreed to provide a tug road to the Southwest corner of Taxiway ‘S’ but noted only Respondent’s intention to construct a tug road on the north side of Taxiway ‘S’” Respondent expressly declined to ‘agree’ to construct the latter tug road, noting that Respondent was ‘not obligated’ to do so. ...” ANC goes on to state, “The lease did, however, obligate CargoPort, at its own expense, to make any necessary modifications to Taxiway ‘S’ to accommodate CargoPort’s requirement. CargoPort [also had] to construct for itself the taxi lane it desired on the north side of its leasehold.” [FAA Exhibit 1, Item 2, pages 58-59.]

The Director assumes the terms and conditions relating to the taxiway construction, maintenance, and operation were items that were discussed and agreed to prior to AGLAD signing the lease agreement with ANC. The record contains no evidence indicating this issue was outside of the lease agreement, nor was there any evidence to demonstrate these terms were forced upon AGLAD at some point after the lease signing. Rather, the Director is persuaded that this is another example of a lease term that RDM, in retrospect, would rather not have had in the lease. However, the Part 16 complaint process is not the proper venue for complaining about lease terms previously agreed to.

The Director finds ANC is not in violation of Grant Assurance 22, *Economic Nondiscrimination*, as a result of including a requirement for AGLAD to pay for taxiway construction, maintenance, and operation as part of ANC’s negotiated agreement with AGLAD.

RDM Allegation point 16. Economically undercutting AGLAD's development by decreasing ANC's fee for parking carriers at their hardstands from \$179 per four-hour stop to \$88.52, a 51% decrease.

RDM alleges, *"In addition to treating other developments more favorably than AGLAD...ANC also acted to financially undermine AGLAD's development."* RDM goes on to state, *"Effective February 1, 2009, ANC increased landing fees but significantly decreased parking fees for carriers at ANC's hardstands from \$179 to \$88.52. This represents a 51% decrease. A significant source of AGLAD's project revenue was parking fees for the new hardstands that were going to be constructed. AGLAD was going to charge \$185/stop to essentially match ANC's fee to entice carriers to come to AGLAD's development. By significantly reducing parking fees, ANC directly handicapped AGLAD's ability to obtain financing. Financing is the specific terms upon which ANC put AGLAD's lease into default."* [FAA Exhibit 1, Item 1, page 19-20.]

In its Answer, ANC states, *"Although AGLAD's proposed development may have been expecting to rely on aircraft parking revenues, Respondent had no obligation to hold parking fees artificially high to aid AGLAD. By the February 1, 2009, effective date of the Respondent's new fees, AGLAD was two days from termination, which was in no way affected by the new fee levels. Under the ...Operating Agreement, aircraft parking fees are based on a cost-center calculation and are not subsidized by landing fees, which are determined on a residual basis."* ANC also notes that, *"...FAA policy requires Respondent to base airfield rates and charges on a cost basis – unless otherwise agreed by the Signatory Airlines – and forbids Respondent from setting airfield rates and charges based on market rates."* [FAA Exhibit 1, Item 3, page 67.]

The Director agrees that ANC was not obligated to hold fees artificially high just to provide a benefit to AGLAD. Rates, fees, rentals, landing fees, and other service charges imposed on aeronautical users for aeronautical use of airport facilities must be fair and reasonable and can reflect market conditions. Airport proprietors must retain the ability to respond to local conditions with flexibility and innovation. ANC is free to set fees on a cost basis and RDM has failed to rebut this argument. ,

The Director finds ANC is not in violation of Grant Assurance 22, *Economic Nondiscrimination*, by reducing the Airport's fees for parking carriers at ANC hardstands.

RDM Allegation point 17. Transferring AGLAD's wetlands permit to ANC without compensation.

In the Complaint, RDM states that, *"...ANC sent a letter to the Corps of Engineers...requesting that the AGLAD wetlands permit be transferred to ANC. ANC requested a five year extension to the permit. This letter states, 'This will allow time for the airport to develop the property, either directly or through a third party.' ANC defaulted AGLAD's entire ground lease and proceeded to request a transfer of the hard-to-obtain and costly...wetlands permit to ANC. The wetlands permit took over a year to*

secure and cost AGLAD hundreds of thousands of dollars. ANC has made no effort to compensate AGLAD for their time and money in securing the wetlands permit yet ANC intends to directly enjoy the use of the permit to develop the site. AGLAD should have received reimbursement from ANC for the money and time AGLAD spent to procure the Army Corps of Engineers wetlands permit.” [FAA Exhibit 1, Item 1, page 20.]

In its Answer, ANC states, “Mr. Lytle¹⁸ wrote to the Corps of Engineers in April 2009, the time limit for work under the wetland fill permit obtained by AGLAD using Respondent’s wetland credits.... Respondent’s wetland credits contributed more to the value of the permit than AGLAD’s efforts. In addition, Respondent understands that AGLAD was no longer eligible to retain the permit once it lost all rights in the subject site, and Respondent sought to preserve the permit, and thus its value, to mitigate, in part, Respondent’s damages due to AGLAD’s lease default.” [FAA Exhibit 1, Item 3, page 67-68.]

RDM has not shown, or even alleged, that the transfer of the wetlands permit to ANC from AGLAD is a violation of a specific grant assurance. Rather, the Director notes that this issue is a contract dispute over terms that were, or were not, included in the lease agreement between AGLAD and ANC. It is not the role of the FAA, in ensuring compliance with federal grant assurances, to adjudicate lease disputes. These issues are more properly decided in the state civil court system.¹⁹

The Director finds no violation of Grant Assurance 22, *Economic Nondiscrimination*, as a result of ANC transferring AGLAD’s wetlands permit to ANC without compensation. Any issues between the parties on this matter are more properly handled in state court.

Director’s Conclusion on Issue 2:

The Director finds the Respondent is not in violation of Grant Assurance 22, *Economic Nondiscrimination*, as a result of terminating AGLAD’s lease or allegedly preventing AGLAD from securing financing.

ANC has not provided more favorable treatment to other aeronautical service providers at the Airport with regard to lease terms, extensions, or by requiring a financial commitment in a manner that unjustly discriminated against RDM in violation of Grant Assurance 22.

¹⁸ Mr. Lytle is an employee of the ANC.

¹⁹ The FAA does not ordinarily arbitrate or mediate negotiations through a formal Part 16 complaint process. Nor does the FAA enforce lease terms between parties to an agreement. Rather, the FAA enforces contracts between an airport sponsor and the federal government. [See AmAv v. Maryland Aviation Administration, FAA Docket No. 16-05-12, (March 20, 2006) (Director’s Determination).] In addition, the Part 16 process is not a venue for arguing on-going legal actions. Such issues are matters of state contract law and are not reviewable in the Part 16 process. [See Platinum Aviation and Platinum Jet Center BMI v. Bloomington-Normal Airport Authority, FAA Docket No. 16-06-09 (June 4, 2007) (Director’s Determination) page 18.]

AGLAD/RDM is not similarly situated to FedEx, UPS or CargoPort. Additionally, AGLAD/RDM agreed to differences in rights, restrictions, and responsibilities in its lease agreements with ANC, and never requested similar treatment in terms of rights, restrictions, and responsibilities with FedEx, UPS, and CargoPort. Therefore, ANC's choice not to offer lease extensions or other lease terms outside of the agreed-upon lease that might have been more favorable to AGLAD/RDM is not unjustly discriminatory.

Also, as stated above, Grant Assurance 22 does not protect a complainant from terms and circumstances to which it previously agreed. In the same way that the rights, restrictions, and responsibilities are not unjustly discriminatory, they are also not unreasonable in that AGLAD/RDM agreed to accept a certain set of rights and responsibilities in exchange for its lease with ANC. It is not unreasonable for ANC to require tenants to comply with the terms of agreements previously agreed to. Furthermore, FAA cannot protect a complainant from its failure to conduct due diligence before it enters a business relationship. AGLAD negotiated the terms and conditions of its lease with ANC prior to its involvement with RDM. When RDM entered into a relationship with AGLAD, RDM accepted those same terms and conditions and the risk and success of that relationship. Now that the relationship has failed, RDM cannot come back and argue for different terms and conditions.

The Director finds ANC has not violated Grant Assurance 22, *Economic Nondiscrimination*, and has not imposed unreasonable terms of use on AGLAD/RDM.

D. Exclusive Rights

Issue 3: Determine whether the Respondent is in violation of Grant Assurance 23, *Exclusive Rights*, by denying AGLAD the right of first refusal for additional land while granting this right to other tenants.

Federal Grant Assurance 23, *Exclusive Rights*, states that an airport sponsor, "...will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

An exclusive right is defined as a "power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege or right. An exclusive right may be conferred either by express agreement, by imposition of unreasonable standards or requirements, or by another means. Such a right conferred on one or more parties, but excluding others from enjoying or exercising a similar right or right, would be an exclusive right." [FAA Order 5190.6B, paragraph 8.2.]

RDM asserts, "*As evidenced in RDM's complaint, ANC, for several years, has willfully engaged in preferential treatment of tenants as determined by what tenants 'bring to the table.' These years of abuse have created an alleged culture of corruption that imperils the public's interests. Tenants need to be confident that ANC must comply with Federal Law as it pertains to all [emphasis theirs] tenants, not just the select few.*" RDM also

asserts, *"It is interesting to note here that ANC was concerned about the size of the project. Had ANC not violated the grant assurances by denying AGLAD the use of First Right of Refusal's (FROR), AGLAD would have been able to initially lease a smaller amount of land and then exercise their right of FROR's as market forces demanded development. This is exactly what FedEx and UPS were both allowed to do. Again, because AGLAD was not bringing thousands of flight landings to Anchorage per year, AGLAD was not allowed FRORs."* [FAA Exhibit 1, Item 4, page 2.]

In their Answer, ANC argues, *"Before Respondent concluded granting AGLAD a first right of refusal would be inappropriate under Draft FAA Advisory Circular 150/5190-6, AGLAD's request was not to 'break' their very large development into small manageable parcels, as suggested in RDM Complaint...but for a future expansion area in addition to the area AGLAD ultimately leased."* [FAA Exhibit 1, Item 3, page 51.]

The FAA has found that: "A sponsor is not required to develop any and all parcels of land in a manner consistent with the wishes of any one party, but rather may exercise its proprietary rights and powers to develop and administer the Airport's land in a manner consistent with the public's interest." [Santa Monica Airport Association (SMAA) Krueger Aviation and Santa Monica Air Center v. County of Santa Monica, FAA Docket No. 16-99-21 (February 4, 2003), [SMAA FAD, 16-99-21, p. 19]

Granting options or preferences on future airport lease sites to a single service provider may be construed as intent to grant an exclusive right. Therefore, the use of leases with options or future preferences, such as rights of first refusal, must generally be avoided. This is because a right of first refusal could allow an exiting tenant to hold a claim on airport land at little or no cost. Then, when faced with the prospect of competition, that leaseholder could exercise its option to inhibit access by others and limit or prevent competition. [FAA Order 5190.6B, 8.7(1) Banking land and/or facilities that a service provider cannot put to aeronautical use in a reasonable period of time denies a competitor from gaining entry onto the airport. [FAA Order 5190.6B, 8.7.b.]

Under the Exclusive Rights prohibition, the sponsor may not grant a special privilege or a monopoly to anyone providing aeronautical services on the airport or engaging in an aeronautical use, and that includes reserving airport land for a lessee for future development. The intent of this restriction is to promote aeronautical activity and protect fair competition at federally obligated airports.

Here, FAA finds that ANC is in compliance with the exclusive rights grant assurance because ANC's refusal to allow AGLAD to have a right of first refusal is in compliance with Grant Assurance 23, *Exclusive Rights*.

Director's Conclusion on Issue 3:

The Director finds the Respondent is not in violation of Grant Assurance 23, *Exclusive Rights*, by treating other entities denying Complainant the right of first refusal for additional land.

VII. FINDINGS AND CONCLUSIONS

Both Complainant and Respondent acknowledge they agreed to the lease terms at issue in this Complaint. There is no evidence in the record to suggest AGLAD/RDM disputed the terms of the various leases they signed, nor is there any suggestion they were not willing to sign the leases. The Director acknowledges the lease terms vary between tenants; however, RDM carries the greater burden in order to show the differences, even large differences, constitute unjust economic discrimination or a violation of exclusive rights. The evidence presented by RDM is not convincing and is insufficient to establish unjust economic discrimination by the application of different lease rates and terms. Of primary relevance is the fact that RDM, via AGLAD, agreed to the terms of which it now complains and that RDM has not presented convincing evidence that the rate and term differences are not justified by time, market conditions, or facilities. Merely presenting evidence of different leases is not sufficient to require a Respondent to prove the lease rates and terms are justified.

Therefore, the Director finds ANC has not unjustly discriminated against the Complainant and is in compliance with its federal grant assurances regarding unjust discrimination and exclusive rights.

ORDER

ACCORDINGLY, it is ordered that:

1. The Complaint is dismissed, and
2. All motions not specifically granted herein are denied.

RIGHT TO APPEAL

This Director's Determination is an initial agency determination and does not constitute final agency action and order subject to judicial review. [14 CFR 16.247(b)(2).] A party to this Complaint 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.



Randall S. Fiertz
Director, Office of Airport Compliance
and Management Analysis

June 7, 2011
Date