

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

Rick Aviation, Inc.)	
)	
COMPLAINANT)	
v.)	
)	Docket No. 16-05-18
Peninsula Airport Commission)	Final May 8, 2007
)	
RESPONDENT)	
)	

DIRECTOR'S DETERMINATION

I. INTRODUCTION

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

Rick Aviation, Inc. (Rick Aviation or Complainant) has filed this Complaint against the Peninsula Airport Commission, Virginia (PAC/Respondent). Rick Aviation alleges that the Respondent, as sponsor of Newport News/Williamsburg International Airport (Airport), has engaged in activity contrary to its Federal obligations.

Specifically, the Complainant states:

PAC has unfairly discriminated against Rick Aviation by (1) permitting Mercury to operate without complying with minimum standards while requiring compliance by Rick Aviation; (2) providing substantially favorable lease terms to Mercury; and (3) taking action to prevent Rick Aviation from providing services that it is permitted to provide under its lease in retaliation for complaining of PAC's favorable treatment to Mercury. By unfairly discriminating against Rick, PAC violated 49 U.S.C.S. §47107(a)(1) and 49 U.S.C.S. §47107(a)(5), along with implementing regulations, policy and relevant grant assurances. ...

In addition, this unfair discrimination has resulted in the granting of an exclusive right to Mercury. The granting of an exclusive right violates 49 U.S.C.S. §40103(e) and 49 U.S.C.S. §47107(a)(4). [FAA Exhibit 1, Item 1, pp. 7-8]

The decision in this matter is based on applicable law and FAA policy regarding the Respondent's Federal obligations as imposed upon it by its grant assurances #22 and #23 (under

49 U.S.C. § 47107(a) and 49 U.S.C. § 40103(e)), review of the arguments and supporting documentation submitted by the parties, and the administrative record in this proceeding.

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

II. THE AIRPORT

The Newport News/Williamsburg International Airport is a public-use airport located in Newport News, Virginia. The Peninsula Airport Commission owns the Airport and is the sponsor of Federal grants. The development of the Airport has been financed, in part, with funds provided to the Authority as the Airport sponsor under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 USC §47101, *et seq.* [FAA Exhibit 1, Item 8]. As a result, PAC is obligated to comply with the FAA sponsor assurances and related Federal law, 49 USC § 47107. PAC is also bound to the terms of deeds issued pursuant to the Surplus Property Act of 1944, codified as 49 USC §§ 47151 through 47153.

III. BACKGROUND

Procedural History

On November 4, 2005, Rick Aviation, Inc, filed a formal complaint pursuant to Part 16. [FAA Exhibit 1, Item 1] The Complaint included the declarations of Rick Aviation officials, Patricia Bombaro [FAA Exhibit 1, Item 2] and John Bombaro. [FAA Exhibit 1, Item 3]

On December 22, 2005, counsel to PAC submitted its Answer and Motion to Dismiss filed on behalf of PAC (Answer). [FAA Exhibit 1, Item 4]

On January 20, 2006, counsel to Rick Aviation submitted its Opposition to PAC's Motion to Dismiss and its Reply Memorandum of Law in Support of its Complaint (Reply). [FAA Exhibit 1, Item 5] This Reply included another declaration of John Bombaro. [FAA Exhibit 1, Item 6]

On February 3, 2006, counsel to PAC submitted its Rebuttal to Complainant's Brief in Opposition to Respondent's Motion to Dismiss (Rebuttal). [FAA Exhibit 1, Item 7]

Factual Background

In 1984, PAC issued Airport Minimum Standards for FBO (1984 Minimum Standards). The Complainant states that PAC adopted these Minimum Standards on October 18, 1984. [FAA Exhibit 1, Item 3, para. 7 and exh. 3]

On December 5, 1984, PAC signed a Lease Agreement with Rick Aviation (1984 Rick Lease). This 1984 Rick Lease is dated December 5, 1984, but signed by Rick Aviation on January 14,

1985. [FAA Exhibit 1, Item 3, exh. 1] As stated in the Complaint:

Rick Aviation is a fixed-based operator (FBO)¹ located at Newport News International Airport. Rick Aviation holds a long-term lease for its facilities at the Airport from PAC. Rick Aviation executed its 20-year lease with PAC on January 14, 1985 (1984 Rick Lease). Prior to executing its lease, Rick Aviation had operated at the Airport as a maintenance shop since June 1, 1978. Thus, Rick Aviation has operated continuously at the Airport since June 1, 1978. Rick Aviation's original lease required it to operate under the minimum standards adopted by PAC on October 18, 1985 (sic, presumed to be 1984, See FAA Exhibit 1, Item 3, para. 7). Since the execution of its original lease, Rick Aviation has executed two amendments to its lease. Rick Aviation executed the amendments on June 28, 1995 and April 19, 1999. [FAA Exhibit 1, Item 1, p. 2]

On July 15, 1993, PAC granted Rick Aviation the status of FBO. [FAA Exhibit 1, Item 3, exh. 2]

On January 20, 1994, PAC issued Airport Minimum Standards for Fixed Base Operators (1994 Minimum Standards). [FAA Exhibit 1, Item 3, exh. 4]

On January 24, 1994, John A. Bombaro of Rick Aviation wrote a letter to PAC's Manager of Finance and Administration, requesting concurrence from PAC that the 1994 Minimum Standards would not apply to Rick Aviation. The document includes a handwritten note appearing to concern a conversation with the Finance Manager on the subject, which reads "Don't worry about it." [FAA Exhibit 1, Item 6, exh. 1]

On May 15, 1995, Rick Aviation signed an 'Agreement and Lease' with Hampton University. [FAA Exhibit 1, Item 7, exh. 4] On July 17, 1995, John A. Bombaro wrote a letter to PAC's Manager of Finance and Administration, forwarding to PAC a copy of a sublease between Rick Aviation and Hampton University, dated May 15, 1995. This letter states, "Rick Aviation, Inc. would like to request to receive approval from the Peninsula Airport Commission to sublease space to Hampton University for the Aerospace Training Center. If this meets with your approval please let me know." [FAA Exhibit 1, Item 4, exh. 13]

On June 28, 1995, PAC executed a lease amendment with Rick Aviation. (1995 Rick Lease Amendment). [FAA Exhibit 1, Item 3, exh. 6]

On April 18, 1996, PAC issued new Airport Minimum Standards for Fixed Base Operators (1996 Minimum Standards). [FAA Exhibit 1, Item 3, exh. 5]

On March 5, 1999, PAC entered into a Lease Amendment with Rick Aviation. (1999 Rick Lease Amendment). [FAA Exhibit 1, Item 3, exh. 7] The 1999 Rick Lease Amendment amends the original 1984 Rick Lease by adding additional parcels of land to the Rick leasehold. The 1999 Rick Lease Amendment included an attached copy of the Newport News/Williamsburg International Airport Rules and Regulations. [FAA Exhibit 1, Item 3, exh. 9]

¹ A fixed-base operation provides aeronautical services to general aviation users of an airport.

On April 1, 1999, PAC entered into another Lease Amendment with Rick Aviation (1999 Rick Classroom Amendment). The 1999 Rick Classroom Amendment amends a previous 1993 lease² for 1,000 square feet of office space to add an additional “480 square feet of additional space for use as a classroom and storage area.” [FAA Exhibit 1, Item 4, exh. 9]

On December 11, 2003, PAC issued a Request for Proposals to Construct Fixed Base Operation Terminal Building and Provide General Aviation Fixed Base Operation Services. This RFP requested proposals to construct a new general aviation terminal building and to take over a leasehold of approximately nine acres and 70,000 square feet of building space. This was not space currently occupied by Rick Aviation.³ [FAA Exhibit 1, Item 4, exh. 1]

On January 15, 2004, Rick Aviation submitted its Response to PAC's Request for Proposal for Fixed-Base Operation at the Airport (See Item 4, exh. 1). [FAA Exhibit 1, Item 4, exh. 7]

On January 20, 2004, John Bombaro, Rick Aviation President, wrote to James Smith, Executive Director of PAC. This letter informs PAC of Rick Aviation's interest in expanding its leasehold in the old-terminal building. [FAA Exhibit 1, Item 3, exh. 11]

On January 23, 2004, Mark S. Falin, Airport Manager, wrote to John A. Bombaro, Rick Aviation, informing Rick Aviation of PAC's decision to begin an audit of Rick Aviation's FBO services, facilities and equipment. [FAA Exhibit 1, Item 2, exh. 1]

On February 5, 2004, PAC conducted a services, equipment and facilities audit of Rick Aviation with Airport personnel. In a follow-up letter, the Airport Manager requested that Rick Aviation respond to PAC's understanding that Rick Aviation "appears not to be in compliance with the equipment required, facilities required or services required of a Full or General Fixed Base Operator." [FAA Exhibit 1, Item 2, exh. 2 and Item 3, exh. 31]

On March 1, 2004, PAC signed a Fuel Farm Lease Agreement with Mercury Air Centers. [FAA Exhibit 1, Item 3, exh. 29]

On March 11, 2004, Rick Aviation sued PAC. In state court, Rick Aviation filed a Petition of Appeal, Rick Aviation, Inc, Petitioner v. PAC. The Petition states, "This is an appeal of the PAC's denial of Rick Aviation's protest of the award of a contract to construct a fixed-based operation (hereinafter, "FBO") terminal building and to provide general aviation FBO services." [FAA Exhibit 1, Item 4, exh. 2] Parties admit that this claim was subsequently dismissed.

² This lease is not included in the record.

³ The Respondent summarizes this episode, stating, “Over the years, PAC has sought to maintain at least two FBOs at the Airport in an effort to foster competition and to encourage the use and growth of aeronautical services for the public. During most of Rick’s tenure, the Airport had a second FBO, Flight International, Inc. (“Flight”). In 2003, with Flight’s lease set to expire in January 2004, PAC issued a Request for Proposals (“RFP”) for “the construction and operation of a FBO Terminal Building and for the provision of General Aviation FBO Services at [the Airport].”... PAC encouraged as many nationally known FBOs as possible to respond to the RFP in order to increase competition and to increase the ability of the Airport to attract national carriers.

Mercury, Piedmont/Hawthorne, and Rick submitted proposals. When each bidder made its oral presentation, Rick stated that it would not surrender its current FBO agreement in order to obtain the new one.” [FAA Exhibit 1, Item 4, p. 4]

On March 30, 2004, PAC signed a Lease Agreement for Commercial Fixed-Base Operation with Mercury Air Centers (2004 Mercury Lease). [FAA Exhibit 1, Item 3, exh. 12]

On April 5, 2004, Goodman & Co. CPA, Independent Accountant wrote to PAC Executive Director. This letter serves as an agreement for Goodwin & Co. to perform 'agreed-upon procedures' to review Rick's fuel sales reporting. [FAA Exhibit 1, Item 3, exh. 30]

On April 7, 2004, Mark S. Falin, Airport Manager, wrote to John A. Bombaro, Rick Aviation, Inc., submitting the results of a services, facility and equipment audit of Rick Aviation's FBO facility conducted on February 5, 2004. The Airport Manager states:

Your oral testimony before the Peninsula Airport Commission (PAC) and your written response to PAC's request for proposals (RFP) raised several questions with regard to your compliance with PAC's Minimum Standards for Fixed Base Operators (enclosed) and your contractual agreements with PAC.... Rick appears not to be in compliance with the equipment required, facilities required or services required of a Full or General Fixed Base Operator.... Your contractual agreements with PAC require you to "obey and conform to all laws, ordinances, rules and regulations for the general operation of the Airport and its facilities... Please review the audit results and give me your response as soon as possible. [FAA Exhibit 1, Item 2, exh. 2]

On April 13, 2004, Rick Aviation prepared 'Response Notes' to PAC's facility, equipment and services audit, conducted on February 5, 2004. These notes include some background into Rick Aviation's history at the Airport and dispute some of the findings and the applicability of the 1996 Minimum Standards to Rick Aviation's FBO operations. [FAA Exhibit 1, Item 2, exh. 3]

On April 25, 2004, Mercury Air Centers faxed its monthly fuel flowage report, showing a total fee of \$8,398.00 due to PAC. [FAA Exhibit 1, Item 7, exh. 2]

On April 30, 2004, PAC Finance and Administration Manager wrote a letter to John A. Bombaro, Rick Aviation, Inc. This letter provides notice to Rick that the PAC had increased the Airport fuel flowage fee at a previous date.⁴ [FAA Exhibit 1, Item 3, exh. 41] Also, on April 30, 2004, PAC Finance and Administration Manager wrote a letter to Mercury Air Centers. This letter provided similar notice to Mercury. [FAA Exhibit 1, Item 4, exh. 8]

On May 5, 2004, counsel to Rick Aviation wrote a letter to PAC's counsel, requesting advance notice of PAC's audits of Rick Aviation and stating, "We do not dispute the airport's right to audit, but we note that the lease provides for more than one audit procedure." [FAA Exhibit 1, Item 2, exh. 4 and Item 3, exh. 32]

On May 7, 2004, PAC Finance and Administration Manager wrote a letter to John A. Bombaro, Rick Aviation, Inc., stating that "the effective date of the fuel flowage fee increase is April 1, 2004." [FAA Exhibit 1, Item 3, exh. 42]

⁴ The effective date of the increase was later stated to be April 1, 2004.

On May 18, 2004, Mark S. Falin, Airport Manager wrote a letter to John A. Bombaro, Rick Aviation, Inc. This letter provided notice to Rick Aviation of termination of its lease for 480 sq. ft. of office space. [FAA Exhibit 1, Item 3, exh. 37]

On June 10, 2004, Mark S. Falin, Airport Manager, wrote a letter to John A. Bombaro, Rick Aviation, Inc. This letter announces members of the General Aviation Advisory Committee (GAAC). It includes a member from Mercury, but does not include a member from Rick Aviation. [FAA Exhibit 1, Item 3, exh. 39] Also on June 10, 2004, Mark S. Falin, Airport Manager, wrote letters to past members of the GAAC. These letters inform past members, including John Bombaro, that they have been replaced by new members for the GAAC from other general aviation users of the Airport. [FAA Exhibit 1, Item 4, exh. 12]

On July 1, 2004, PAC and Mercury entered into a Month-to-Month Facility Lease for the 480 sq. ft. flight instruction classroom that was previously occupied by Rick Aviation. [FAA Exhibit 1, Item 3, exh. 23]

On July 7, 2004, counsel to Rick Aviation wrote to Mark S. Falin, Airport Manager, responding to and disputing the findings of February 5, 2004 facilities audit of Rick Aviation. Among other things, this letter states that Rick Aviation, “is subject to the minimum standards adopted by the Commission on October 18, 1984.”⁵ [FAA Exhibit 1, Item 4, exh. 10, p. 1] Also, counsel to Rick Aviation states, “due to lack of student interest in Part 141 instruction, the FAA placed RAI’s Part 141 flight school in inactive status beginning on December 31, 1993 until a student requests enrollment in the program.” [FAA Exhibit 1, Item 4, exh. 10, p. 2]

On July 14, 2004, Mark S. Falin, Airport Manager, wrote to counsel to Rick Aviation, requesting additional information with respect to the financial audit of Rick Aviation. This requested information includes a complete accounting of all revenues received by Rick Aviation from all government contracts, flight instruction, and aircraft sales. [FAA Exhibit 1, Item 3, exh. 13]

On July 20, 2004, James Evans, PAC Manager of Business Development, wrote a letter to CEO of Mercury Air Centers. The letter states:

Now that Mercury Air Centers has been operating here at PHF for a few months, I think it is timely to remind you of the minimum standards that you are required to adhere to as a General Fixed Base Operator..... We do expect full compliance with our Standards, and as you know we may audit your facility from time-to-time to verify that all required services are being provided as stipulated. [FAA Exhibit 1, Item 3, exh. 19]

On August 10, 2004, John A. Bombaro, of Rick Aviation, wrote to FAA Richmond Flight Standards District Office regarding Rick Aviation’s plans to become an Approved Pilot School under Part 141. The letter states, “This is to notify the Federal Aviation Administration of our intent to become an Approved Pilot School under Part 141.” [FAA Exhibit 1, Item 6, exh. 2]

⁵ As discussed elsewhere, the Complainant does not allege that PAC’s application of the more recent 1996 Minimum Standards to Rick Aviation is a grant assurance violation. However, from the context of the disputes, it appears that Rick Aviation’s assumption that only the 20-year old 1984 Minimum Standards apply to it may be the core of the conflict between Rick Aviation and PAC.

On August 20, 2004, counsel to PAC wrote to counsel to Rick Aviation, responding to Rick Aviation's response and dispute of PAC's audit findings. This letter states

We have determined that Rick is in substantial and material breach of its obligations under the lease....

...Rick clearly and unequivocally agreed to comply with the terms of the April 18, 1996 Minimum Standards and all subsequent amendments...

Rick has had more than sufficient time and opportunity to get its house in order. If Rick does not come into full compliance prior to November 1, 2004 its status will be changed to Specialized Fixed Base Operator. Among other things, this means that as of that date Rick will no longer be eligible to sell fuel at the Airport. Further, based on Rick's default the Airport may terminate the lease. [FAA Exhibit 1, Item 3, exh. 14]

On August 30, 2004, the CEO of Mercury Air Centers wrote a letter to James Evans, PAC Manager of Business Development. This letter states that Mercury Air Centers intends on using contractors to provide several aeronautical services, which are required of the minimum standards. [FAA Exhibit 1, Item 3, exh. 20]

On September 3, 2004, John Bombaro, Rick Aviation President, wrote to Director of Hampton University Aerospace Center, to provide notice of termination of Rick Aviation's sublease for Hampton University's non-FBO use of hangar space. [FAA Exhibit 1, Item 3, exh. 36]

On September 8, 2004, John Bombaro, Rick Aviation President, wrote a letter to James Smith, Executive Director of PAC. This letter states:

The time has come for Rick Aviation, Inc. to execute their 1st of two ten-year options on our lease. My records indicate this renewal will be effective August 1, 2005 and the ground rent will be increased to twenty-one cents per square foot. Please let this serve as notice to the Peninsula Airport Commission that Rick Aviation, Inc. and John A & Patricia A. Bombaro would like to execute this option. [FAA Exhibit 1, Item 3, exh. 17]

On September 10, 2004, PAC's Finance and Administration Manager wrote to John A. Bombaro, Rick Aviation, notifying Rick Aviation of a PAC audit of all of Rick Aviation's revenue sources. The letter informs Rick Aviation that the auditors will require tax reports from 2002 and 2003, all contracts that provide revenue for Rick Aviation and other financial reports that the auditors may request. The letter also states, "If you have a conflict with September 28, 2004, please notify me as soon as possible." [FAA Exhibit 1, Item 2, exh. 5]

On September 30, 2004, the FAA issued an Air Agency Certificate No. IVIS104F to Rick Aviation, Inc D/B/A Rick Aviation Flight School, empowering Rick Aviation to operate a provisional pilot school including a private pilot and instrument pilot ratings. [FAA Exhibit 1, Item 6, exh. 3]

On October 14, 2004, Rick Aviation's counsel wrote to PAC's CPA consultants, Goodwin & Assoc, objecting to a request for John and Patricia Bombaro's individual tax returns. Counsel to

Rick Aviation characterizes the financial audit as “punitive, retaliatory and discriminatory towards Rick.” [FAA Exhibit 1, Item 7, exh. 1, p. 2]

On October 21, 2004, counsel to Rick Aviation wrote a letter to counsel to PAC. This letter requested that PAC schedule an inspection of Rick Aviation's leasehold so that Rick Aviation can demonstrate its compliance with the Minimum Standards. This letter mentions PAC's alleged "threat" to enforce compliance with its minimum standards by denying Rick Aviation's fuel concession at the Airport. [FAA Exhibit 1, Item 3, exh. 15]

On October 21, 2004, Jim Evans of PAC wrote an email to the CEO of Mercury Air Centers. This email reminded Mercury that Mercury needed to identify how it is going to fulfill the aircraft sales requirement of the FBO minimum standards. [FAA Exhibit 1, Item 3, exh. 25]

On November 4, 2004, Mark S. Falin, Airport Manager, wrote to John A. Bombaro, Rick Aviation, Inc., regarding issues arising from the on-going "facilities, services and financial audits of Rick Aviation's operations." These issues include the dispute over alleged under-reporting of gross receipts by Rick Aviation. [FAA Exhibit 1, Item 2, exh. 6]

On November 23, 2004, James Evans, PAC Manager of Business Development, wrote a letter to CEO of Mercury Air Centers. This letter responds to Mercury Air Centers' request to fulfill the requirements of the Airport FBO minimum standards by providing required aeronautical services under contract with others. It states that PAC has “approved your request of August 30, 2004 (See FAA Exhibit 1, Item 3, exh. 20) to subcontract certain required services here at [the Airport]. The PAC declined to approve Mercury's request to subcontract aircraft sales services pending additional information.” [FAA Exhibit 1, Item 3, exh. 21]

On December 21, 2004, the FAA issued an Air Agency Certificate No. W7BS248H to Jamestown Flight Center LLC, empowering it to operate a provisional pilot under Part 141. [FAA Exhibit 1, Item 6, exh. 4]

On February 1, 2005, Mercury Air Centers' Area General Manager wrote a letter to James Evans, PAC Manager of Business Development. This letter explains Mercury Air Centers' plan for Cirrus Design to be its aircraft sales arm. Mercury states, "With this arrangement, it will comply with the aircraft sales requirement of our current lease." [FAA Exhibit 1, Item 3, exh. 26]

On February 7, 2005, James Smith, Executive Director of PAC, wrote a letter to John A. Bombaro, Rick Aviation, Inc. This letter discusses PAC's ongoing concerns with Rick Aviation's performance under its lease and states, "the Commission has no choice but to conclude that Rick is in default of the Lease. We look forward to your prompt and complete response within the next ten calendar days, so that all matters concerning your Lease may be resolved before the Lease expires." [FAA Exhibit 1, Item 3, exh. 16]

On March 23, 2005, James Evans, PAC Manager of Business Development, wrote a letter to the General Manager of Mercury Air Centers, summarizing some issues raised in the Mercury facility audit. This letter discusses PAC's concerns with Mercury's apparent non-compliance with applicable Airport minimum standards, stating "several areas where you do not appear to be

in compliance." PAC asks Mercury to "review these items and let me know by April 7 how you will correct any noted items." Under the heading "Equipment," PAC states:

The Minimum Standards require a General Fixed Base Operator to "provide ground service equipment to include, but not be limited to ground power units, oxygen carts, fire extinguishers, portable compressed air, passenger loading steps, jacks, de-icers, and towing equipment as necessary for the servicing of aircraft servicing the airport." After reviewing your operation, we note the following apparent deficiencies:

- *There does not appear to be passenger loading steps available.*
- *Although a de-icer is available, it is not tall enough to service all air carrier aircraft serving the airport (namely MD88's)*
- *Although towbars and towheads are available for a variety of general and corporate aviation aircraft, towing equipment does not seem to be available for air carrier aircraft*
- *You have told us that jacks, oxygen equipment, large compressed-air tanks, and other required items are provided to you by your maintenance contractor L3 Flight International. As of this date, we have been unable to verify this information.*
[FAA Exhibit 1, Item 3, exh. 34]

On March 29, 2005, General Manager of Mercury Air Centers responded to James Evans, PAC Manager of Business Development. This letter states that Mercury is "taking the letter and results of the audit seriously and are working diligently to ensure that any discrepancy or concern is addressed to the satisfaction of the (PAC). [FAA Exhibit 1, Item 3, exh. 35]

On April 6, 2005, L3 Communications Flight International wrote a letter to Mercury Air Centers, confirming that specific "aircraft maintenance support items, services, and hangar facilities mentioned in the letter addressed to you from the (PAC) letter dated March 23, 2005 (See FAA Exhibit 1, Item 3, exh. 34) are provided to Mercury Air Center PHF on an as needed basis." [FAA Exhibit 1, Item 3, exh. 22]

On June 15, 2005, the General Manager of Mercury Air Centers wrote a letter to James Evans, PAC Manager of Business Development. This letter responds to PAC's request that Mercury designate an acceptable representative for aircraft sales in order for Mercury to comply with PAC's Minimum Standards requirements of FBOs. (SEE FAA Exhibit 1, Item 3, exh. 21) [FAA Exhibit 1, Item 4, exh. 15]

On July 27, 2005, James Evans, PAC Manager of Business Development, wrote a letter to General Manager of Mercury Air Centers. In this letter, PAC states, "As you are aware, we have reminded Mercury several times of your obligation to maintain certain pieces of aircraft ground servicing equipment on site as a condition of your lease and operating agreement here at Newport News/Williamsburg International Airport.... Therefore, please be advised that we expect operational air stairs to be at your PHF facility no later than 31 August 2005." [FAA Exhibit 1, Item 4, exh. 14a]

On August 17, 2005, PAC submitted a Motion for Judgment in PAC v. Rick Aviation in the Virginia Circuit Court of the City of Newport News. [FAA Exhibit 1, Item 4, exh. 7]

On September 15, 2005, PAC adopted a resolution to approve the design of a fuel farm expansion to allow additional jet fuel storage. [FAA Exhibit 1, Item 4, exh. 18]

On November 14, 2005, James Evans, PAC Manager of Business Development, wrote a letter to General Manager of Mercury Air Centers. In this letter, PAC states, "We have had several discussions regarding the ground service equipment that you are required to have on site as a condition of your designation as a full-service Fixed Base Operator... With temperatures now dipping into the 30's, we expect this deicing equipment to be on the property no later than November 21." [FAA Exhibit 1,Item 4, exh. 14b]

On November 25, 2005, Terry J. Page, Manager FAA Washington Airports District Office, wrote to ATAC, another tenant of the Airport, regarding a separate dispute between ATAC and PAC. The FAA acknowledges that the FAA's involvement in the dispute between ATAC and PAC dates back to at least as early as September 28, 2005. [FAA Exhibit 1, Item 4, exh. 5]

On December 13, 2005, the General Manager of Mercury Air Centers wrote to James Evans, PAC Manager of Business Development, stating that Jamestown Flight Center is providing flight instruction for Mercury. The letter forwards a copy of the Jamestown Flight Center's Part 141 Certificate. [FAA Exhibit 1, Item 4, exh. 11]

On January 31, 2006, James Evans, PAC Manager of Business Development, wrote a letter to General Manager of Mercury Air Centers, discussing Rick Aviation's complaint that Mercury's flight school subcontractor was operating without an FAA Part 141 certification. PAC states:

[Mercury] investigated this allegation, and confirmed to me that Rick's claim is accurate.... The fact that your company allowed your flight school to operate here, even though it was only a few weeks, without meeting our minimum standards is very troubling. ... As you know, we will be conducting a facility and service audit on you and your subcontractors sometime soon. Mercury Air will be held responsible for all aspects of your subcontractor's performance during this inspection. [FAA Exhibit 1, Item 7, exh. 3]

IV. ISSUES

The principal matter to be determined by the FAA is whether or not the airport sponsor is in compliance with its Federal obligations as embodied in its Federal grant agreements and conveyances of Federal land listed in 14 CFR 16.1. The Complainant states:

PAC has unfairly discriminated against Rick Aviation by (1) permitting Mercury to operate without complying with minimum standards while require compliance by Rick Aviation; (2) providing substantially favorable lease terms to Mercury; and (3) taking action to prevent Rick Aviation from providing services that it is permitted to provide under its lease in retaliation for complaining of PAC's favorable treatment to Mercury.

By unfairly discriminating against Rick, PAC violated 49 U.S.C.S. §47107(a)(1) and 49 U.S.C.S. §47107(a)(5), along with implementing regulations, policy and relevant grant assurances. ...

In addition, this unfair discrimination has resulted in the granting of an exclusive right to Mercury. The granting of an exclusive right violates 49 U.S.C.S. §40103(e) and 49 U.S.C.S. §47107(a)(4). [FAA Exhibit 1, Item 1, pp. 7-8]

Upon review of the Complainant's allegations and the record summarized above in the Background Section, the FAA has determined that the following issues require consideration and analysis in order to provide a complete review of this sponsor's compliance with applicable Federal law and FAA policy:

1. Whether PAC has enforced its minimum standards in regard to competing FBO operations at the Airport in a manner that unjustly discriminates against Rick Aviation in violation of Federal grant assurance 22.
2. Whether PAC has provided substantially more favorable lease terms to Rick Aviation's competition at the Airport in a manner that unjustly discriminates against Rick Aviation in violation Federal grant assurance 22.
3. Whether PAC has denied reasonable access to Rick Aviation to conduct commercial aeronautical activities at the Airport, or unjustly economically discriminated against Rick Aviation, in violation of Federal grant assurance 22.
4. Whether PAC's alleged unjust economic discrimination and/or unreasonable denial of aeronautical access have constructively granted an exclusive right in a manner prohibited by its Federal grant assurance 23 and Federal law.

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The Federal Aviation Act of 1958, as amended (FAAct), 49 USC § 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 developing civil aviation has been augmented by various legislative actions that authorize programs for providing funds and surplus Federal property to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions.

The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program, authorized by the Airport and Airway Improvement Act of 1982, (AAIA), 49 USC § 47101 *et seq.* This program provides financial assistance to an airport sponsor for airport development in exchange for binding commitments designed to assure that the public interest will be served. These commitments are set forth in the sponsor's applications for Federal assistance and in the grant agreement as sponsor assurances,

i.e., a list of applicable Federal laws, regulations, executive orders, statute-based assurances, and other requirements binding the sponsor upon acceptance of the Federal assistance. Pursuant to 49 USC § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

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

The Airport Sponsor Assurances and Deed Covenants

The AAIA, 49 USC § 47107, et seq., sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. Pursuant to 49 USC § 47107(g)(1), the Secretary is authorized to prescribe project sponsorship requirements to ensure compliance with 49 USC § 47107. These sponsorship requirements are included in every AIP agreement as explained in the Order, Chapter 2, "Sponsor's Obligations." Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal government.

PAC is also bound to the terms of deeds issued pursuant to the Surplus Property Act of 1944, codified as 49 USC §§ 47151 through 47153. A Surplus Property Deed provides, in relevant part, that ". . . the property transferred hereby . . . shall be used for public airport purposes, and only for such purposes, on reasonable terms and without unjust discrimination." These deed covenants are the same as the Federal grant assurances discussed below and that are also imposed upon the City. Our analysis and enforcement of the obligations is identical.

Federal Grant Assurance 22, Economic Nondiscrimination

Federal grant assurance 22, *Economic Nondiscrimination*, deals with the sponsor's obligation to make the airport available for aeronautical use on reasonable and not unjustly discriminatory terms.

Grant assurance 22, *Economic Nondiscrimination*, of the prescribed sponsor assurances implements the provisions of 49 USC §47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport:

...will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. [grant assurance 22(a)]

...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. [grant assurance 22(h)]

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

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

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

The Order describes the responsibilities under grant assurance 22, *Economic Nondiscrimination*, assumed by the owners of public-use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport, and to make all airport facilities and services available on reasonable terms without unjust discrimination. [*See* Order, Secs. 4-14(a)(2) and 3-1.]

The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. [*See* Order, Sec. 3-8(a).]

Federal Grant Assurance 23: Exclusive Rights

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

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

Assurance 23, “Exclusive Rights,” of the prescribed sponsor assurances requires, in pertinent part, that the sponsor of a Federally obligated airport:

“... will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public... It further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities...”

In the Order, the FAA discusses its exclusive rights policy and broadly identified aeronautical activities as subject to the statutory prohibition against exclusive rights. While public use

airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. However, a sponsor is under no obligation to permit aircraft owners to introduce on the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. See Order, Sec.3-9(e).

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.

The Order sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. The Order provides basic guidance for 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 Complaint Process

Pursuant to 14 CFR, Part 16, §16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint shall also describe how the complainant was directly and substantially affected by the things done or omitted by the respondents. [14 CFR, Part 16, §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. [14 CFR, Part 16, §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 Procedure Act (APA) and Federal case law. The APA provision states, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 USC §556(d). *See also, Director, Office of Worker’s Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 US 267, 272 (1994); *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 that the complainant must 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 argument necessary for the FAA to determine whether the sponsor is in compliance.”

VI. ANALYSIS

The Complainant states:

PAC has unfairly discriminated against Rick Aviation by (1) permitting Mercury to operate without complying with minimum standards while require compliance by Rick Aviation; (2) providing substantially favorable lease terms to Mercury; and (3) taking action to prevent Rick Aviation from providing services that it is permitted to provide under its lease in retaliation for complaining of PAC’s favorable treatment to Mercury. By unfairly discriminating against Rick, PAC violated 49 U.S.C.S. §47107(a)(1) and 49 U.S.C.S. §47107(a)(5), along with implementing regulations, policy and relevant grant assurances. ...

In addition, this unfair discrimination has resulted in the granting of an exclusive right to Mercury. The granting of an exclusive right violates 49 U.S.C.S. §40103(e) and 49 U.S.C.S. §47107(a)(4). [FAA Exhibit 1, Item 1, pp. 7-8]

The Respondent states:

Rick has filed a complaint that is long on allegations and short on any manner of proof. It is the result of a misplaced sense of entitlement by an FBO with a long history at the Airport, an FBO that, unfortunately, has lost sight that PAC’s obligation is not to favor its longtime tenants, but to serve the public and larger aeronautical community. For its part, PAC has acted vigorously to collect monies due the Airport from its tenants and other service providers to make the Airport more self-sustaining, and it has sought healthy competition through the presence of multiple FBOs. [FAA Item 1, Exhibit 4, p. 1]

Issue One

Whether PAC has enforced its minimum standards in regard to competing FBO operations at the Airport in a manner that unjustly discriminates against Rick Aviation in violation of Federal grant assurance 22.

The Complainant states, “PAC has unfairly discriminated against Rick Aviation by permitting Mercury to operate without complying with minimum standards while requiring compliance by Rick Aviation.” [FAA Exhibit 1, Item 1, p. 7] The Complainant also states, “Mercury (Rick Aviation’s competitor) has failed to comply with many of the minimum requirements with which Rick Aviation is forced to comply.” [FAA Exhibit 1, Item 1, p. 8]

The Respondent states, “This claim is factually wrong.... Rick distorts the requirements of the Minimum Standards ... and ignores the services of Mercury’s approved subcontractors in its calculations of Mercury’s square footage and personnel totals. It also overlooks the full facility audit of Mercury performed by PAC and the multiple notices that PAC has sent to Mercury holding it to the Minimum Standards.” [FAA Exhibit 1, Item 4, pp. 19-20]

The standard for an airport sponsor's noncompliance with its Federal obligations is not the simple fact of a tenant's noncompliance with its lease terms, or the sponsor’s minimum standards. As stated in the Order,

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

With regard to competing aeronautical businesses on a Federally-obligated airport, competitors frequently act to provide themselves with a competitive advantage. Day-to-day actions by FBO competitors, including incidental, or even somewhat persistent, violations of the minimum standards do not automatically result in a finding that an airport sponsor has unjustly discriminated in violation of grant assurance 22. Such an interpretation would be impractical, unworkable, and even counter-productive.

Rather, as stated above, the FAA deems that airport sponsors are in compliance with their Federal grant assurances if they have a program in place to address their respective grant obligations and that they implement the program. Enforcement of minimum standards is the FAA’s recommended way for a sponsor to deal with the expected friction among competing aeronautical service providers, in an environment of leases entered into at different times, under different circumstances, and reflecting changing management priorities. Finally, the standard of compliance, quoted above, does not require that airport sponsors enforce minimum standards so rigidly as to require identical tone and posture toward all competitors that have different records and history with the sponsor.

Rick Aviation has been on the Airport since 1978. [FAA Exhibit 1, Item 1, p. 2] PAC executed the 2004 Mercury Lease, which allowed Mercury to begin operations at the Airport, on March 30, 2004. [FAA Exhibit 1, Item 3, exh. 12] The record, discussed below, shows that PAC began informing and enforcing the 1996 Minimum Standards upon Mercury within its first months of its operation.⁶

Minimum standards may change over time. Lease terms may change over time. The FAA recognizes that leases are legal documents that exist in time and are rarely identical between users because of differing circumstances of the leases, sites, users, negotiations, business plans, economic circumstances, and market conditions, etc. The FAA does not enforce lease provisions through the compliance program. When a sponsor amends its minimum standards, it may attempt to apply such standards to all users. If such application of new minimum standards appears to be in conflict with lease agreements, such a dispute is a legal dispute over lease terms.⁷ This is outside of FAA jurisdiction. However, the FAA recognizes that sponsors may not always be able to enforce new minimum standards against leaseholders of prior legal contracts. In such circumstances, the FAA often recommends that when the sponsor has the ability to re-open lease agreements, it should pursue amending the leases to be consistent with the new minimum standards. The FAA does not require airport sponsor to refrain from applying newer minimum standards to prior tenants.

In the Part 16 process, the Complainant carries the burden-of-proof to establish the facts of its allegations. The Complainant states, “PAC provides no evidence, other than conclusory statements, demonstrating that Mercury is in compliance with the minimum standards.” [FAA Exhibit 1, Item 5, p. 7] However, Part 16 does not require that PAC demonstrate Mercury’s compliance. Rather, the Complainant must show that PAC has unjustly discriminated against Rick Aviation, by denying to Rick a preference that it has provided to Mercury in the context of Rick and Mercury being similarly-situated. As discussed above, this similarity between users is not so precise as to require that PAC use exactly the same tone and legal posture when enforcing compliance upon the Airport’s FBOs.

Considering the above, the FAA examines the points and allegations made by the Complainant to determine whether or not PAC has failed to enforce its program in a manner consistent with its Federal obligations under grant assurance 22.

Point 1

The Complainant states, “Mercury does not have 24/7 operations for tie downs, hangar storage, intoplane fueling, and ramp services.” [FAA Exhibit 1, Item 1, p. 8] The Complainant also states “even if the minimum standards do not require 24/7 operation by Mercury, Mercury’s lease does.” [FAA Exhibit 1, Item 5, p. 8]

⁶ See FAA Exhibit 1, Item 3, exhs. 22, 25, 34, 35; and Item 4, exh. 14.

⁷ As discussed elsewhere, the Complainant does not allege that PAC’s application of the more recent 1996 Minimum Standards to Rick Aviation is a grant assurance violation. However, from the context of the disputes, it appears that Rick Aviation’s assumption that only the 20-year old 1984 Minimum Standards apply to it may be the core of the conflict between Rick Aviation and PAC.

The Respondent states, “The Complainant misconstrues the terms of the Minimum Standards. For example, “24/7” service is not required of FBOs. Mercury staff is at the Airport from 0600 until midnight, thus meeting the Minimum Standards. In addition, they are on call 24 hours a day, and are often at the Airport between midnight and 0600 servicing customers. These are the same operating hours required of Rick.” [FAA Exhibit 1, Item 4, p. 12]

In fact, the Section 3.2 of the 2004 Mercury Lease states that Mercury shall “meet all the standards and requirements of PAC’s minimum standards for an FBO, including... Adequate ramp service for general aviation aircraft users, with a qualified attendant available on the ramp twenty-four (24) hours a day, seven (7) days a week.” As stated above, the FAA does not enforce lease terms. [FAA Item 1, Exhibit 3, exh. 12, pp. 8-9]

With regard to the sale of fuel and transient aircraft services, the 1996 Minimum Standards require that “The Operator must provide the capability to perform minor repairs on a stand-by basis during hours that the maintenance and repair facilities are closed. The Operator must provide qualified personnel to render competent service to general aviation customers between the hours of 6:00 a.m. to 12:00 p.m. daily.” [FAA Exhibit 1, Item 3, exh. 5, p. 4]

PAC’s interpretation of its tenants’ obligations appears to be reasonable and consistent, in that PAC states, “These are the same operating hours required of Rick.” Furthermore, even though the FAA does not enforce lease agreements, it appears from the record that PAC’s interpretation of the 2004 Mercury Lease is reasonable and non-discriminatory.

Consequently, the evidence in the record does not support that Mercury is in noncompliance with the 2004 Minimum Standards. Therefore, logically, PAC is not practicing unjust economic discrimination by unequal enforcement.

Point 2

The Complainant states, “Mercury has not complied with the square footage requirements for its sale of fuel and transient services. Although Mercury had proposed to build a terminal of sufficient size to comply with the minimum standards at the time it executed its lease, Mercury has just recently begun site preparation. In fact, although PAC forbids Rick Aviation from including sub-leased space in this requirement, PAC has allowed Mercury to use sub-leased space to fulfill the requirement, thereby resulting in financial gain to Mercury.” [FAA Exhibit 1, Item 1, p. 9]

The Respondent states, “the Complainant omits square footage and personnel provided by Mercury’s authorized subcontractors, who do provide all the services and facilities listed in the Complaint. These subcontractors are expected to provide the same level of service as the primary FBO.” [FAA Exhibit 1, Item 4, p. 12]

The Complainant does not point to evidence to show that Mercury is failing to meet square footage requirements. Neither the Complaint nor the Reply address any specific calculations of how Mercury is insufficient with regard to square footage required by the 1996 Minimum

Standards. In a Part 16 procedure, the Complainant bears the burden-of-proof to establish his or her complaint.

FAA examination of the record reveals that PAC's original Request for Proposal for the leasing of the specific FBO facility leased by Mercury describes the leasehold as a nine acre parcel, including a 12,000 square foot hangar; a 17,150 square foot hangar; a 15,800 square foot hangar, office and shop facility; and a 25,000 square foot office building. Within the nine-acre parcel, these facilities total approximately 69,950 square feet. [FAA Exhibit 1, Item 4, exh. 1, p. 6] The 1996 Minimum Standards require 21,500 square feet of floor space and 110,000 square feet of land space. [FAA Exhibit 1, Item 3, exh. 5, p. 3] The copy of the 2004 Mercury Lease provided by the Complainant does not describe the built facilities of the Mercury leasehold. [FAA Exhibit 1, Item 3, exh. 12]

Upon examination, however, the record reveals evidence that undermines the Complainant's allegation of unjust economic discrimination with regard to hangar space, discussed here. In fact, the evidence in the record supports the PAC's conclusion that Rick Aviation was not maintaining sufficient square footage to meet the 1996 Minimum Standards.

The Complainant, through repetitive pleadings, points to two pieces of evidence. One is a terminal floorplan, marked, "To Be Replaced" as an attachment to the 2004 Mercury Lease. [FAA Exhibit 1, Item 3, exh. 12, p. 45⁸] The second piece of evidence appears to be a PAC internal memo. [FAA Exhibit 1, Item 3, exh. 18] This PAC internal memo shows PAC's analysis of a July 7, 2004 letter from Rick Aviation counsel responding to the results of a PAC audit of Rick Aviation's facilities (discussed further below). [FAA Exhibit 1, Item 4, exh. 10]⁹

In the July 7, 2004 letter, counsel to Rick Aviation answers and disputes PAC's understanding of Rick Aviation's own square footage deficiencies. Counsel to Rick Aviation states, "RAI (Rick Aviation) also has another 23,200 square-foot hangar (Hangar 14). In this hangar, there is 8000 square feet of hangar space and 15,200 square feet of shops and offices. Hampton University currently leases this hangar from RAI, but *RAI has retained the right to access and use the premises as needed to perform services required under the Minimum Standards.*" [FAA Exhibit 1, Item 4, exh. 10, pp. 3-4]

The PAC internal memo disputes this argument regarding Rick Aviation square-footage, stating, "Included in this amount is the 23,200 square-foot Hangar 14, which Rick has leased to Hampton University.... Indeed... Rick is only permitted access to perform repairs to the facility... Therefore, the PAC does not recognize Hangar 14 as counting towards the minimum space requirement." [FAA Exhibit 1, Item 3, exh. 18, p. 7]

The Respondent also provides a copy of the Hampton University Lease. This Lease appears to be a non-commercial lease that does not provide for services to the public typical of an FBO. Paragraph 2 states, "The premises will be used for Hampton University's Aerospace Training Center and it is understood that the premises will not be used to perform any activities that will

⁸ The pagination of this citation is unclear, since most pages of the lease are un-paginated and the pagination of the evidence is not completely copied.

⁹ The Complainants did not provide a copy of this July 7, 2004 letter, but the Respondent did do so.

be in direct conflict of interest with Lessor's current or future business." [FAA Exhibit 1, Item 7, exh. 4, para. 2] The Hampton University Lease also states, "Lessor shall have access during reasonable hours to inspect the premises, make necessary repairs and, during the last thirty days of the term of this Lease, to show the premises to prospective tenants ... Lessor may enter Lessee's premises without first securing Lessee's consent only when a bona fide emergency exists which threatens serious loss, damage, or injury to persons or property, and Lessee cannot be reached or unreasonably withholds consent, or the emergency is of such a nature that it would be unreasonable to require Lessor to attempt to secure Lessee's consent." [FAA Exhibit 1, Item 7, exh. 4, para. 19]

Upon analysis of this information, PAC concludes in its Rebuttal, "As for the sublease with Hampton University, PAC did not count it towards Rick's FBO requirements because Hampton University's use of the space had no apparent connection to the FBO services outlined in the Minimum Standards. In addition, the sublease does not appear to give Rick access to the leased space if needed to provide FBO services." [FAA Exhibit 1, Item 7, p. 6]

The evidence in the record supports the conclusion by PAC that Rick Aviation's sublease to Hampton University has nothing to do with its FBO activities. PAC's judgment to not accept such a sublease as part of Rick Aviation's square-footage requirements is reasonable, not unjustly discriminatory, and justifiable.

Considering the lack of evidence provided by the Complainant to show an actual deficiency of square footage by Mercury; the Respondent's statement that authorized sub-contractors' square-footage can count toward fulfilling the 1996 Minimum Standards square-footage requirements; the lack of evidence that PAC has turned down any request from Rick Aviation for similar treatment for sub-contracting; and the Complainant's unsubstantiated allegation that "PAC forbids Rick Aviation from including sub-leased space in this requirement," the FAA finds that PAC has not unjustly discriminated against Rick Aviation in regard to the enforcement of square-footage requirements of FBOs in regard to fuel and transient services.

Also, considering that the Complainant admits that Mercury is proceeding with the construction of the terminal building [FAA Exhibit 1, Item 1, p. 9], it appears that PAC has succeeded in compelling Mercury's compliance with the 2004 Mercury Lease. Furthermore, the FAA does not enforce lease agreements through the grant assurance compliance program. The requirement to build a new terminal building is contained in the 2004 Mercury Lease, not in the 1996 Minimum Standards. The record does not establish that Rick Aviation is required to build a new terminal building. For these reasons, PAC has not unjustly discriminated against Rick Aviation in regard to enforcement of any new-terminal requirement.

Points 3 & 4

The Complainant states:

Mercury has failed to comply with the square footage requirements and employment requirements for its engine/aircraft maintenance service. Mercury hired another company to perform any necessary maintenance and thus does not have a full-time

certified mechanic as an employee. Because Mercury does not have a full-time mechanic, it does not have any floor space or land for its maintenance services.” [FAA Exhibit 1, Item 1, p. 9]

The Complainant also states, “Mercury does not meet the square footage requirements for an air taxi/charter service. Mercury does not have an air taxi or charter service at the airport. Mercury has stated that if this service is needed, Mercury will hire an outside service.” [FAA Exhibit 1, Item 1, p. 9]¹⁰

As above, the Respondent states, “the Complainant omits square footage and personnel provided by Mercury’s authorized subcontractors, who do provide all the services and facilities listed in the Complaint. These subcontractors are expected to provide the same level of service as the primary FBO.” [FAA Exhibit 1, Item 4, p. 12]

The Complainant does not point to evidence to show that Mercury is failing to meet square footage requirements. Neither the Complaint nor the Reply address any specific calculations, depictions, or analysis of how Mercury is insufficient with regard to square footage required by the 1996 Minimum Standards. FAA examination of the record reveals that PAC’s original Request for Proposal for the leasing of the specific FBO facility leased by Mercury describes the leasehold as a nine-acre parcel, including approximately 69,950 square feet of built space. [FAA Exhibit 1, Item 4, exh. 1, p. 6] The 1996 Minimum Standards require 21,500 square feet of floor space and 110,000 square feet of land space. [FAA Exhibit 1, Item 3, exh. 5, p. 3] In a Part 16 procedure, the Complainant bears the burden-of-proof. Furthermore, FAA examination of the 2004 Mercury Lease reveals Article 3.2(h), which states:

Company shall have the right to sublease services by way of a third party with the approval of PAC not to be unreasonably withheld. The Company’s right to sublet shall in no way relieve the Company from the responsibility to provide full service. [FAA Exhibit 1, Item 3, exh. 12, p. 9]

The Complainant has provided no evidence that PAC has denied similar treatment to Rick Aviation.

Instead, the Complainant points to evidence that PAC did investigate, review and approve of some of Mercury’s arrangements to provide FBO services. The Complainant has not pointed to any instance where PAC has disapproved any proposal from Rick Aviation to sub-contract FBO services. In this case, the Complainant points to several letters between PAC and Mercury. In a July 20, 2004 letter, PAC reminds Mercury of its need to adhere to the 1996 Minimum Standards

¹⁰ FAA review of Points 3 through 8 regarding square footage requirements suggests that the Complainant may have consistently misinterpreted and misapplied the 1996 Minimum Standards. The 1996 Minimum Standards require General Fixed Base Operators such as Rick Aviation and Mercury to include 21,500 sq. ft of floor space. [FAA Exhibit 1, Item 3, exh. 5] In fact, evidence provided by the Complainant shows that PAC was reviewing Rick Aviation’s leasehold against this standard when determining that the Hampton University sub-lease created a square footage deficit for Rick Aviation below 21,500 sq. ft. [FAA Exhibit 1, Item 3, exh. 18, pp. 6-7] It appears that Rick Aviation’s allegations regarding specific-activity square-footage deficiencies of Mercury are erroneously based on the individual square-footage requirements for Specialized Fixed Base Operators listed on the same page of minimum standards. [FAA Exhibit 1, Item 3, exh. 5, p. 3]

and encloses a copy for Mercury's reference. [FAA Exhibit 1, Item 3, exh. 19] In an August 30, 2004, Mercury proposes some sub-contracting arrangements for FBO services and pledges to acquire specific equipment. [FAA Exhibit 1, Item 3, exh. 20] In a November 23, 2004 letter PAC approves some of the services Mercury will sub-contract, while requiring more information on Mercury's proposal to sub-contract aircraft sales. [FAA Exhibit 1, Item 3, exh. 21]

PAC awarded the FBO space to Mercury pursuant to an RFP process. [FAA Exhibit 1, Item 4, p. 6] PAC and Mercury executed the 2004 Mercury Lease on March 30, 2004. [FAA Exhibit 1, Item 3, exh. 12] These issues of Mercury's compliance with the 1996 Minimum Standards are being addressed between the parties within Mercury's first months of operation.

Considering the lack of evidence that Mercury is deficient in required square footage; the evidence that PAC has investigated, reviewed and approved Mercury's arrangement for providing some FBO services by sub-contract; and the lack of evidence that PAC has turned down any request from Rick Aviation for similar treatment, the FAA finds that PAC has not unjustly discriminated against Rick Aviation in regard to the enforcement of square-footage or employee requirements of FBOs in engine/aircraft maintenance service. Nor has PAC unjustly discriminated against Rick Aviation in regard to the square footage requirements for an air taxi/charter service.

Points 5 & 6

The Complainant states:

Mercury has failed to meet the square-footage and employment requirements for its radio instrument sales, service and parts operations. Mercury has an outside company perform any necessary service and does not have any in-house employees to perform these services. Thus, Mercury does not have any floor space associated with this service, thereby failing to comply with the square-footage requirement. [FAA Exhibit 1, Item 1, p. 9]

The Complainant also states, "Mercury has failed to meet the square-footage requirement for aircraft rental." [FAA Exhibit 1, Item 1, p. 10]

As above, the Respondent states, "the Complainant omits square footage and personnel provided by Mercury's authorized subcontractors, who do provide all the services and facilities listed in the Complaint. These subcontractors are expected to provide the same level of service as the primary FBO." [FAA Exhibit 1, Item 4, p. 12]

The Complainant does not point to evidence to show that Mercury is failing to meet square footage requirements. Neither the Complaint nor the Reply address any specific calculations, depictions or analysis of how Mercury is insufficient with regard to square footage required by the 1996 Minimum Standards. FAA examination of the record reveals that Mercury is leasing a nine-acre parcel, including approximately 69,950 square feet of built space. [FAA Exhibit 1, Item 4, exh. 1, p. 6] The 1996 Minimum Standards require 21,500 square feet of floor space and

110,000 square feet of land space. [FAA Exhibit 1, Item 3, exh. 5, p. 3] In a Part 16 procedure, the Complainant bears the burden-of-proof.

Instead, the Complainant points to evidence that PAC did investigate, review and approve of some of Mercury's arrangements to provide FBO services. As noted before, this was consistent with the 1996 Minimum Standards. The Complainant has not pointed to any instance where PAC has disapproved any proposal from Rick Aviation to sub-contract FBO services. In this case, the Complainant points to several letters between PAC and Mercury. These letters, however, do not address the issue of square-footage nor employment requirements for its radio instrument sales, service and parts operations, nor aircraft rental. In a July 20, 2004 letter, PAC reminds Mercury of its need to adhere to the 1996 Minimum Standards and encloses a copy for Mercury's reference. [FAA Exhibit 1, Item 3, exh. 19] In an August 30, 2004, Mercury proposes some sub-contracting arrangements for FBO services and pledges to acquire specific equipment. [FAA Exhibit 1, Item 3, exh. 20] In a November 23, 2004 letter PAC approves some of the services Mercury will sub-contract, while requiring more information on Mercury's proposal to sub-contract aircraft sales. [FAA Exhibit 1, Item 3, exh. 21]

PAC awarded the FBO space to Mercury pursuant to an RFP process. [FAA Exhibit 1, Item 4, p. 6] PAC and Mercury executed the 2004 Mercury Lease on March 30, 2004. [FAA Exhibit 1, Item 3, exh. 12] In short, these issues of Mercury's compliance with the 1996 Minimum Standards were addressed between the parties within Mercury's first months of operation.

Considering the above lack of evidence that Mercury is deficient in required square footage; the evidence that PAC has investigated, reviewed and approved Mercury's arrangement for providing some FBO services by sub-contract; and the lack of evidence that PAC has turned down any request from Rick Aviation for similar treatment, the FAA finds that PAC has not unjustly discriminated against Rick Aviation in the enforcement of square-footage or employee requirements of FBOs to radio instrument sales, service and parts operations, and aircraft rental.

Point 7

The Complainant states:

Mercury has failed to meet the square-footage and employment requirements for its flight instruction. Mercury has no employees who perform flight instruction, and Mercury utilizes only 480 square feet of space for its flight instruction, thereby failing to meet the minimum requirement of 6,000 square feet of floor space and 15,000 square feet of land.¹¹ [FAA Exhibit 1, Item 1, p. 10]

¹¹ Clearly, here, if not throughout the allegations in Issue 1, the Complainant significantly misinterprets and misapplies the plain reading of the 1996 Minimum Standards. General Fixed Base Operators such as Rick Aviation and Mercury are required to have 21,500 sq. ft. of floor space. The 6000 sq. ft. requirement applies to Specialized Fixed Base Operators. [FAA Exhibit 1, Item 3, exh. 5, p. 3] Also as mentioned above, the Complainant's analysis appears to apply a stricter standard upon Mercury than PAC applied to Rick in its separate analysis of Rick Aviation's alleged square-footage deficiencies discovered in a facility audit, discussed more fully below. [FAA Exhibit 1, Item 3, exh. 18, p. 7]

As above, the Respondent states, “the Complainant omits square footage and personnel provided by Mercury’s authorized subcontractors, who do provide all the services and facilities listed in the Complainant. These subcontractors are expected to provide the same level of service as the primary FBO.” [FAA Exhibit 1, Item 4, p. 12]

The Complainant does not point to evidence to show that Mercury is failing to meet square footage requirements. As stated above, FAA examination of the record reveals that Mercury is leasing a nine-acre parcel, including approximately 69,950 square feet of built space. [FAA Exhibit 1, Item 4, exh. 1, p. 6] The 1996 Minimum Standards require 21,500 square feet of floor space and 110,000 square feet of land space. [FAA Exhibit 1, Item 3, exh. 5, p. 3] In a Part 16 procedure, the Complainant bears the burden-of-proof.

Like the other points in Issue 1, the Complainant does not provide any evidence that PAC’s interpretation that General Fixed Base Operators can comply with the 1996 Minimum Standards through subcontract arrangements is unreasonable. The Complainant has not shown that PAC has denied any request from Rick Aviation to use subcontractors to fulfill any requirements of the 1996 Minimum Standards.

The Complainant does not point to evidence to show that Mercury is failing to meet square footage requirements. FAA examination of the record reveals that PAC’s original Request for Proposal for the leasing of the specific FBO facility leased by Mercury describes the leasehold as a nine-acre parcel, including approximately 69,950 square feet of built space. [FAA Exhibit 1, Item 4, exh. 1, p. 6] The 1996 Minimum Standards require 21,500 square feet of floor space and 110,000 square feet of land space. [FAA Exhibit 1, Item 3, exh. 5, p. 3]

Instead, the Complainant points to evidence that Mercury has leased from PAC an additional “480 square foot of space for use as a Flight Instructor classroom,” in addition to the 69,950 square feet of space already leased by Mercury. [FAA Exhibit 1, Item 3, exh. 23, p. 1] The Complainant also points to a document listing office hours for Jamestown Flight Center at the Airport. [FAA Exhibit 1, Item 3, exh. 24] The point of this evidence is not clear.

Considering the above lack of evidence that Mercury is deficient in required square footage; the evidence that PAC has approved Mercury’s arrangement for providing some FBO services by sub-contract; and the lack of evidence that PAC has turned down any request from Rick Aviation for similar treatment, the FAA finds that PAC has not unjustly discriminated against Rick Aviation in regard to the enforcement of square-footage or employee requirements of FBOs in flight training.

Point 8

The Complainant states:

Mercury has failed to meet the square-footage and employment requirements for its aircraft sales operation. Mercury does not have a full-time sales person as required by the minimum standards. Thus, its aircraft sales result solely from outside referrals.
[FAA Exhibit 1, Item 1, p. 10]

As above, the Respondent states, “the Complainant omits square footage and personnel provided by Mercury’s authorized subcontractors, who do provide all the services and facilities listed in the Complaint. These subcontractors are expected to provide the same level of service as the primary FBO.” [FAA Exhibit 1, Item 4, p. 12]

The Complainant does not point to evidence to show that Mercury is failing to meet square footage requirements. FAA examination of the record reveals that PAC’s original Request for Proposal for the leasing of the specific FBO facility leased by Mercury describes the leasehold as a nine-acre parcel, including approximately 69,950 square feet of built space. [FAA Exhibit 1, Item 4, exh. 1, p. 6] The 1996 Minimum Standards require 21,500 square feet of floor space and 110,000 square feet of land space. [FAA Exhibit 1, Item 3, exh. 5, p. 3]

With regard to employment requirements, the 1996 Minimum Standards state, “The Operator shall have at least one full-time employee authorized to transact sales.” [FAA Exhibit 1, Item 3, exh. 5, p. 8] The parties do not speak directly to this precise language of the 1996 Minimum Standards with regard to aircraft sales transaction personnel. In fact, the Complainant does not precisely quote the requirement. The Respondent points to subcontractors fulfilling, generally, personnel requirements. [FAA Exhibit 1, Item 4, p. 12] The FAA does not interpret the plain language of this minimum standard to require a full-time sales person.

The Complainant points to evidence that PAC has inquired about Mercury’s proposal to comply with the 1996 Minimum Standards regarding aircraft sales. On October 21, 2004, PAC reminded Mercury of the need for Mercury to describe its “plan to satisfy the aircraft sales component of our FBO Minimum Standards,” and asked for a response. [FAA Exhibit 1, Item 3, exh. 25] Again on November 23, 2004, PAC requests that Mercury “present us with a plan on how you will fulfill the aircraft sales requirement contained in our 1996 Minimum Standards.” [FAA Exhibit 1, Item 3, exh. 27] On February 1, 2005, Mercury responded with a proposal to satisfy its aircraft sales requirement. [FAA Exhibit 1, Item 3, exh. 26] While the letter is short on detail, PAC indicates that, “So far, Mercury has corrected all problems brought to its attention.” [FAA Exhibit 1, Item 4, pp. 11-12]

Again, the Complainant has the burden-of-proof. Simply alleging that Mercury does not have a full-time sales person does not establish that PAC is in violation of its grant assurances by failing to enforce minimum standards requiring “one full-time employee authorized to transact sales.” Also, as stated, the Complainant has not established that PAC has required Rick Aviation to have a ‘full-time sales person.’ In any case, the evidence submitted to the record supports the conclusion that PAC has acted to enforce its minimum standards on a new tenant getting established at the Airport.

Considering the above, the Director cannot find sufficient evidence to conclude that PAC has unjustly discriminated against Rick Aviation by enforcing more stringent requirements upon Rick Aviation regarding aircraft sales than it enforces upon Mercury.

Point 9

The Complainant states, “Mercury does not have all the required equipment, including tow bars and jacks.” [FAA Exhibit 1, Item 1, p. 10]

The Respondent states, “PAC does enforce the Minimum Standards against Mercury. PAC has conducted a full facility audit on Mercury’s FBO business, and has filed several formal notices with Mercury noting deficiencies in its operation. So far, Mercury has corrected all problems brought to its attention.” [FAA Exhibit 1, Item 4, pp. 11-12]

The Complainant points to no evidence in the record. However, FAA examination of the record reveals that PAC has acted to enforce the 1996 Minimum Standards upon Mercury, as stated by PAC. On March 23, 2005, PAC wrote to Mercury summarizing the results of an ongoing “facility and service audit of Mercury Air Center to insure that your operation meets the requirements of the April 1996 Minimum Standards.” [FAA Exhibit 1, Item 3, exh. 34, p. 1] This letter lists numerous deficiencies, including a lack of certain passenger loading steps, certain types of de-icing equipment, certain types of towbars, and various other equipment. The letter requests a response and correction of deficiencies. [FAA Exhibit 1, Item 3, exh. 34] In fact, Mercury did respond to the March 23, 2005 letter on March 29, 2005. The letter responds to PAC’s concerns and provides timeline from several weeks for the receipt of specific equipment to several months in the case of de-icing equipment. The letter also addresses some issues of subcontracting and subleasing discussed above. [FAA Exhibit 1, Item 3, exhibit 35]

The evidence submitted to the record illustrates PAC’s efforts to enforce the 1996 Minimum Standards upon Mercury. The evidence in the record includes enforcement actions by PAC within Mercury’s first year of operation. The grant assurances do not require PAC to utilize identical enforcement posture among FBO users that have different histories and records and relationships with PAC.

Considering the above, the Director cannot conclude that PAC has unjustly discriminated against Rick Aviation by enforcing more stringent requirements upon Rick Aviation regarding required equipment than it enforces upon Mercury.

Summary of Issue 1

FAA examination of the 2004 Mercury Lease reveals Article 3.2(h), which states:

Company shall have the right to sublease services by way of a third party with the approval of PAC not to be unreasonably withheld. The Company’s right to sublet shall in no way relieve the Company from the responsibility to provide full service. [FAA Exhibit 1, Item 3, exh. 12, p. 9]

The Complainant has provided no evidence that PAC has denied similar treatment to Rick Aviation. The Complainant has provided no evidence that Rick Aviation has requested such treatment. The disputed sublease with Hampton University was not a commercial lease, providing facilities and services of an FBO to the public. PAC did not disapprove the sublease,

but rather determined that Rick Aviation had insufficient square footage devoted to FBO activities to meet the minimum standards, as discussed under Issue 1, Point 2 above.

Mercury's business plan appears to be allowable under the minimum standards. PAC has not acted to prohibit Rick Aviation from pursuing the same business plan. In fact it would appear that Rick Aviation could pursue such a business plan.

The Complainant's analysis and allegations regarding square footage is doubly flawed. First, the analysis requires a misinterpretation of the plain reading of the 1996 Minimum Standards. Second, the Complainant does not refute the evidence in the record that Mercury's leasehold contains facilities and space well above that required of the 1996 Minimum Standards. Also, apart from the inaccurate comparison of Rick Aviation's Hampton University sublease, the Complainant presents no information that PAC prevented Rick Aviation from sub-contracting or required Rick Aviation to retain more square footage than Mercury.

Finally, as stated above, non-compliance by Mercury does not automatically result in non-compliance by PAC. The record evidence, submitted by the Complainant and discussed above, demonstrates that PAC has reasonably instituted a program to enforce its own minimum standards in a manner consistent with PAC's grant assurances.

Issue Two

Whether PAC has provided substantially more favorable lease terms to Rick Aviation's competition at the Airport in a manner that unjustly discriminates against Rick Aviation in violation Federal grant assurance 22.

The Complainant states:

Because both Rick Aviation and Mercury operate as FBOs at the Airport and thus are similarly situated, the only issue in this regard is whether the difference between the lease terms is large enough to constitute an unreasonable disparity. Mercury's lease [2004 Mercury Lease] contains six terms¹² which substantially favor Mercury and impede Rick Aviation's ability to compete on an equal footing. [FAA Exhibit 1, Item 1, p. 12]

The Respondent states that these claims are factually incorrect, adding:

Rick begins with the fundamentally wrong proposition that it and Mercury are similarly situated "because both Rick Aviation and Mercury operate as FBOs at the Airport." This conclusory statement ignores the entire body of law... which holds that where leased facilities are dissimilar, whether in age, location, condition, financing, potential uses, or required improvements, they are not "similarly situated" for purposes of exclusive rights analysis.¹³ In this case.... PAC reasonably structured its lease with

¹² These six terms are summarized below.

¹³ Both parties confuse the standards of compliance between grant assurance 22 concepts of economic discrimination and exclusive rights prohibitions. A constructive granting of an exclusive right as alleged herein,

Mercury to provide for significant infrastructure improvements and monthly facility rents. [FAA Exhibit 1, Item 4, pp. 21-22]

The Director has consistently concluded that Assurance 22 does not require a sponsor to offer lease rates and terms that are identical to other leases negotiated at different points in time. The FAA does not require a sponsor to maintain equal lease rates over time between competing FBOs. [See, FAA Docket No. 16-00-03, Aerodynamics of Reading, Inc. v. Reading Regional Airport Authority, Final Decision and Order, (July 23, 2001), hereinafter *Aerodynamics.*, p. 17; See also, Penobscot Air Services LTD v. FAA, 164 F.3d 713, 726 (1st Cir., 1999)] Further, two operators may not be considered essentially similar as to rates and charges even though they offer the same services to the public. For example, differences in lease terms are permitted when there is a difference in space, location, or facilities. [FAA Order 5190.6A, Chapter 4, Sec. 4-14d(2)(a, b)]

A Complainant does not establish a *per se* violation of Assurance 22 (unjust discrimination) simply by showing differences between two leases. The FAA has found that differences in lease terms executed at different points in time can be justified by the market conditions present at the time of lease execution. [See, FAA Docket No. 16-99-09, Wilson Air Center, LLC v. Memphis-Shelby County Airport Authority, Final Decision and Order (August 30, 2001), hereinafter, *Wilson*] Additionally, FAA policy provides that an airport sponsor may quite properly increase its standards from time to time in order to ensure a higher quality of service to the public. [See, FAA Order 5190.6A, Sec. 3-17(c)] In *Wilson*, the FAA held that differences in lease terms that result from an airport sponsor improving its business practice does not result in a *per se* violation of Assurance 22. [*Wilson*, p. 17] That said, an airport sponsor that increases its standards may be required to apply those same standards to previously executed leases at the time those leases are modified or renewed. [See, FAA Docket No. 16-01-10, Maxim United, LLC v. Board of County Commissioners of Jefferson County, Colorado, Final Decision of Director's Determination (April 2, 2002)]

In this case, the timeframes of the compared leases differ by about 20 years; Rick Aviation signed its original lease in December 1984 (but also referenced by PAC as Rick's 1985 lease) while Mercury signed its lease in January 2004. [FAA Exhibit 1, Item 3, exhs. 1, 12] The Complainant provides no argument regarding any physical similarities or location similarities.

Relying upon Wilson Air Center, LLC v. Memphis-Shelby County Airport Authority, Final Decision and Order (August 30, 2001), Complainant argues that the case

*does not stand for the proposition that properties are not similarly situated if the facilities are dissimilar in age, location, condition, potential uses, or required improvements. In fact, the court in Wilson stated that “[a]s the Director noted, the buildings varied in age, location, condition, potential uses **and** needed improvements.” Wilson Air Center, LLC v. FAA, 372 F.3d 807, 819, (6th Cir. 2004) (emphasis added by*

requires an unreasonable denial of access or unjust economic discrimination, which would be violations of grant assurance 22. While it is true that in some past decisions, the FAA has found airports in non-compliance because of the constructive granting of an exclusive right, these findings, absent unusual circumstances, are redundant to a grant assurance 22 finding. The FAA will provide a finding regarding exclusive rights below.

Complainant). All of the aforementioned factors are not present in the case at bar. Thus Wilson actually supports the claim by Rick Aviation that the properties are similarly situated. [FAA Exhibit 1, Item 1, exh. 5, pp. 11-12]

This is an inaccurate conclusion from *Wilson*. While certain facilities at issue in *Wilson* were markedly different, the Complainant here has described no similarities between Rick Aviation's and Mercury's circumstances, other than that they are both FBOs. Of most significance to the FAA is the undisputed fact that Rick Aviation has been an FBO on the Airport for two decades, while Mercury started operations at the Airport in 2004.

In general terms, airport management may make changes in lease terms, rates and conditions of occupancy in order to more nearly balance the various legitimate interests of the public in civil aviation as the circumstances effecting civil aviation change over time. [See *Penobscot* and *Wilson*] At the very least, this means that a sponsor is *not* required to perpetuate identical lease terms of an established and/or pioneering FBO for a new entrant; nor must the sponsor demand that the new entrant pursue the same business plan as the established FBO. Market conditions and competitive situations change over time. These economic changes can occur during the time period between the respective negotiations of leases by competing FBOs starting up at different points in time. FBOs can also pursue competitive advantage by implementing opposing business strategies. Grant assurance #22 is not intended to protect FBOs from the inherent business risks associated with an FBO's decision to implement a certain business plan at a certain point in time in competition with other FBOs.

PAC supports the reasonable basis for the establishment of its new approach to lease standards, stating:

Rick signed its original lease in 1985, two decades before Mercury's lease. The RFP for the new FBO agreement... made it clear that PAC wanted to simplify revenue payments to include a flat regular payment, a monthly fuel flowage fee, and a significant capital investment in lieu of charging a percentage of gross receipts. The newer methodology was thought to be easier to audit and to provide less room for error or dispute. [FAA Exhibit 1, Item 4, pp. 13-14]

It is notable that Rick Aviation was unwilling to forfeit its current leasehold arrangement for the allegedly more advantageous terms of the RFP leasehold. The Complainant does not refute the Respondent's statement, "Mercury, Piedmont/Hawthorne, and Rick submitted proposals. When each bidder made its oral presentation, Rick stated that it would not surrender its current FBO agreement in order to obtain the new one." [FAA Exhibit 1, Item 4, p. 4]¹⁴

The Complainant presents six examples of allegedly favorable treatment provided to Mercury in 2004 that have not been provided to Rick Aviation.

¹⁴ Also, *Aerodynamics*, p. 16 states that it is "incumbent upon the Complainant to prove its allegations of unjust discrimination by providing evidence that similar terms and conditions were requested and were subsequently denied without adequate justification." Rick Aviation provides no such evidence.

Point 1

The Complainant states, “Mercury’s option periods are determined by its capital investment while Rick Aviation’s are set at two to ten year options.” [FAA Exhibit 1, Item 1, p. 12]

The Respondent does not dispute that the lease terms differ.

In fact the 1984 Rick Lease and the 2004 Mercury Lease do differ with regard to the structure of the lease option periods. [SEE FAA Exhibit 1, Item 3, exh. 1, para. 2.2 and exh. 12, para. 4.2]

As stated above, airport management may make changes in lease terms, rates and conditions of occupancy in order to more nearly balance the various legitimate interests of the public in civil aviation as the circumstances effecting civil aviation change over time. [See *Penobscot and Wilson*] At the very least, this means that a sponsor is *not* required to perpetuate identical lease terms of an established and/or pioneering FBO for a new entrant; nor must the sponsor demand that the new entrant pursue the same business plan as the established FBO. Market conditions and competitive situations change over time. In *Wilson*, the FAA held that differences in lease terms that result from an airport sponsor improving its business practice does not result in a *per se* violation of Assurance 22. [Wilson, p. 17] That said, an airport sponsor that increases its standards may be required to apply those same standards to previously executed leases at the time those leases are modified or renewed. [See, FAA Docket No. 16-01-10, Maxim United, LLC. v. Board of County Commissioners of Jefferson County, Colorado, Final Decision of Director’s Determination (April 2, 2002)]

PAC states, “PAC reasonably structured its lease with Mercury to provide for significant infrastructure improvements and monthly facility rents. [FAA Exhibit 1, Item 4, p. 22]

Considering the above rational basis for altering PAC’s leasing practice, the Director cannot conclude that PAC has unjustly discriminated against Rick Aviation by providing different option period terms in the 2004 Mercury Lease than those offered to Rick Aviation in the 1984 Rick Lease.

Point 2

The Complainant alleges that, “Mercury currently pays no rent on approximately nine acres (392,040 square-feet) of lease land while Rick Aviation currently pays \$24,749 for 123,390 square-feet of leased land.” [FAA Exhibit 1, Item 1, p. 12] Through a second pleading, the Complainant cites the 1984 Rick Lease, which does not conclusively substantiate Rick Aviation’s current lease payment. It would appear from the context that Rick Aviation states that it is paying a ground rent of \$24,749 per year. [SEE FAA Exhibit 1, Item 3, exh. 1, para. 3.1]

PAC states that the Complainant’s allegation

ignores the fundamentally different structures of payment in the two leases, making it impossible to accurately compare individual components without looking at the larger structure. Viewed in totality, Mercury in fact is required to pay \$10,416 per month in

“facility rent,” a payment that... Rick is advantageously not required to pay. [FAA Exhibit 1, Item 4, p. 13]

In fact, the 2004 Mercury Lease does require a facility rent, a fuel flowage fee and a land rent. [FAA Exhibit 1, Item 3, exh. 12, para. 6.1] Exhibits 5 and 6 to the 2004 Mercury Lease provide rent schedules for Mercury’s leasehold, including the Facility Rent that is set at \$10,416 per month¹⁵ with annual CPI adjustment through year six of the lease. At year six, PAC will conduct a market analysis to adjust rent. [FAA Exhibit 1, Item 3, exh. 12, exh. 5] Exhibit 6 includes a rent schedule for Land Rent that is set a \$0 dollars through year 5. At year 6, the rent is set by market analysis. In addition, Mercury pays a fuel flowage fee that appears to be the same as charged to Rick Aviation. Finally, the 2004 Mercury Lease, as discussed further below, does require capital improvements. [FAA Exhibit 1, Item 3, exh. 12, para. 2.3]

As stated above, airport management may make changes in lease terms, rates and conditions of occupancy in order to more nearly balance the various legitimate interests of the public in civil aviation as the circumstances effecting civil aviation change over time. [See *Penobscot and Wilson*] In *Wilson*, the FAA held that differences in lease terms that result from an airport sponsor improving its business practice does not result in a *per se* violation of Assurance 22. [Wilson, p. 17]

PAC states:

PAC wanted to simplify revenue payments to include a flat regular payment, a monthly fuel flowage fee, and a significant capital investment in lieu of charging a percentage of gross receipts. The newer methodology was thought to be easier to audit and to provide less room for error or dispute. The pending litigation in Newport News Circuit Court regarding Rick’s underreporting of gross receipts bears this out. [FAA Exhibit 1, Item 4, pp. 13-14]

Considering the above rational basis for altering PAC’s leasing practice, the Director cannot conclude that PAC has unjustly discriminated against Rick Aviation by providing different rent payment structures in the 2004 Mercury Lease than those offered to Rick Aviation in the 1984 Rick Lease.

Point 3

The Complainant states, “neither Mercury nor any other commercial aviation tenant at the Airport pays a percentage of its gross income in rent to PAC, while Rick Aviation is required to pay two percent of its gross income to PAC.” [FAA Exhibit 1, Item 1, p. 13] In short, Complainant appears to allege that PAC is not equally enforcing collection of the gross income tax. Complainant requests “equal treatment in that PAC will either collect the 2% fee from all FBO’s or not collect the fee from any of the FBO’s.” [FAA Exhibit 1, Item 5, p. 7].

¹⁵ Of course, this results in a facility rent of \$124,992 per year, plus annual inflation adjustments, in addition to a fuel flowage fee and a land rent that commences at year 6 of the 2004 Mercury Lease.

In regard to the 2004 Mercury Lease, PAC states “PAC wanted to simplify revenue payments to include a flat regular payment, a monthly fuel flowage fee, and a significant capital investment in lieu of charging a percentage of gross receipts.” [FAA Exhibit 1, Item 4, p. 13] In regard to the other, prior, FBO, PAC states, “PAC received [gross receipts] payments from Flight International when it was an FBO.”¹⁶ [FAA Exhibit 1, Item 4, p. 14] In its Rebuttal, PAC adds:

PAC believed that Flight International had properly submitted payments. Until 2004, neither Flight International nor Rick Aviation had been audited. As with Rick, PAC is currently investigating Flight International for potential under-reporting of gross revenues and intends to recover any monies owed. [FAA Exhibit 1, Item 7, p. 4]

The Complainant presents no evidence regarding the timing, persistence, or amount of alleged under-collection of rent by PAC vis-à-vis competing FBOs.

The Director finds PAC’s explanation of offering a lease to Mercury having different terms (i.e., one not including a two-percent gross income fee but rather a facility rent for example) to be rational and reasonable. Considering PAC’s explanation and the fact that airport sponsors may change lease terms, rates and conditions of occupancy in order to more nearly balance the various legitimate interests of the public, including improved business practices; the Director cannot conclude that PAC has unjustly discriminated against Rick Aviation by providing different rent payment structures in the 2004 Mercury Lease than those offered to Rick Aviation in the 1984 Rick Lease.

Point 4

The Complainant states, “Mercury has three fuel tanks while Rick Aviation only has two. Rick had orally requested another fuel tank at the tenant meeting held on August 17, 2005, but the Airport has failed to address this request.” [FAA Exhibit 1, Item 1, p. 13] The FAA notes that Rick Aviation filed this formal complaint less than three months after its initial oral request.

PAC states, “In September 2005, partially as the results of Rick’s request, PAC authorized an expansion of the fuel farm, which is currently at maximum capacity. The design of this expansion is currently underway. Once construction is complete, all FBOs will have every opportunity to lease additional fuel storage capacity.” [FAA Exhibit 1, Item 4, p. 14]¹⁷

The record evidence for this point does not support the Complainant’s allegation. To the contrary, the record evidence supports PAC’s assertion that it has addressed this request. In any case, a fuel tank disparity between FBOs is not sufficient to support a determination of unjust economic discrimination or a constructive granting of an exclusive right. Consequently, the

¹⁶ The Respondent states, “Over the years, PAC has sought to maintain at least two FBOs at the Airport in an effort to foster competition and to encourage the use and growth of aeronautical services for the public. During most of Rick’s tenure, the Airport had a second FBO, Flight International, Inc. (“Flight”). In 2003, with Flight’s lease set to expire in January 2004, PAC issued a Request for Proposals.” [FAA Exhibit 1, Item 4, p. 4]

¹⁷ See also FAA Exhibit 1, Item 4, exh. 18. This exhibit includes evidence of PAC’s progress of expanding the fuel farm, including a vote of the Airport Commission “to approve the design of a fuel farm expansion to allow additional jet fuel storage,” dated September 15, 2005, within one month of Rick Aviation’s verbal request for additional storage.

Director cannot conclude that PAC has unjust discriminated against Rick Aviation in regard to fuel tank allocation.

Point 5

The Complainant states, “When the property leased by Mercury reverts back to PAC, PAC will pay Mercury an amount representing the value of improvements made less depreciation taken on the improvements. PAC, however, will not make any payments to Rick Aviation upon the reversion of the lease property. Rick has made improvements valuing approximately \$3,000,000.¹⁸” [FAA Exhibit 1, Item 1, p. 13]

This is an inaccurate interpretation of the 2004 Mercury Lease. It states:

Company’s Improvements: Upon termination of the initial term, Company’s improvements on the Premises shall become the property of PAC. Upon termination prior to expiration of the initial term, if PAC terminates this Agreement in accordance with Article 12 herein, Company shall be reimbursed for Company’s improvements as specified in Exhibit 2 on a straight-line depreciated basis over the initial term as provided under Amortized Cost of Company’s improvements. [FAA Exhibit 1, Item 3, exh. 12, article 11]

PAC states, “PAC reasonably structured its lease with Mercury to provide for significant infrastructure improvements and monthly facility rents.” [FAA Exhibit 1, Item 4, p. 22] In fact, as discussed above, the 2004 Mercury Lease does support the reasonable goal of specific infrastructure improvement. The 2004 Mercury Lease includes that Mercury agrees

To construct the following minimum Improvements...

A new general aviation terminal building of not less than 5200 square feet adequate to house an office, pilot’s lounge, telephone and public restroom facilities, line service area, customer service counter, flight planning area, lobby with adequate seating for passengers, break and vending areas, and conference room to meet reasonable demand...

[Mercury] shall submit to PAC, in advance of any work performed, all plans, specifications, shop drawings or suitable sketches on [Mercury’s] planned Leasehold Improvements for PAC’s reasonable approval. [FAA Exhibit 1, Item 3, exh. 12, article 2.3]

The Complainant’s premise that PAC’s grant assurances require PAC to treat Rick Aviation and Mercury as similarly-situated in regards to leasehold improvements is unpersuasive. The differences are numerous. Primarily, as discussed above, PAC entered into its lease with Rick Aviation two decades before it agreed with Mercury for specific leasehold improvement requirements. Also, as noted above, the Complainant simply states that it has made \$3,000,000 of improvements to its leasehold. There is no evidence or argument in the record that PAC is

¹⁸ The Complainant does not describe these improvements. The Complainant does not report that PAC agreed to the reversion of specific depreciated leasehold improvements of Rick as part of any negotiated agreement.

required to value the depreciated value of these alleged unknown, uncharacterized, undiscussed improvements. As stated in *Wilson*¹⁹:

A dollar equivalency of rent reductions is not the relevant comparison. Rather, the relevant comparison is the value to [an airport sponsor] of proposed leasehold improvements to the [respective facilities of leaseholders]. In any case, the Respondent is not required by its Federal obligations to treat dissimilar situations identically. Therefore, rent and required investment scenarios do not have to result in a specific rent that is identical between the two differing leased structures, but may result in a mix of rental rates and specific leasehold improvements.

Also, allowing the market to influence how best to use limited Airport property under demand from various uses is acceptable. As discussed above, willingness-to-pay (bidding) is a valid method to determine how best to use Airport property....

...Any lease agreement could contain a mix of rent abatements and required investments, does not have to consider the fair market value of the property, does not have to provide a dollar equivalency to [respective leasehold improvement proposals], and must provide a reasonable benefit to the [the airport sponsor]. [[See, FAA Docket No. 16-99-09, Wilson Air Center, LLC v. Memphis-Shelby County Airport Authority, Director's Determination (August 2, 2000), Wilson DD, p. 23]

Should Rick Aviation decide to make leasehold improvements in the future, it should go to PAC and negotiate how those improvements might be credited by PAC in the future.

Considering the above rational basis for altering PAC's leasing practice, and the fact that airport sponsors may change lease terms, rates and conditions of occupancy in order to more nearly balance the various legitimate interests of the public, including improved business practices, the Director cannot conclude that PAC has unjustly discriminated against Rick Aviation by providing different terms for reimbursement of leasehold improvements.

Point 6

The Complainant states, "PAC does not require Mercury to make any capital investment in its leased property while Rick Aviation has invested approximately \$3,000,000 in its leased premises. While PAC required Mercury to build a 5200 square foot general aviation terminal building, PAC nonetheless agreed to later compensate Mercury for these improvements" [FAA Exhibit 1, Item 1, p. 14]

The Complainant points to no evidence that shows that PAC required Rick Aviation to make any improvements. The Complainant does not even characterize the nature of the alleged \$3,000,000 worth of improvements. The Complainant points to no evidence that PAC amended its 2004 Mercury Lease to relieve Mercury of making the terminal improvements discussed under Point 5 above.²⁰ Finally, the Complainant admits that Mercury is proceeding with the construction of a

¹⁹ The discussion of leasehold improvements is more fully discussed in the *Wilson* Director's Determination, issued on August 2, 2000, not the Final Decision and Order.

²⁰ It appears that the Complainant may be rearguing the issue of compensation of the un-depreciated value of the improvements under the 2004 Mercury Lease. That issue has been discussed under Point 5, above.

terminal building, stating, “PAC has approved a less costly building design for Mercury to construct than that originally proposed by Mercury in its RFP.” [FAA Exhibit 1, Item 5, p. 8]

The 2004 Mercury Lease states that Mercury agrees

To construct the following minimum Improvements...

A new general aviation terminal building of not less than 5200 square feet adequate to house an office, pilot’s lounge, telephone and public restroom facilities, line service area, customer service counter, flight planning area, lobby with adequate seating for passengers, break and vending areas, and conference room to meet reasonable demand...

[Mercury] shall submit to PAC, in advance of any work performed, all plans, specifications, shop drawings or suitable sketches on [Mercury’s] planned Leasehold Improvements for PAC’s reasonable approval. [FAA Exhibit 1, Item 3, exh. 12, article 2.3]

PAC responds:

In fact, Mercury is constructing a \$1.6 million corporate aviation terminal facility that is scheduled to open in early 2006. Ownership of this facility will revert to PAC when Mercury’s current lease expires. The building is actually more expensive than initially planned by Mercury. More importantly, its design meets the square footage requirements of the Minimum Standards, which simply do not address the costs of structures. [FAA Exhibit 1, Item 4, pp. 12-13]

The Complainant fails to raise facts demonstrating a difference in treatment, much less unjust economic discrimination. The Complainant points to no requirement that it, Rick Aviation, make any specific leasehold improvements that revert to the PAC, yet the Complainant alleges, “PAC does not require Mercury to make any capital investment in its leased property.” [FAA Exhibit 1, Item 1, p. 14] The Director refers the parties to the discussion under Point 5 regarding requirements for leasehold improvements and the fact that they can differ over time and in consideration of the sponsor’s valuation of the specific improvements. The grant assurances do not prevent a sponsor from valuing certain capital improvements and do not prevent a sponsor from crafting lease agreements to effectuate certain improvements in lieu of rent. Consequently, the Director cannot conclude that PAC has unjustly discriminated against Rick Aviation.

Issue Three

Whether PAC has denied reasonable access to Rick Aviation to conduct commercial aeronautical activities at the Airport, or unjustly economically discriminated against Rick Aviation, in violation of Federal grant assurance 22.²¹

²¹ The Complainant’s list of seven grievances are not clearly and logically consistent with its allegation that “PAC has taken action to prevent Rick Aviation from providing services that it is permitted to provide under its lease.” The list of seven grievances is not associated with a specific grant assurance violation. However, the words used to introduce the list of grievances is most nearly consistent with an allegation of an unreasonable denial of access under grant assurance 22.

The Complainant states that

PAC has taken the following actions [discussed below] with the intent of forcing Rick Aviation off the Airport.... PAC has engaged in these actions in order to prevent Rick Aviation from providing services that it is permitted to provide under its lease. Further, these actions have resulted in both a loss of considerable income and a significant increase in expenses, thereby impeding Rick Aviation's ability to compete on equal footing with Mercury and placing a significant burden upon Rick Aviation. [FAA Exhibit 1, Item 1, pp. 17-18]

In its Reply, the Complainant states that PAC's alleged actions against Rick Aviation, "all occurred after Rick Aviation challenged PAC's decision to award the leasehold to Mercury. Thus, PAC engaged in the aforementioned actions with the intent to unjustly discriminate against Rick Aviation." As discussed below, the record does not show that all of the alleged PAC actions occurred after Rick Aviation's court challenge. In any case, alleged motive or intent is not equivalent to a grant assurance violation. The Complainant has not proven such intent. As stated in *BMI Salvage Corp. v Miami-Dade County Director's Determination*, "The Director notes that under the standard for compliance discussed above, motive or ill will does not, alone, amount to non-compliance, even if established by the Complainant. Such evidence must be accompanied by an actual unreasonable denial of access for an aeronautical activity or unjust economic discrimination. Motive alone does not establish non-compliance." [See, FAA Docket No. 16-05-16, *BMI Salvage Corp & Blueside Services v. Miami-Dade County, Director's Determination* (July 25, 2006), p. 16]

PAC responds that "Rick's litany of allegations... are factual [sic] incorrect." [FAA Exhibit 1, Item 4, p. 23]

Point 1

The Complainant states, "PAC performed improper and unnecessary audits of Rick Aviation in retaliatory fashion." [FAA Exhibit 1, Item 1, p. 17] In a different part of the Complaint, Rick Aviation states that PAC conducted numerous audits, stating:

Since Rick Aviation challenged PAC's decision to allow Mercury to operate as an FBO at the Airport, PAC has retaliated by engaging in discriminatory actions against Rick Aviation. PAC conducted an audit of Rick Aviation's services, equipment, and facilities on February 5, 2004. PAC determined that Rick Aviation failed to meet the minimum standards for a number of issues. In fact, however, the auditor's findings were incorrect. In May of 2004, PAC demanded an immediate audit of Rick Aviation's books and records. Then, in July of 2004, PAC requested additional financial information for an upcoming audit.... Then in September of 2004, PAC notified Rick Aviation that it would perform yet another audit and made additional onerous requests for financial records. [FAA Exhibit 1, Item 1, p. 3]

The parties agree that PAC did spend 2004 examining several aspects of Rick Aviation's business, including financial and physical compliance with lease agreements and minimum standards. [FAA Exhibit 1, Item 2, exhs. 1-10 and Item 4, p. 7]

PAC responds:

PAC has not "retaliated" against Rick Aviation. As the Complainant notes, Rick's lease permits PAC to perform quarterly audits. Far from being subjected to "onerous" audit requests, Rick had not been subjected to an audit in at least a decade, if not longer. However, Rick officials made comments to PAC during the RFP process in January 2004 that raised issues about the extent to which Rick was in compliance with the Minimum Standards.²² As a result, Airport Manager Mark Falin conducted a random facility audit of Rick's operations in February 2004. Several deficiencies were uncovered, which were communicated to Rick in writing in April 2004....

Following the facility audit, and again pursuant to the lease, PAC undertook a financial audit of Rick. This audit came in two phases: first an audit of fuel sales, followed by a full financial audit of all gross revenues. The financial audit for calendar year 2003 uncovered unreported receipts by Rick in excess of \$779,000, resulting in lost revenue to PAC of over \$15,000 for one year. Rick refused to provide adequate financial records to permit a complete financial audit of prior years. As a result, PAC filed suit against Rick in Newport News Circuit Court for breach of the lease. That litigation is pending.

As presented by the Complainant, on January 23, 2004, PAC notified Rick Aviation that PAC would conduct an audit of Rick Aviation. [FAA Exhibit 1, Item 2, exh. 1] On March 11, 2004, Rick Aviation sued PAC. In state court, Rick Aviation filed a Petition of Appeal, Rick Aviation, Inc. Petitioner v. PAC. [FAA Exhibit 1, Item 4, exh. 2] The record does not support the Complainant's allegation that PAC 'retaliated' against Rick Aviation for the filing of the lawsuit. Even if the audit did occur after the lawsuit, the FAA would have to consider that such a divergence of understanding of respective rights and responsibilities inherent in the lawsuit might reasonably inspire doubt in PAC that Rick Aviation and PAC were consistently interpreting lease agreements and minimum standards in the same manner.

Audits are common and acceptable business practices. As discussed above, the record clearly establishes a significant dispute over the payment of rent. Audits were expressly permitted under Rick's lease. This kind of apparent lack of transparency, consistency, and trust between parties to an agreement would certainly serve as a reasonable basis to proceed with an audit. The FAA encourages audits. The Complainant's allegation that the sponsor's choice to conduct audits is retaliatory is not supported by the evidence and is not relevant. Attitude and intent do not establish a grant assurance violation.

²² See also FAA Exhibit 1, Item 2, exhs. 1 & 2, supporting PAC's concerns with Rick Aviation's operations. The April 7, 2004 letter [Item 2, exh. 2] summarizes the audit that had occurred in February 2004, and cites Rick Aviation's prior comments in January 2004 as the basis for going forward with the audits that were previously announced in January 2004 [Item 2, exh. 1]

As with other issues, this is, at least in significant part, a lease dispute over rent.²³ The FAA does not adjudicate compliance with lease agreements. As stated above, the parties are in court over issues of compliance with the 1984 Rick Lease. Lack of consistency with lease agreements does not establish a grant assurance violation. Unreasonable or unjust actions by a sponsor are bases for potential grant assurance violations.

The Complainant has not established that PAC's actions with regard to the audits in 2004 were unreasonable. Finally, grant assurance 22 does not require an airport sponsor to investigate a second party, when the sponsor suspects the first party of not adhering to its lease agreement. Consequently, PAC's decision to audit Rick Aviation is not discriminatory, because Mercury is not similarly situated, in that they have not been conducting business on the Airport for years and are not engaged in a dispute over rent owed, as is Rick Aviation.

Point 2

The Complainant states, "PAC threatened to terminate Rick Aviation's fueling rights for [Rick's] alleged failure to comply with minimum standards while only asking Mercury to eventually become compliant." [FAA Exhibit 1, Item 1, p. 17]

The Respondent states, "PAC has treated Rick and Mercury in equal fashion regarding fueling rights and has not issued 'threats.'" [FAA Exhibit 1, Item 4, p. 23]

As stated above, the FAA deems that airport sponsors are in compliance with their Federal grant assurances if they have a program in place to address their respective grant obligations and that they implement the program. Enforcement of minimum standards is the FAA's recommended way for a sponsor to deal with the expected friction among competing aeronautical service providers, in an environment of leases entered into at different times, under different circumstances and reflecting the changing management priorities. Finally, the standard of compliance, quoted above, does not require that airport sponsors enforce minimum standards so rigidly to require identical tone and posture toward all competitors that have different records and history with the sponsor.

Threatening to deny rights under an agreement that describes terms of tenancy or minimum standards is not an unreasonable denial of access in a situation of default by the airport user. Not adhering to minimum standards or not paying rent are reasonable bases for a finding of default.

²³ A February 7, 2005 letter from PAC to Rick Aviation summarizes the lease dispute underlying the rent deficit cited by PAC. The letter states:

As to the Lease payments, the Commission never agreed to change your payment obligations. As a public body, only the Commission has authority to change the Lease terms. Article 14.1 [of 1984 Rick Lease, See FAA Exhibit 1, Item 3, exh. 1, p. 19] provides that all such changes shall be in writing and signed by the Commission's designated representative. This was never done. The Commission needs the requested financial information, so that it can fulfill its public duty to insure that all required payments were made in accordance with the Lease. While the Lease only requires Rick to retain certain records for three years, we would expect you to have kept the financial records requested in the ordinary course of business. There is nothing in the Lease that places a time limit on the Commission's right to enforce the Lease terms.

Based on the information provided to date the Commission has no choice but to conclude that Rick is in default of the Lease. We look forward to your prompt and complete response within the next ten calendar days, so that all matters concerning your Lease may be resolved before the Lease expires. [FAA Exhibit 1, Item 3, exh. 16]

We note that the Complainant does not state that any access has been actually denied under this point. Also, as stated above, the respective differences in the history and circumstances between Rick Aviation and Mercury create dissimilar situations.

Point 3

The Complainant states, “PAC attempted to terminate Rick Aviation’s lease even though Rick Aviation notified PAC of its intent to renew.” [FAA Exhibit 1, Item 1, p. 17]

The letter cited by the Complainant from PAC states:

As you know the term of Rick Aviation, Inc’s Lease with the Peninsula Airport Commission dated December 5, 1984, expires on July 31, 2005. You did not provide written notice of your intent to renew the Lease pursuant to Article 2.2, at least six month’s in advance of the Lease expiration date. Therefore, you should make plans to vacate and surrender possession of the facility to the Airport Commission. ...

Based on the information provided to date the Commission has no choice but to conclude that Rick is in default of the Lease. We look forward to your prompt and complete response within the next ten calendar days, so that all matters concerning your Lease may be resolved before the Lease expires. [FAA Exhibit 1, Item 3, exh. 16]

PAC answers, “PAC has acted reasonably in its litigation involving Rick’s lease and whether Rick provided proper notice of its intent to renew the lease.” [FAA Exhibit 1, Item 4, p. 23]

Evidence in the record reflects a notification from Rick Aviation to PAC, dated September 8, 2004. [FAA Exhibit 1, Item 3, exh. 17] The parties do not describe the nature of the dispute in court over the validity of this document. In any case, the record does not reflect that PAC has denied Rick Aviation access to its leasehold. As stated repeatedly, the FAA does not enforce leases or adjudicate lease disputes. The FAA assumes that the parties will address this matter in court.

The FAA cannot determine that PAC’s alleged ‘attempt to terminate’ the 1984 Rick Lease is an unreasonable denial of access because it is speculative and properly the subject of court review regarding the meaning and applicability of lease terms and the legitimacy of certain documents. The Complainant has not presented any evidence or argument that PAC has unjustly discriminated against Rick.

Point 4

The Complainant states, “PAC forced Rick Aviation to terminate its sublease to Hampton University, resulting in the loss of considerable income.” [FAA Exhibit 1, Item 1, p. 17]

PAC answers, “PAC did not ‘force’ Rick to terminate its sublease with Hampton University.” [FAA Exhibit 1, Item 4, p. 23]

The Complainant points to no evidence that PAC forced it to terminate its sublease.²⁴ In its reply, the Complainant reargues the issues discussed under Issue 1, Point 2 above. [FAA Exhibit 1, Item 5, p. 6] As discussed and analyzed in that section, PAC did enforce minimum square-footage requirements against Rick Aviation, finding that Rick Aviation was deficient. As determined under Issue 1, Point 2, PAC's conclusions about Rick Aviation's FBO square-footage were reasonable.

PAC answers, "Rick had several options available to cure this deficiency, including building additional space or seeking a waiver from PAC of the square footage requirement. Instead, Rick chose to evict its tenant with 30-days notice in September 2004. PAC first learned of this when notified by Hampton University." [FAA Exhibit 1, Item 4, p. 9]

The FAA has already determined that PAC's actions regarding the Hampton sublease were not unjustly discriminatory under Issue 1, point 2, above. The Complainant's allegations of fact are not supported by the evidence in the record. Therefore, the Director cannot conclude that PAC unreasonably denied access to Rick Aviation in regard to its ability to earn revenue through the Hampton sublease that did not provide FBO services to the public.

Point 5

The Complainant states, "PAC has taken office space used by Rick Aviation for its flight school and given it to Mercury."²⁵ [FAA Exhibit 1, Item 1, p. 17]

PAC answers, "PAC took reasonable and appropriate actions regarding the use of Airport facilities for a proper flight school." [FAA Exhibit 1, Item 4, p. 23] In fact, PAC does not dispute that it did not renew a month-to-month lease for 480 square-foot space, stating:

In November 1993, PAC and Rick entered into a month-to-month lease governing the 480 square foot space in question. [See Also FAA Exhibit 1, Item 4, exh. 9] The space was to be used as a "classroom and storage area" for Rick's flight school. Pursuant to the Minimum Standards, Rick was required to maintain a flight school that met all requirements detailed in FAA Regulations Part 141. However, as Rick's counsel admitted to PAC in a letter dated July 7, 2004, Rick's flight school did not meet this standard, but rather was operating under FAA Part 161 guidelines. Mercury agreed to bring a fully-licensed Part 141 flight school through its approved subcontractor Jamestown Flight Center. [FAA Exhibit 1, Item 4, pp. 7-8]

Rick Aviation admits that it did not have an active Part 141 flight school. It states:

Rick Aviation operated its flight school under an FAA Part 141 air agency certificate from 12/10/91 until 12/31/93. The FAA placed Rick Aviation's Part 141 certificate in an inactive status and agreed to reactivate it when Rick Aviation had a request from

²⁴ In fact, the Complainant points to the Complainant's own letter, dated September 3, 2004, to Hampton University, canceling the sublease as evidence that PAC forced such action. This is not persuasive. [FAA Exhibit 1, Item 3, exh. 36]

²⁵ See also Issue 1, point 7, above.

students. In fact, when Rick Aviation discovered that PAC was taking the 480 square-feet of office space that Rick Aviation used for its flight school and giving it to Mercury, Rick Aviation contacted the FAA on August 10, 2004 and reactivated its Part 141 certification (which occurred on September 30, 2004). [FAA Exhibit 1, Item 5, p. 5]

One of the reasons that an airport sponsor enters into short-term leases is to ensure that property be used for purposes more nearly serving the interests of the public in civil aviation. Rick Aviation did not attempt to operate an approved Part 141 Flight School for nearly 11 years. According to the record, Rick Aviation sought to reactivate its Part 141 Flight School only right after it found out that PAC was going to terminate Rick's month-to-month lease and make it available to Mercury for its Part 141 flight school. Rick Aviation states, "when Rick Aviation discovered that PAC was taking the 480 square-feet of office space... Rick Aviation contacted the FAA." [FAA Exhibit 1, Item 5, p. 5] PAC states that "Mercury agreed to bring a fully-licensed Part 141 flight school to the airport through its approved subcontractor Jamestown Flight Center." [FAA Exhibit 1, Item 4, p. 8]

Again, as elsewhere, the Complainant mentions the existence of prior 1984 Minimum Standards. [FAA Exhibit 1, Item 5, p. 4] It is not clear from the record what the Complainant is arguing with this point. The Complainant does not allege that PAC's application of the more recent 1996 Minimum Standards to Rick Aviation is a grant assurance violation. However, from the context of the disputes, it appears that Rick Aviation's assumption that only the 20-year old 1984 Minimum Standards apply to Rick Aviation may be the core of the conflict between Rick Aviation and PAC. As stated elsewhere, PAC may apply the most recent minimum standards to all FBO users of the Airport. In any case, PAC's attempt to treat the FBOs similarly by expecting Rick Aviation to have been operating a Part 141 Flight School is neither unreasonable nor discriminatory.

Finally, the Complainant mentions that Jamestown Flight School did not obtain its Part 141 certificate until December 2004, a few months after Rick Aviation obtained its Part 141 certificate in September 2004. [FAA Exhibit 1, Item 6, exhs. 3 & 4] PAC responds that it was unaware of this delay stating, "PAC was not aware of this discrepancy, but has addressed it with Mercury and the problem has been promptly resolved." [FAA Exhibit 1, Item 7, p. 5]

As stated, an airport sponsor's decision to retain some property in short term leases, so that it can distribute the property to more readily serve the civil aviation needs of the public, is reasonable and responsive to its federal obligations. The facts summarized above, including Rick Aviation's 11-year hiatus from offering Part 141 flight instruction, establish a reasonable basis to lease this office/classroom/storage space to a new operator with the promise of providing the desired flight-training curriculum, that Rick Aviation was admittedly not providing. The Complainant has not established that PAC intended that Mercury/Jamestown would not offer Part 141 flight training and, in fact, the parties admit that Mercury/Jamestown had obtained the certificate several months prior to the filing of this Complaint.

The Director cannot conclude that PAC's actions with regard to the 480 square-foot office/classroom space constitute an unreasonable denial of access because its actions to provide space for an aeronautical service to the public appear to be reasonable. The Complainant has

failed to show unjust economic discrimination. In fact, the Complainant establishes just cause for PAC to have distinguished between the two potential providers of flight instruction.

Point 6

The Complainant states, “PAC did not select a member of Rick Aviation to the General Aviation Advisory Committee yet it selected a representative of Mercury.” [FAA Exhibit 1, Item 1, p. 17]

PAC answers:

The General Aviation Advisory Committee (the “Committee”) is an informal board that provides input to PAC on matters impacting general aviation.... It does not require representatives from all FBOs at the Airport. Rick and others had served on the Committee for many years, and PAC reasonably decided that it was time for new members to provide fresh ideas. A representative from the new FBO, Mercury, was appointed to serve on the Committee to fill the FBO seat. In addition, three other members were replaced on the Committee at the same time as Rick’s representative, the result of normal turnover that allows for the greatest participation by a cross-section of the general aviation community. [FAA Exhibit 1, Item 4, pp. 8-9] [See also FAA Exhibit 1, Item 3, exh. 40 & Item 4, exh. 12]

Rotating representation of airport users on an airport advisory committee is reasonable and consistent with PAC’s grant assurances. The Complainant has presented no evidence of unjust economic discrimination or unreasonable denial of access. Also, the Complainant’s allegation of retaliation by PAC is unsupported by the record and unpersuasively argued as a grant assurance violation. The Director cannot conclude that PAC has unjustly discriminated or unreasonably denied access.

Point 7

The Complainant states, “PAC delayed its notification to Rick Aviation of an increase to the fuel flowage fee until after the fact.” [FAA Exhibit 1, Item 1 p. 7] Elsewhere, the Complainant states:

In March of 2004, PAC increased the Fuel Flowage Fee. The effective date of the increase was April 1, 2004. Although PAC notified Rick Aviation via letter dated April 30, 2004, Rick Aviation did not receive this notification until May 7, 2004. This delay prevented Rick Aviation from providing a thirty-day notice of the increase to its fuel customers. [FAA Exhibit 1, Item 1, p. 4]

PAC does not dispute the facts but states that “the increase in fuel flowage fees was applied retroactively to both Rick and Mercury.” [FAA Exhibit 1, Item 4, p. 7]

The Complainant replies that the “retroactive application of the increase had no material effect on Mercury because Mercury did not sign its lease until March 30, 2004 and had no customers at the time of the increase.” [FAA Exhibit 1, Item 5, p. 4] The parties dispute this fact. PAC

presents evidence that Mercury did, in fact, have to pay the increased fuel flowage rate on 168,000 gallons of fuel delivered in April 2004. [FAA Exhibit 1, Item 7, exh. 2] PAC provides no evidence that Mercury was unable to pass this higher costs on to end users, or even any discussion of Mercury's use of this fuel.

The Director accepts that PAC's actions with regard to the timing and notification of the increase in fuel flowage fees may have had an effect on Rick Aviation's revenue for that month. The record does not establish a reasonable basis for PAC to have chosen to delay notification, effectively raising the fuel-flowage fee retroactively. The record is insufficient to determine that PAC acted deliberately. There is no evidence in the record that PAC has established a pattern of delayed notification that creates a persistent unreasonable term of tenancy or unjust economic discrimination. This occurrence appears to have been incidental and isolated. In any case, the cure for this lack of care is for PAC to provide sufficient notice for future increases. Any damages to Rick Aviation would be appropriately addressed in state court.

Consequently, the Director cannot determine that this incident constitutes an unreasonable denial of access or unjust economic discrimination.

Issue Four

Whether PAC's alleged unjust economic discrimination and/or unreasonable denial of aeronautical access have constructively granted an exclusive right in a manner prohibited by its Federal grant assurance 23 and Federal law.

Rick Aviation argues that "PAC has granted an exclusive right to Mercury by (1) permitting Mercury to operate without complying with minimum standards; (2) providing substantially favorable lease terms to Mercury; and (3) taking action to prevent Rick Aviation from providing services that it is permitted to provide under its lease. [Exh. 1, Item 5, p. 14.] As discussed above, Rick Aviation had the burden to prove its allegations and it has failed to do so. Since there is no violation of PAC's obligation to provide access on reasonable terms and without unjust discrimination, there can be no exclusive rights violation.

In FAA Order 5190.6A, the FAA published its exclusive rights policy and broadly identified aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, the FAA has taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [See e.g., Pompano Beach v FAA, 774 F.2d 1529 (11th Cir, 1985).]

The Complainant's allegation that the PAC has discriminated against Rick Aviation, by its application of dissimilar lease provisions, discriminatory enforcement, and retaliatory, harmful acts has implications for the grant assurance prohibiting the granting of an exclusive right, as discussed above. However, at the very least the FAA would have to determine that the PAC had established such inequity in its leases, standards and/or practices as to violate a provision of grant

assurance #22. As discussed above, the FAA is not persuaded by the record that this is the case for the reasons discussed in Issues 1 through 3.

The Complainant does not present any evidence or argument of circumstances beyond which is discussed above to establish an exclusive right.

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

VII. CONCLUSION

Based on the foregoing discussion and analysis, which takes into account the procedural history and background information as well as the record, applicable law and policy, the Director finds that the Peninsula Airport Commission is not in violation of 49 USC § 47107(a)(1 and 4) and § 40103(e) or its Federal obligations pursuant to grant assurances 22, *Economic Nondiscrimination* and 23, *Exclusive Rights*. Also, PAC is not in violation of the terms of deeds issued pursuant to the Surplus Property Act of 1944, codified as 49 USC §§ 47151 through 47153.

ORDER

Accordingly, it is ordered that:

1. The Complaint is dismissed.
2. All Motions not expressly granted in this Determination are denied.

RIGHT OF APPEAL

This Director's Determination, FAA Docket No. 16-05-18, is an initial agency determination and does not constitute a final agency decision and order subject to judicial review. [14 CFR § 16.247(b)(2)]. A party adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR § 16.33(b) within thirty (30) days after service of the Director's Determination.

Signed,



May 8, 2007

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

Date