UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Sun Valley Aviation, Inc.	)	
Complainant	)	**FAA Docket No. 16-10-02**
v.	)	
Valley International Airport, City of Harlingen, TX	)	
Respondent	)	

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on the Complaint filed under Title 14 of the Code of Federal Regulations (CFR), Part 16, by Sun Valley Aviation, Inc. (Complainant) against the City of Harlingen, Texas, (City, Respondent, or Sponsor), as owner and sponsor of the Valley International Airport (VIA[1] or Airport).

In this Part 16 Complaint, the Complainant alleged the Respondent violated Grant Assurance 22, *Economic Nondiscrimination*, Grant Assurance 23, *Exclusive Rights*, and Grant Assurance 24, *Fee and Rental Structure*. Specifically, the Complainant alleged the Respondent:

1. Unjustly discriminated against and denied access to the Complainant by continually delaying, obstructing, and denying its attempts to establish a Fixed Based Operator[2] business on the Airport in violation of Grant Assurance 22; [FAA Exhibit 1, Item 2 and FAA Exhibit 1, Item 8]
2. Engaged in a pattern of deliberate behavior to protect the incumbent FBO's position as the sole FBO on the airport offering services similarly proposed by the Complainant in violation of Grant Assurance 23; [FAA Exhibit 1, Item 2 and FAA Exhibit 1, Item 8] and

[1] The Director notes HRL is the location identifier for Valley International Airport; however, since the parties primarily use the abbreviation VIA to identify the airport, the Director will continue that use for consistency purposes in this Determination.

[2] A fixed-base operator (FBO) is a commercial entity providing aeronautical services such as fueling, maintenance, storage, ground and flight instruction, etc. to the public. See, FAA Order 5190.6B, Page 8-11, Footnote 25 or Appendix Z.

3. Acted in direct contravention of the FAA's and public interest to foster airport infrastructure and competition in violation of Grant Assurance 24. [FAA Exhibit 1, Item 2 and FAA Exhibit 1, Item 8]

The Respondent denies each allegation and requests dismissal of the Complaint. In requesting dismissal, the Respondent alleges: (1.) The Complainant failed to certify substantial and good faith efforts were made toward resolution in accordance with 14 CFR, § 16.21; (2.) The Complainant "jumped the gun" by filing the formal complaint before the informal complaint was resolved; and (3.) The Respondent offered the Complainant a 40-year lease four days prior to filing its Answer to the Complaint. [FAA Exhibit 1, Item 7]

The decision in this matter is based on: (i) applicable law and FAA policy regarding the Respondent's Federal obligations as imposed by grant assurances 22, *Economic Nondiscrimination;* 23, *Exclusive Rights*; and 24, *Fee and Rental Structure;* as well as Title 49 United States Code (U.S.C.), § 47107 *et. seq.*; (ii) Respondent's surplus property obligations; and (iii) arguments and supporting documentation submitted by the parties, which comprise the Administrative Record (Record) reflected in the attached FAA Exhibit 1.

At this time, the Director finds the Respondent is taking the appropriate steps to achieve the basic standard of voluntary compliance under Grant Assurance 22, *Economic Nondiscrimination*, and Grant Assurance 23, *Exclusive Rights*. Additionally, the Director finds the Respondent is not currently in violation of Grant Assurance 24, *Fee and Rental Structure*. The basis for the Director's decision is set forth herein.

II. PARTIES

A. Respondent

The City of Harlingen, Texas (City, Respondent, or Airport Sponsor) is located in the southernmost part of the state, with Mexico to the south and the Gulf of Mexico to the east. The City is the owner and sponsor of record with the FAA for the Valley International Airport (Airport or VIA). The Airport Manager, who is a city employee and reports directly to the City Mayor and City Commission, signs the FAA Airport Improvement Program (AIP) grants on behalf of the City for the Airport. [FAA Exhibit 1, Item 22, Exhibit C]

The City created an Airport Board, which is responsible for providing daily operational oversight and management of Valley International Airport. The Airport Board consists of nine members, appointed by the City Mayor with approval by the City Commission. The Airport Board submits annual budgets, as well as intermittent amendments throughout the year to the City Commission for approval. The City has given limited express powers to the Airport Board by delegating to it certain operational decisions; however, the City retains oversight and approval authority for all funding decisions. The Airport Board may execute leases with tenants; however, the Airport Board does not have the authority to expend

Airport funds except as specifically provided for in budgets or budget amendments approved by the City Commission[3]. [FAA Exhibit 1, Item 22, Exhibit A and A2]

Valley International Airport is a Part 139 certificated primary small hub airport[4] with surplus property agreements under Public Law 80-289[5] (P.L. 80-289). In addition to its surplus property obligations, the planning and development of the Airport has been financed in part with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C., § 47101, *et seq*. The airport has accepted more than $79 million in FAA Airport Improvement Program funding since 1982. [FAA Exhibit 1, Item 12, Exhibit A] It has three runways, approximately 33 based aircraft, and hosts nearly 50,000 operations annually, approximately 11,500 of which are air carrier. [FAA Exhibit 1, Item 12]

B. Complainant

The Complainant, Sun Valley Aviation, Inc. (Complainant or SVA), is a Texas corporation comprised of investors. The company describes its investors as business and aviation business professionals whose intent is to establish a full service fixed based operation at Valley International Airport. [FAA Exhibit 1, Item 2, page 1] Patrick Kornegay served at the president of SVA until he resigned that position in April 2010. [FAA Exhibit 1, Item 2, exhibit I20] His son, Clyde Kornegay, was appointed president by the SVA Board. [ibid.] Michael Scaief has served as the corporation's Chairman since its inception. [FAA Exhibit 1, Item 2, Exhibit N]

III. BACKGROUND AND PROCEDURAL HISTORY

A. Background

The setting for the instant Complaint focuses on a particular portion of property at the Airport, specifically, the east side and there upon, the proposed development of the north GA ramp or apron.[6] The Director has taken an excerpt from the Airport Layout Plan submitted by the Respondent [See, FAA Exhibit 1, Item 15, exhibit Z1] and used color codes to define

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[3] If the Airport Board acts in a manner that is not consistent with the City's grant assurances, then the City, as the Airport sponsor, may risk ceding its rights and powers to a non-sponsoring entity, in violation of Grant Assurance 5, *Preserving Rights and Powers*.

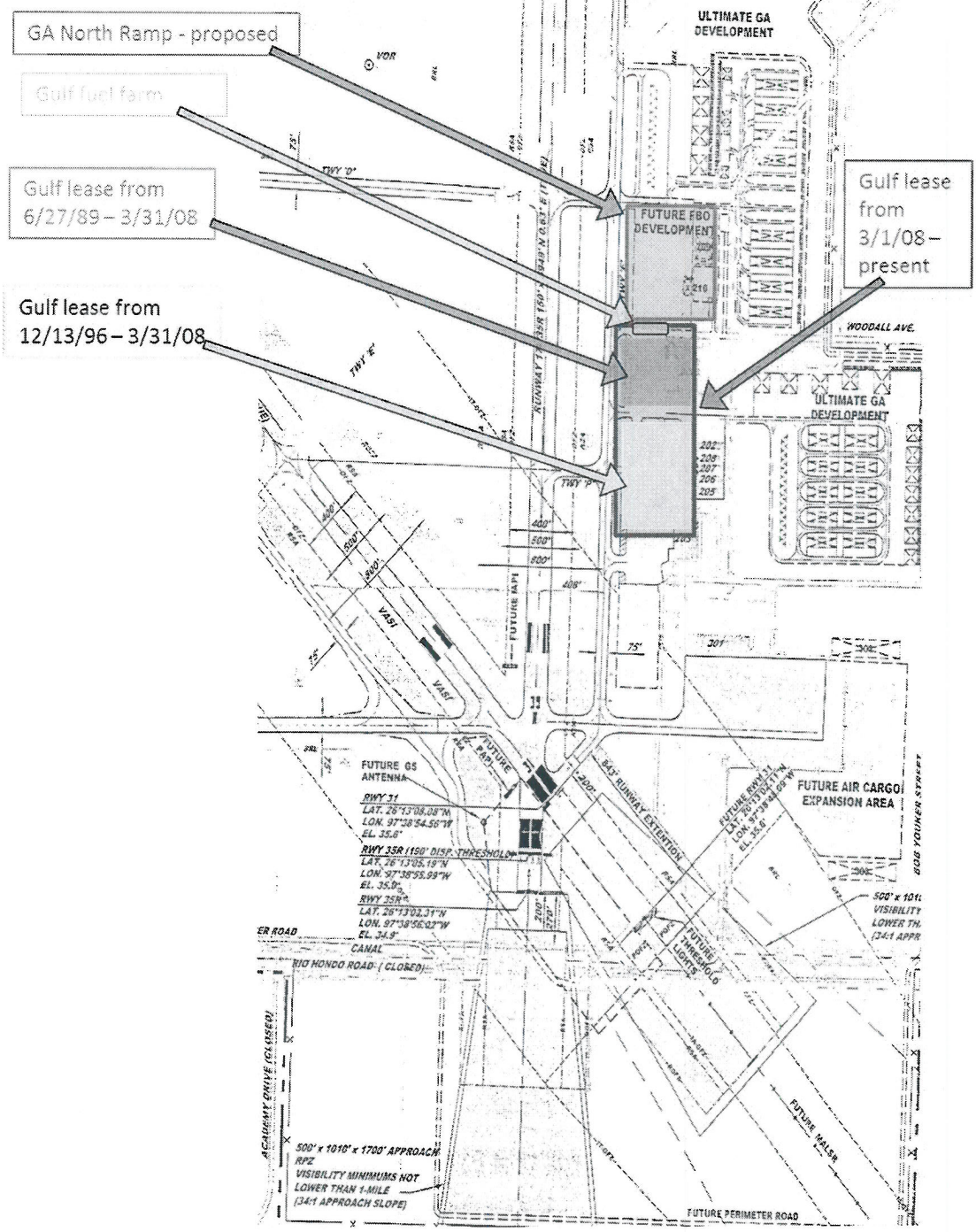
[4] A "small hub airport" means a commercial service airport that has at least 0.05 percent but less than 0.25 percent of the passenger boardings. 49 U.S.C., §47102(25)

[5] Adopted in 1947, P.L. 80-289 amended the 1944 Surplus Property Act of 1944 to authorize the Administrator of the War Assets Administration (WAA), and subsequently, the General Services Administration (GSA), to convey as surplus federally owned real and personal property for airport purposes without monetary consideration to the United States. These conveyances include specific terms, conditions, reservations and restrictions, many of which reflect current and application grant obligations. [*See*, FAA Order 5190.6B, Section 3-3]

[6] Throughout the pleadings, the parties refer to an area on the east side of the airport that became the focus for the Complainant's proposed lease location as either the north GA ramp, the north GA apron, or a similar variation. For consistency purposes, the Director will refer to this area as the north GA ramp. This area is depicted as "GA North Ramp – proposed" on MAP 1.

locations relevant to this Complaint. The Director will reference this map, entitled, "**MAP 1: East Side of the Airport (VIA)**" for illustrative purposes as necessary.

MAP 1: East Side of the Airport (VIA)



1. North and South Hangars: Leases from 1988 – March 2008

It is undisputed that the Respondent built two corporate aviation hangars on the east side of the Airport in 1988. The Respondent leased the north hangar to Gulf Aviation, Inc. (Gulf) and the south hangar to Harlingen Aero Center. The Gulf lease was executed on June 27, 1989 and expired on March 31, 1999. The lease included an option to extend, executable solely by Gulf Aviation. Gulf exercised this option, thereby extending the lease until March 31, 2008. [FAA Exhibit 1, Item 7, page 6 and FAA Exhibit 1, Item 2, Exhibit E1]

Sometime in 1996, Harlingen Aero Center ceased operations. On December 13, 1996, the Respondent entered into a lease with Gulf for the south hangar, the facility formerly occupied by Harlingen Aero Center. The lease expired on March 20, 1999 and included an option to extend, executable solely by the Respondent, until March 31, 2008. The lease also included a provision allowing Gulf to move its operations from the north hangar to the south hangar and apply that lease extension to the south hangar, and thus vacating the north hangar at its option. [FAA Exhibit 1, Item 7, page 6 and FAA Exhibit 1, Item 2, Exhibit E1 and E2]

Respondent stated it issued a request for proposals for the combined property, the north and south hangars, in 1998. [FAA Exhibit 1, Item 7, Page 5] The Respondent:

> *... received proposals from two parties: (1) Southwind Aviation, and (2) Gulf Aviation. VIA's Board chose Gulf Aviation and leased the Property under leases set to expire in March 2008.*
>
> [FAA Exhibit 1, Item 7, page 5]

In March 2007, approximately one year before the leases for the north and south hangars were set to expire, the Respondent inquired with the FAA's Southwest Region (ASW) Airport Compliance Program Manager, Ed Chambers, regarding exclusive rights. Mr. Chambers responded to this inquiry in a letter to Mr. Michael Browning, VIA Director of Aviation in a letter dated March 9, 2007. Mr. Chambers' letter stated in pertinent part:

> *The presence on an airport of only one enterprise engaged in any aeronautical activity is not considered a violation of (FAA) policy if there is no understanding, commitment, express agreement, or apparent intent to exclude other reasonably qualified enterprises.... Re-leasing the hangars to the current tenant without soliciting bid proposals would be viewed as the granting of an exclusive right in violation of federal law. If no other bids are received or if the current tenant submits the best proposal, then there would be no problem with re-leasing the hangars to the current tenant.*
>
> [FAA Exhibit 1, Item 2, Exhibit I1]

The Respondent queried Mr. Chambers a second time regarding the leases. On April 16, 2007, Mr. Chambers responded with a second letter to Mr. Browning. In that letter, Mr. Chambers clearly responded to a specific question posed to him regarding extending a lease term. Mr. Chambers reiterated that as long as no other service provider was being denied the right to serve the airport and as long as other qualified service providers had the

opportunity to become tenants, then there was no exclusive rights violation. [FAA Exhibit 1, Item 2, Exhibit I2]

According to the Airport Board Agendas and Meeting Minutes submitted to the Record, the lease with Gulf Aviation was discussed in executive session during each of the meetings from May 2007 through February 2008. [FAA Exhibit 1, Item 2, Exhibits A1- A7 and B1-2]

The Respondent states that during the June 28, 2007 Airport Board Meeting, the Board "voted unanimously to begin negotiations with Gulf Aviation to amend and extend its leases on the Property." [FAA Exhibit 1, Item 7, Page 6] The Airport Board approved the Chairman appointing a committee to develop and prepare a lease with Gulf. During this meeting, Mr. Browning advised the Airport Board the FAA would not find the proposed lease extensions with Gulf to violate FAA's exclusive use policy. [FAA Exhibit 1, Item 2, Exhibit A2]

During the September 19, 2007 Airport Board Meeting, the Board voted to send the draft lease to Gulf Aviation. [FAA Exhibit 1, Item 7, Page 6 and FAA Exhibit 1, Item 2, Exhibit A5]

In November 2007, Pat Kornegay and Michael Scaief of Sun Valley Aviation approached Mr. Browning regarding establishing an FBO on the airport. [FAA Exhibit 1, Item 2] The Respondent agreed the Complainant approached the Respondent to discuss a lease for a second FBO at that time. [FAA Exhibit 1, Item 7, Page 6]

On December 4, 2007, Mr. Kornegay memorialized this meeting in a letter to Mr. Browning wherein he reiterated the Complainant's interest in establishing an FBO at VIA. [FAA Exhibit 1, Item 2, Exhibit I3] The following week, Mr. Kornegay provided a detailed explanation of his plan to Mr. Browning in a letter dated December 12, 2007. At this time, Mr. Kornegay stated he believed the Airport could support a second FBO and expressed specific interest in the north hangar. [FAA Exhibit 1, Item 2, Exhibit I4] The leases set to expire on March 31, 2008 between the Respondent and Gulf provided that Gulf could consolidate its operations in the south hangar. [FAA Exhibit 1, Item 2, Exhibits E1 and E2]

Mr. Browning responded to the initial letter via email dated December 9, 2007 in which he noted that the Airport Board had been advised of Mr. Kornegay's proposal. [FAA Exhibit 1, Item 2, Exhibit J1] The next week, the Complainant's proposal was discussed during executive session at the Airport Board Meeting on December 17, 2007. [FAA Exhibit 1, Item 2, Exhibit A7]

On January 2, 2008, Mr. Kornegay sent a letter to Mr. Browning reiterating the Complainant's interest in leasing the north hangar to operate a second FBO on the airport. [FAA Exhibit 1, Item 7, Exhibit C6] Mr. Browning responded to Mr. Kornegay's letter on January 22, 2008, stating that the Airport Board:

> *considered (SVA's) proposal, but because of the commitment to negotiate in good faith with Gulf, your (SVA's) proposal was to be held until some conclusion regarding Gulf was reached.* [FAA Exhibit 1, Item 7, Exhibit C7]

In this letter, Mr. Browning advised Mr. Kornegay that Gulf would continue to operate the north and south hangars; however, if Mr. Kornegay was still interested in opening an FBO, Mr. Browning would work with him to "make it a reality." [FAA Exhibit 1, Item 7, Exhibit C7] Mr. Browning's letter clearly relayed the Respondent's interest in allowing the Gulf lease negotiations to supersede the Complainant's proposals. [FAA Exhibit 1, Item 7, Exhibit C7]

During a January 2008 meeting with Mr. Kornegay and Mr. Browning, Manny Vela, former Airport Board Chairman, asked if the Complainant would be interested in leasing facilities the Respondent would build on the east side of the Airport. Mr. Kornegay expressed interest and was asked by Mr. Vela to develop a presentation for the Airport Board including scope, intent, investors' resumes, and a detailed business plan. [FAA Exhibit 1, Item 2, Page 3] The Airport Board finalized the new Gulf lease at its February 18, 2008 meeting. The lease was effective on March 1, 2008. [FAA Exhibit 1, Item 2, Exhibit 2, page 3 and FAA Exhibit 1, Item 2, Exhibit E3]

2. Negotiations for New Space: April 2008 – December 2010

In April 2008, the Complainant again met with the Respondent to establish a second FBO on the Airport. [FAA Exhibit 1, Item 2, page 4 and FAA Exhibit 1, Item 7, page 7] The Complainant filed the appropriate lease application and during the May 19, 2008 Airport Board meeting, the Board:

> *voted unanimously to authorize the director of aviation to begin negotiations with Sun Valley Aviation subject to receiving a written proposal and business plan. It was also requested to have the Airport's attorney make sure an RFP is not required before continuing the negotiations process.* [FAA Exhibit 1, Item 2, Exhibit B5]

At the Respondent's request, the Complainant made a presentation to the Airport Board during its June 30, 2008 Board meeting regarding its business plan. The Board convened into Executive Session but no further action was taken. [FAA Exhibit 1, Item 2, Exhibit B6]

On August 5, 2008, Mr. Browning emailed Mr. Scaief and Mr. Kornegay regarding a Letter of Credit, as well as the site plan and layout of a proposed facility valued at $1.5 million. [FAA Exhibit 1, Item 2, exhibit J3].

On September 19, 2008, Mr. Browning emailed Mr. Michael Scaief stating: "It appears that we need bonds as required by Local Government Code Chapter 252. Let's proceed in that direction." [FAA Exhibit 1, Item 2, Exhibit J4]

During the October 20, 2008 Airport Board meeting, the proposed SVA lease was discussed in executive session, but no action was taken. [FAA Exhibit 1, Item 2, Exhibit B10]

At the November 17, 2008 Airport Board meeting, the proposed SVA lease again was discussed in executive session; a vote followed with the Board voting 3-2 in favor of the lease with a recommendation that "the City of Harlingen City Commission to sell Certificates of Obligation to provide funding in the amount of $1.5 million." [FAA Exhibit 1, Item 2, Exhibit B11] The Complainant's lease was structured to have the Complainant "pay rental to VIA so the City could retire the proposed debt used to finance construction." [FAA Exhibit 1, Item 7, page 8] Under the 40-year lease agreement proposed, the Complainant would pay back the certificates within 20 years, with a profit to the city. [FAA Exhibit 1, Item 2, Exhibit I8] Dr. Bonnie De La Rosa Villareal abstained from the vote while Airport Board Chairman Pro-Tem, Rick Ledesma, and Airport Board Member, Jim Solis, voted against the lease. [FAA Exhibit 1, Item 2, Exhibit B11]

In a December 4, 2008 letter to Mr. Browning, Mr. Kornegay expressed his gratitude regarding the lease and pending financing approval by the City Council. He also expressed two concerns regarding Mr. David Garza, owner of Gulf Aviation, the incumbent FBO. Mr. Kornegay stated Mr. Garza had been given time to make presentations opposing the Complainant's lease before the Airport board. He also stated Mr. Garza has been allowed to interrupt Mr. Kornegay during time allotted for the Complainant's presentations. Mr. Kornegay expressed concern that Mr. Garza has gone to great lengths and expense to convince the City that a second FBO was not needed and thus should not be supported. Mr. Kornegay concluded his letter by stating he witnessed Mr. Jim Solis board an aircraft operated by Gulf Aviation on May 15, 2008. He also requested the Airport Board investigate whether or not Mr. Solis violated the City's ethics code and until such time as that investigation is concluded, have Mr. Solis excused from future votes regarding SVA. [FAA Exhibit 1, Item 2, Exhibit I7]

Two months later, on February 6, 2009, Mr. Kornegay sent a letter to City Commissioner Robert Leftwich. This letter served to recount the meeting the Complainant had with Commissioner Leftwich regarding the Complainant's proposed lease. Mr. Kornegay reiterated to Commissioner Leftwich the profit margins the Respondent would earn under the proposed lease, as well as the $1.7 million investment the Complainant was prepared to make at the Airport. According to the letter, Commissioner Leftwich expressed concerns to which the Complainant responded by accelerating "the construction of its second aircraft storage facility as (he) requested." [FAA Exhibit 1, Item 2, Exhibit I8]

Between November 17, 2008 and March 9, 2009, there was no mention in the City Commission's meeting minutes regarding the proposed lease, which had been supported and recommended by the Airport Board. During the March 9, 2009 City Commission meeting, the Commissioners held a vote on whether to issue Certificates of Obligation to fund the new FBO facilities at VIA. The measure failed. Although the vote was 3-2 in favor of the measure, Harlingen City Code requires any obligation of debts incurred by the City receive a four-fifths super majority favorable vote. [FAA Exhibit 1, Item 7, page 8]

Within two days of the failed vote, on March 12, 2009, the Complainant went back to the Respondent with a proposal that the Complainant obtain a land only lease and take on the expense of building the facility. On March 13, 2009, Mr. Browning emailed Mr. Kornegay advising him of a planned meeting with Browning, Kornegay, then airport Board Chairman Rick Ledesma, and Mr. Gene McCullough, Airport Board Counsel, to restart negotiations with the Complainant based on its latest proposal. [FAA Exhibit 1, Item 2, exhibit J12] On March 27, 2009, Mr. Kornegay provided Mr. Browning with building plans and heights for new hangars and a new fuel farm. [FAA Exhibit 1, Item 2, exhibit J13]

On March 13, 2009, Mr. Pat Kornegay also sent a letter to the FAA's Flight Standards District Office (FSDO) in San Antonio alleging Federal Aviation Regulations (FARs) violations by Gulf Aviation[7]. [FAA Exhibit 1, Item 2, Exhibit I11]

By the end of March 2009, several emails regarding building height and other master planning items for the proposed SVA facility were exchanged with various VIA officials and SVA. [FAA Exhibit 1, Item 2, Exhibits J12-J13]

On April 2, 2009, Mr. Browning emailed the Complainant stating the airport's master plan was being updated and "they have sent us a draft layout of the area east of Valley Hangars." [FAA Exhibit 1, Item 2, Exhibit J14] A few days later, on April 8, 2009, Mr. Ledesma emailed Mr. Kornegay requesting a meeting with him and Mr. Scaief. [FAA Exhibit 1, Item 2, exhibit J15] Less than 24 hours later, Mr. Ledesma sent the following email to Mr. Kornegay:

> *Pat, I asked Mr. Browning to call you to convey the message I hoped to pass on at a face to face meeting. There won't be a need for a meeting at this point. Thank you, Rick Ledesma.* [FAA Exhibit 1, Item 2, Exhibit J15]

During the regularly scheduled Airport Board meeting held on April 20, 2009, the Airport Board voted to go into executive session to "discuss/seek attorney's advice, and possible action regarding proposed lease with Sun Valley Aviation." [FAA Exhibit 1, Item 2, Exhibit C6 at Action 8] The following day, Mr. Browning emailed Mr. Kornegay and Mr. Scaief to advise them "the committee to negotiate the ground lease" had met that day and requested a meeting the following week to discuss the terms. [FAA Exhibit 1, Item 2, Exhibit J17]

On April 27, 2009, Mr. Pat Kornegay sent a letter to Mr. Ledesma, a copy of which also went to Mr. Brendan Hall, Harlingen City Attorney. In the letter, Mr. Kornegay restated his request that the Airport Board launch an investigation into Gulf Aviation's relationship with Airport

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[7] Mr. Kornegay sent a letter to FAA Flight Standards District Office (FSDO) in San Antonio, Texas, in which he registers a complaint regarding Gulf Aviation and its president, David Garza. In this complaint, Kornegay states: "On May 15, 2008 at approximately 10:15 a.m., Mr. Jim Solis, VIA board member, boarded one of Mr. Garza's aircraft, a Cessna 421C, FAA registration N600DC for a round trip flight to Laredo, Texas. Gulf Aviation is not an FAA certified Air Taxi operator and cannot conduct air charter flights or charge a fee for that purpose. If Mr. Solis paid Gulf Aviation for the flight, the company is in clear violation of the Federal Aviation regulations. If he did not, I would suggest that this was a favor of great value that Mr. Garza has done for a member of the airport board." [FAA Exhibit 1, Item 2, Exhibit I11]

Board Member Solis. By copy of his letter to Mr. Hall, he further requested the City commence an investigation as well. In the interim, Mr. Kornegay also requested Mr. Solis excuse himself from future votes regarding SVA pending this possible conflict of interest. [FAA Exhibit 1, Item 2, exhibit I12 and Item 7, exhibit C8]:

The following day, Mr. Browning met with Mr. McCullough, Mr. Hall, and Mr. Ledesma at which time Mr. Hall informed them that since:

> *(Mr. Kornegay's) letter of April 27 lacked the formalities under Section 6.02 of the ordinance it did not initiate action by the City Attorney. Therefore, Mr. Hall sent Mr. Kornegay copies of the Ordinances and the format of an affidavit so that, should Mr. Kornegay chose, a formal complaint could be made.* [FAA Exhibit 1, Item 7, Exhibit C12, pages 8-9]

On April 29, 2009, Mr. Kornegay sent a letter to the FSDO in San Antonio requesting an investigation of Gulf Aviation. [FAA Exhibit 1, Item 2, Exhibit I13] In this letter, Mr. Kornegay reiterated concerns he outlined in a previous letter regarding Gulf Aviation and potential Part 135 violations associated with Mr. Solis.

On May 4, 2009, Mr. Kornegay called Mr. Browning to discuss the status of lease negotiations. Two weeks had elapsed since the Complainant had been advised by Mr. Browning that the Airport Board committee assigned to negotiate the proposed lease with the Complainant would be requesting a meeting. Mr. Browning contacted Mr. Ledesma to ask him if there had been any developments. On May 8, 2009, Mr. Browning advised Mr. Kornegay that "negotiations could not resume until the letter of April 27 was withdrawn in writing. [FAA Exhibit 1, Item 7, Exhibit C12, page 9]

On May 13, 2009, Mr. Kornegay filed an Affidavit with the City Attorney requesting the City commence an ethics investigation pertaining to Mr. Ledesma conditioning negotiations on Mr. Kornegay's withdrawal of his April 27, 2009 letter. [FAA Exhibit 1, Item 2, Exhibit M6 and FAA Exhibit 1, Item 7, Exhibit C10] On May 15, 2009, Mr. Kornegay filed an Affidavit with the City Attorney requesting the City commence an ethics investigation pertaining to his allegations that Mr. Solis improperly accepted a flight from Gulf Aviation. [FAA Exhibit 1, Item 2, Exhibit M5 and FAA Exhibit 1, Item 7, Exhibit C11]

On May 22, 2009, City Attorney Brendan Hall named Mr. Tom Sullivan, a Brownsville attorney, Special Prosecutor to investigate allegations made by Mr. Kornegay "in his formal sworn complaints against Mr. Solis and Mr. Ledesma." [FAA Exhibit 1, Item 7, Exhibit C12, page 5] Harlingen City Police Officer, Detective W. Stan Duncan also was appointed by the Respondent to participate in the investigation. In the Report, the investigators state the scope of the investigation was governed by Harlingen Code, which:

> *clearly demarcates the parameters of the responsibility of the Special Prosecutor and limits the investigation to ethical violations by City Officials.* [FAA Exhibit 1, Item 7, Exhibit C12, page 4]

On June 15, 2009, three weeks after the special prosecution team was appointed, the Airport Board convened an executive session during its monthly meeting to discuss the SVA lease; however, no actions were taken. [FAA Exhibit 1, Item 2, Exhibit C8 at Action 11]

The following month, during July 2009, Mr. Kornegay sent several emails to Mr. McCullough, one of which referenced a telephone conversation pertaining to the proposed lease. [FAA Exhibit 1, Item 2, Exhibits J19-21] Mr. McCullough emailed Mr. Kornegay on August 21, 2009 advising Mr. Kornegay that he had not heard back from the investigator regarding the ethics complaints. Mr. McCullough stated:

> *Until he (the investigator, Mr. Tom Sullivan) concludes his investigation, and indicates that it is concluded, I do not feel it is appropriate that I suggest to the board that it take any action on the lease.* [FAA Exhibit 1, Item 2, Exhibits J22]

On August 25, 2009, the Special Prosecutor's Report was issued. The report found Messrs. Solis and Ledesma had not violated Harlingen's Code of Ethics. [FAA Exhibit 1, Item 7, Exhibit C12]

With the report issued, Mr. Kornegay again presented the SVA proposal during the September 21, 2009 Airport Board meeting. [FAA Exhibit 1, Item 2, Exhibit C12] Another month later, at the October 19, 2009 Airport Board Meeting, a motion was made, which carried unanimously, to table the Complainant's lease proposal. This was the same lease drafted in March 2009, previously put on hold pending the Special Prosecutor's Report. The Airport Board reasoned it now wanted to negotiate a better "buy back" provision. [FAA Exhibit 1, Item 2, Exhibit C13 at Action 14]

Before any further negotiations commenced, the City Commission placed the Special Prosecutor's Report on its agenda for the November 4, 2009 meeting. The relevant agenda item read:

> *City Commission led investigation authorized into the indictments described in the August 25, 2009 Special Prosecutor's report describing an apparent attempt to coerce or influence a public servant in the specific performance of his official duty involving millions of dollars of taxpayers monies.* [FAA Exhibit 1, Item 2, Exhibit K3]

During the meeting, Commissioner Leftwich advised that anyone who has a conflict of interest should recuse themself from this agenda item. Commissioner Leftwich stated he believed that because Mayor Boswell represented a bank in which Mr. Pat Kornegay held shares, there would be a conflict of interest. Although Mayor Boswell objected to the assertion, he did excuse himself and Commissioner Leftwich assumed the role of Mayor Pro Tem for this agenda item. [FAA Exhibit 1, Item 2, Exhibit K3]

Commissioner Leftwich proceeded to discuss the Special Prosecutor's Report. He then requested a vote by the City Commission to initiate an "investigation into the actions that

were described by the special prosecutor in terms of political coercion or at least trying to influence a public servant in the specific performance of his official duty."[8] [FAA Exhibit 1, Item 2, Exhibit K3] Two commissioners questioned who would be the subject of the proposed investigation. When questioned by other City Commissioners who would be investigated, the meeting minutes state: "Commissioner Leftwich replied that he thinks at this time it probably is not appropriate to reveal that." [FAA Exhibit 1, Item 2, exhibit K3] The meeting minutes do not indicate that Commissioner Leftwich or any member of the City Commission or City staff provided a name. Two commissioners then questioned if the Commission had the authority to investigate a nonpublic official for ethics violations. The Interim City Attorney said "the Charter is pretty clear on that and read from the Charter that the Commission may investigate the financial transaction of any office or department of the city government and the acts and conduct of any official or employee." Commissioner Leftwich then proceeded to state he wished to begin an initial investigation into the allegations made by in the Special Prosecutor's Report. The four remaining commissioners split the vote. Commissioner Leftwich cast the deciding vote in favor of the investigation. The meeting concluded with Commissioner Leftwich requesting the special prosecution team, Mr. Sullivan and Det. Duncan, appear before the commission to answer questions in person. [FAA Exhibit 1, Item 2, Exhibit K3]

On November 11, 2009, Mr. Browning inquired with then City Manager Craig Lonon, whether the airport could move forward with the Complainant's proposed lease. Mr. Lonon replied to Mr. Browning via an email, on which he copied all the City Commissioners. In the email, Mr. Lonon advised Mr. Browning that it was his opinion that the Airport Board should not "delay action to consider an additional fixed based operator at the airport" because of the Special Prosecutor's Report. Mr. Lonon also stated that subsequent discussion of the Report at the previous City Commission meetings indicated any forthcoming investigation would be aimed at a city official, per the City's Charter. [FAA Exhibit 1, Item 2, Exhibit J24] According to Lonon's email, this would exclude Mr. Kornegay from the realm of possible targets for the investigation. [FAA Exhibit 1, Item 2, Exhibit J24]

During the November 18, 2009 City Commission Meeting, Special Prosecutor Sullivan and Detective Duncan appeared before the Commission to answer questions regarding their report. Once again, Mayor Boswell excused himself from the discussion and Commissioner Leftwich served as Mayor Pro Tem. There were no motions or actions taken at that time. [FAA Exhibit 1, Item 2, Exhibit K4]

The next day, Mr. Pat Kornegay and Mr. Browning exchanged emails wherein Mr. Browning stated they are "in agreement on the lease terms" but:

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[8] Commissioner Leftwich's statements and allegations during the November 4, 2009 City Commissioner Meeting were based upon a sentence that appeared on page 23 of the 24 page Special Prosecutor's Report, which read: "The timing of the allegation of unethical conduct (by Mr. Kornegay against Messrs. Solis and Ledesma) strikes this investigation as retaliatory and an effort to coerce or at least influence a public servant in the specific performance of his official duty." [Exhibit 1, Item 7, Exhibit C12, page 23] The Director notes that the Report did not make formal findings or allegations against Mr. Kornegay, nor did it contain documentation supporting the investigators' opinions. Moreover, the Director notes Mr. Kornegay filed a complaint available to all citizens of Harlingen and did so pursuant to statute as he had been previously advised by City Attorney Brendan Hall. [FAA Exhibit 1, Item 7, Exhibit C12, pages 8-9]

> *[D]ue to the City Commission voting to initiate an investigation into the ethics charges, a request by a City Commissioner has been made to postpone action until the investigation has been completed.* [FAA Exhibit 1, Item 2, Exhibit J23]

At the December 2, 2009 City Commission Meeting, Commissioners Leftwich and Prepejchal placed on the agenda an item to take action "to terminate employment services of city manager Craig Lonon." After public comments and commissioner discussion, the email sent by Mr. Lonon on November 11, 2009 was stated to be the cause for discussing Mr. Lonon's dismissal. The email in question was read aloud. The Commissioners voted to dismiss Mr. Lonon by a 3-2 vote with Commissioners Leftwich, Prepejchal, and Trevino in favor. [FAA Exhibit 1, Item 2, Exhibit K5]

At this point, the City had not taken any action regarding the Special Prosecutor's Report, nor had the Airport Board engaged in further discussions with the Complainant regarding the proposed lease. During the December 21, 2009, Airport Board meeting, the Board voted to authorize Mr. Browning to execute a professional services contract with Brown, Leal, and Associates in the amount of $150,000 for the engineering design for the expansion of the north GA ramp.[9] [FAA Exhibit 1, Item 2, Exhibit C16]

On January 28, 2010, the Airport Board convened a special meeting with a single agenda item: to discuss SVA. At this meeting, Mr. McCullough advised against any action due to a pending legal investigation. [FAA Exhibit 1, Item 2, Exhibit D2]

At the next regular Airport Board Meeting held on February 15, 2010, the Board considered Mr. McCullough's legal advice to exclude the north GA ramp project from the budget while the SVA issue was still outstanding. Although previously authorized by the board on December 21, 2009, the Board voted again on this matter. The second vote also was in favor of executing the project as initially requested. [FAA Exhibit 1, Item 2, Exhibit D3]

During this same meeting, Mr. Garza, owner of Gulf Aviation, distributed a paper Gulf commissioned, which was authored by Aviation Management Consulting Group (AMCG) entitled "White Paper – FBO Competition.[10]" [FAA Exhibit 1, Item 2, Exhibit D3 and Exhibit H] There was no action or discussion by the Board regarding this item.

On March 23, 2010, Mr. Sullivan was appointed Attorney Pro Tem by the Cameron County, Texas, administrative presiding judge "for the matter involving Pat Kornegay." [FAA Exhibit 1, Item 7, Exhibit C13] The Record does not include any citation to City

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[9] See MAP 1 on page 4

[10] Aviation Management Consulting Group (AMCG) published a document on May 29, 2008 entitled "White Paper - FBO Competition." The Director notes this is an opinion document commissioned by Gulf Aviation. Summarily, the paper asserts "competition is not normal" among FBOs and thus "does not mean that an airport sponsor must lease land and/or improvements to entities desirous of engaging in activities when such activities are expected to have a detrimental impact on the overall range, level, and quality of products, services, and facilities (and/or the manner provided) at the airport – even if the entity is willing to meet the airport's minimum standards." [FAA Exhibit 1, Item 2, exhibit H] The Director notes this position is not consistent with guidance contained in FAA Order 5190.6B.

Commission meeting minutes wherein the investigation of Mr. Kornegay or Sun Valley was authorized.

Upon learning of the investigation now targeting him, Mr. Kornegay submitted his resignation as President of Sun Valley Aviation to its Board of Directors, on April 7, 2010. [FAA Exhibit 1, Item 2, Exhibit I20] That same day, Mr. Scaief sent a letter to Mr. Browning advising him Pat Kornegay resigned as president and the SVA Board appointed Mr. Clyde Kornegay to serve in that role. Mr. Scaief continued:

> *With the pending investigation no longer involving an officer of the organization, please proceed with a board agenda item to approve Sun Valley Aviations (sic) request to operate a fixed base operation at Valley International Airport. In addition, we request approval of the lease previously negotiated to operate out of the approved North GA Apron (ramp) expansion.* [FAA Exhibit 1, Item 2, Exhibit I21]

On April 14, 2010, Mr. Scaief sent a letter to Mr. Bill Gunn of the Texas Department of Transportation's Aviation Division (TxDOT) outlining his initial complaint against the Respondent. [FAA Exhibit 1, Item 2, Exhibit I22] Although Texas is a block grant state[11] and as such is responsible for acting on behalf of the FAA for the federally obligated airports in that state, all Part 139 certificated airports are managed by the FAA's Southwest Airport Division, Texas Airport Development Office (TX ADO). Mr. Gunn forwarded the complaint to FAA's Southwest Airports Division (ASW) on April 19, 2010, to the attention of Mr. Rodney Clark. Mr. Gunn advised Mr. Clark that he visited with Mr. Pat Kornegay recently regarding this matter. [FAA Exhibit 1, Item 2, Exhibit I23]

The same day as Mr. Gunn advised the FAA ASW office of the informal complaint, the Airport Board held a regular meeting. The Complainant's proposed lease was on the agenda to discuss in executive session; however, no action was taken at the advice of Mr. McCullough due to "a pending investigation." [FAA Exhibit 1, Item 2, Exhibit D5]

In May 2010, Mr. Randall Crane, a board member and attorney representing Mr. Pat Kornegay, inquired with Mr. McCullough on at least two occasions regarding the legal reasoning supporting McCullough's advice to delay any negotiations with the Complainant while the investigation of Mr. Pat Kornegay was underway. Mr. Crane noted that Mr. Kornegay had resigned as President of SVA the previous month. He also noted nothing was done to suspend activities related to a Board member and the incumbent FBO when they were under investigation. Finally, Mr. Crane asserted he contacted the Attorney Pro Tem appointed to the investigation of Mr. Pat Kornegay, but was told he had "no idea when his investigation would be completed.[12]" [FAA Exhibit 1, Item 2, Exhibit I24] In all

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[11] The State of Texas participates in the FAA's State Block Grant Program. In accordance with Title 49 U.S.C., §47128 and 14 CFR, Part 156, a state participating in this program "shall use monies distributed pursuant to a State block grant agreement for airport development and airport planning, for airport noise compatibility planning, or to carry out airport noise compatibility programs, in accordance with the Airport and Airway Improvement Act of 1982, as amended." (14 CFR §156.4(a))

[12] In the FAA's Request for Additional Information, the Director requested the Respondent provide the first and final billing statements from Mr. Sullivan to Cameron County pertaining to the investigation of Mr. Pat

correspondence, Mr. Crane asked Mr. McCullough to explain why the further delay. [FAA Exhibit 1, Item 2, Exhibits I23-26]

During the June 14, 2010 Airport Board meeting, the Airport Board approved funding for the east and south GA ramp expansion projects. [FAA Exhibit 1, Item 2, Exhibit D7] These projects abut property leased by Gulf Aviation. [FAA Exhibit 1, Item 15, Exhibit V] Due to the locations of these ramps, they could not host additional FBO facilities, as they are either adjacent to the building restriction line or located directly behind the incumbent FBO's leasehold. [FAA Exhibit 1, Item 15, Exhibit Z1]

Mr. Pat Kornegay contacted FAA's ASW Airports Office on June 29, 2010 and July 13, 2010, regarding the status of the informal complaint. He first left a message; then on July 12, 2010, he spoke to Mr. Mike Nicely, manager of the FAA's Texas Airports Development Office (ADO). During this call, Nr, Nicely advised Mr. Kornegay the complaint was moving forward and further advised the FAA does not consider "a pending investigation" cause for barring aeronautical activity at a federally funded airport. [FAA Exhibit 1, Item 2, page 18]

On July 13, 2010, Mr. Nicely sent a letter to the Respondent providing the allegations submitted by the Complainant and requested a response within 30 days. [FAA Exhibit 1, Item 2, Exhibit I27 and FAA Exhibit 1, Item 7, Exhibit B]

Also on July 13, 2010, Mr. David Moran, outside counsel for the Respondent, sent a letter to Mr. Crane responding to Crane's June 16, 2010 letter, in which he alleged the airport had violated Grant Assurances 22, 23, and 24. In the response, Mr. Moran denied any violations, as well as asserted Mr. Crane's client (SVA): "has no claim or legal right to complain about alleged grant agreement violations – only the FAA may do so – and therefore your client lacks standing to advance any such assertion." [FAA Exhibit 1, Item 7, Exhibit C14] Mr. Moran then requested additional information regarding Mr. Pat Kornegay's association with SVA. [FAA Exhibit 1, Item 7, Exhibit C14]

Mr. Crane replied to Mr. Moran's letter on August 2, 2010. In his reply, Mr. Crane included copies of all the records requested by Mr. Moran pertaining to Mr. Pat Kornegay's relationship and status with SVA. Mr. Crane also posited that the FAA would not appear to condone such prolonged delays because a member of a corporation proposing to institute an aeronautical business on a federally funded airport is under investigation. [FAA Exhibit 1, Item 7, Exhibit C15]

At a Joint City Commission and Airport Board Special Meeting held on August 18, 2010, an agenda item stated there would be a closed executive session to discuss "contemplated pending litigation" pertaining to a complaint filed by Sun Valley Aviation. [FAA Exhibit 1, Item 2, Exhibit D11]

Kornegay. [FAA Exhibit 1, Item 13] Based on Mr. Sullivan's initial billing summary, dated April 13, 2010, provided by the Respondent in its supplemental pleadings, Mr. Sullivan had completed a draft interim report and also had conducted a "personal conference with City Commissioner Robert Leftwich regarding memo from City Attorney's office and potential extraneous offenses" sometime before April 13, 2010. [FAA Exhibit 1, Item 18, Exhibit B]

On August 20, 2010, the Respondent, through its outside counsel, filed its Answer to the informal complaint with Mr. Nicely, Manager of the FAA's ASW Texas Airport Development Office. In the Answer, the Respondent denied all allegations and requested FAA direction on the matter pertaining to the investigation of Mr. Kornegay. [FAA Exhibit 1, Item 7, Exhibit C]

Also on August 20, 2010, Mr. Crane sent a letter to Mr. Moran in which he stated the Complainant was filing a formal complaint. A copy of the draft complaint was included with the letter. [FAA Exhibit 1, Item 2, Exhibit F5]

3. Supplemental Pleadings through Lease Execution: December 16, 2010 – January 2012

The initial round of pleadings submitted, as prescribed by 14 CFR, Part 16, concluded on December 16, 2010. On April 15, 2011, the Director of the FAA Office of Airports, Airport Compliance and Management Analysis Division, issued a Request for Additional Information and Notice of Extension of Time. [FAA Exhibit 1, Item 13]

In the Request for Additional Information, the FAA asked the Complainant to provide further explanations and supporting documentation, where applicable, regarding lease negotiations with the Respondent beginning in November 2007. Specifically, the FAA asked if the north GA ramp was the only lease location offered. The Complainant stated: "No location other than the North Ramp was offered by Valley International Airport (VIA) or refused by Sun Valley Aviation (SVA)." [FAA Exhibit 1, Item 14]

The FAA also asked if there had been any further negotiations since December 16, 2010, when Respondent stated in its Rebuttal, submitted that day: "Mr. Browning has delivered to Sun Valley a proposed lease that VIA is willing and eager to sign and respectfully requested that Sun Valley sign the lease." [FAA Exhibit 1, Item 11, page 4] The Complainant stated: "There have been no negotiations or offers of sponsor by the sponsor since December 2010." [FAA Exhibit 1, Item 14] Included as an exhibit to this submission, the Complainant provided a letter dated December 15, 2010, sent from Mr. Clyde Kornegay to Mr. Browning, questioning the status of lease negotiations. [FAA Exhibit 1, Item 14, SuppB2]

In FAA's Request for Addition Information, the FAA asked the Respondent to revisit its assertions regarding lease negotiations for the existing north and south hangars before the new lease with Gulf was executed on March 1, 2008. Specifically, the FAA asked if the Respondent had received any interest in the leasehold prior to March 2008 and if it had issued a request for proposal (RFP).[13] The Respondent asserted its belief that because it had

[13] The Director notes that Grant Assurance 22 only requires airport sponsors not unreasonably deny access or impose unjustly discriminatory terms and conditions. A sponsor's Federal obligations do not require or prohibit airport sponsors from issuing RFPs. [*See*, Pacific Coast Flyers, Inc., Donnya Daubney d/b/a Carlsbad Aircraft Pilot Supply, & Roger Baker v. County of San Diego, Cal., FAA Docket No. 16-04-08 (July 25, 2005) (Director's Determination), page 28] Past precedent and FAA guidance support the premise that the FAA does not normally intervene in an airport sponsor's business decision where grant assurance violations are not at

commenced negotiations with Gulf and because it had sought advice from Mr. Chambers[14], the Respondent acted accordingly and compliantly. [FAA Exhibit 1, Item 15, pages 1-3]

The FAA also asked the Respondent to provide documentation demonstrating the steps the Respondent had taken to offer the Complainant space on the airport since November 2007. As it had in its initial pleadings, the Respondent continued to cite the investigations requested by and regarding Mr. Pat Kornegay as reasons for delays. [FAA Exhibit 1, Item 15, pages 4-8] The Respondent also stated the lease offered in December 2010 would include the same location discussed since January 2008, the north GA ramp, and would be a 40-year ground lease. [FAA Exhibit 1, Item 15, page 8]

In addition to questions regarding lease space and locations, the FAA also requested information regarding the special prosecutor. Specifically, the FAA asked for copies of agreements, bills, and payments made pertaining to the special prosecutor's investigation of Mr. Pat Kornegay. The Respondent provided the documentation showing Mr. Sullivan was appointed to investigate Mr. Kornegay on March 23, 2010. [FAA Exhibit 1, Item 15, Exhibit U] The Respondent provided two billing statements submitted by Mr. Sullivan in connection with the Kornegay investigation. The first statement, dated April 13, 2010, included 13.6 total billable hours. The following graphic [See GRAPHIC 1] shows the activities conducted between the time Mr. Sullivan was appointed to investigate Mr. Kornegay on March 23, 2010 and the billing date, April 13. 2010. [FAA Exhibit 1, Item 18, Exhibit B]

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issue. [*See*, Jet 1 Center Inc. v. Naples Airport Authority, FAA Docket No. 16-04-03 (January 4, 2005) (Director's Determination) p. 25]

[14] Mr. Chambers' last correspondence with the Respondent was a letter dated April 16, 2007 in which he stated in part: "There is no objection to the proposed lease amendment as long as there are no proposed FBOs being denied the right to serve as an FBO on the airport." [FAA Exhibit 1, Item 7, Exhibit C1]

GRAPHIC 1: FAA Exhibit 1, Item 18, Exhibit B

LAW OFFICE OF THOMAS SULLIVAN

[redacted]

Certified Mediator
Civil and Family Law
Certified TEA Hearing Examiner

Tel: [redacted]
Fax:
e-ma

Cameron County District Attorney Office
[redacted]
Brownsville, Texas 78520

Invoice No. 201001
File No. 201021

Fed. Tax ID [redacted]

April 13, 2010

RE: Attorney Pro Temp- Pat Kornegay

For legal services rendered in connection with the investigation and prosecution of Pat Kornegay including but not limited to:

Telephone conference with Stephanie Rollins regarding possible appointment as Attorney Pro Temp (A.P.T.)	No Charge
Received and Review Order from Judge Euresti	0.1 hrs.
Review file in preparation for meeting with ADA Rollins	0.4 hrs.
Personal Conference with ADA Rollins	0.5 hrs
Legal research on authority of A.P.T. including presentation of a case to Grand Jury; Draft and Prepare Memorandum of Law on authority; review all annotations in §36.03 & §36.06 Texas Penal Code	3.2 hrs
Telephone conference with Jim Solis to arrange meeting	0.1 hrs
Personal conference with Jim Solis at his office	2.0 hrs
Draft and Prepare interim report for ADA Rollins; advised by ADA Rollins she did not require interim report	1.8 hrs
Received and Review Memo from City of Attorney's office regarding possible extraneous offenses	0.2 hrs
Personal Conference with Harlingen City Attorney Roxanne P. Controneo	2.0 hrs
Personal Conference with City Commissioner Robert Leftwich regarding memo from City Attorney's office and potential extraneous offenses	1.8 hrs
TOTAL HOURS	**13.6 HRS**

ATTORNEY FEES (13.6 X $250.00)	$3,400.00
EXPENSES	$ 0.00
TOTAL DUE THIS STATEMENT	**$3,400.00**

The second billing statement provided by the Respondent from Mr. Sullivan is dated January 12, 2011 and included 3.9 billable hours. The following graphic [See GRAPHIC 2] shows the activities conducted between the time Mr. Sullivan was appointed to investigate Mr. Kornegay on March 23, 2010 and the billing date, January 12, 2011. [FAA Exhibit 1, Item 18, Exhibit C]

GRAPHIC 2: FAA Exhibit 1, Item 18, Exhibit C

LAW OFFICE OF THOMAS SULLIVAN ID# 16

[redacted]

Certified Mediator
Civil and Family Law
Certified TEA Hearing Examiner

Tel: [redacted]
Fax:
e-ma

Cameron County Auditor
[redacted]
Brownsville, Texas 78520

Invoice No. 201006
File No. 201021

Fed. Tax ID [redacted]

January 12, 2011

RE: Attorney Pro Temp- Pat Kornegay

Previous balance	$3,200.00
Payment received- Thank you	$3,200.00
Attorney fees this statement	$ 975.00
Expenses	$ 0.00
Total Due this Statement	**$ 975.00**

For legal services rendered in connection with the investigation and prosecution of Pat Kornegay and Sun Valley Aviation, Inc. including but not limited to:

Received and Review Court orders dismissing case	0.3 hrs.
Conduct legal research on possible appeal	2.0 hrs.
Conduct legal research on issue of statute of limitations	0.5 hrs.
Telephone conference with Ms. Cotroneo regarding Dismissal of charges	0.6 hrs.
Telephone Conference with Jim Solis re-dismissal	0.2 hrs.
Draft and Prepare Letter of resignation as Attorney Pro Tem	0.3 hrs.
Total Hours	**3.9 hrs.**

Attorney fees (3.9 X $250)	$975.00
Expenses	$ 0.00
TOTAL DUE THIS STATEMENT	**$975.00**

Lastly, the FAA requested the Respondent submit documentation illustrating the airport's layout plan, Federal investment, and existing leases, limited to the east side of the airport, which the Respondent has chosen to use for its general aviation area. The documentation provided by the Respondent demonstrates the north GA ramp had been slated for development to host another FBO since at least 2007. [FAA Exhibit 1, Item 15, Exhibit W] The documentation also notes the airport does not have any other space suitable for an FBO without additional infrastructure development due to the location of the existing Gulf leasehold, as well as the Gulf fuel farm. [FAA Exhibit 1, Item 15, Exhibit V] The Respondent acknowledges it has requested and received Federal funds to develop the infrastructure adjacent to Gulf's leasehold including additions to the south and east apron since 2008. [FAA Exhibit 1, Item 15, Exhibit X] Respondent also acknowledges it has not requested Federal funds to develop the north GA ramp. Specifically, the Respondent noted that the airport budget item that would have allowed the proposed expansion of the north GA ramp had not been approved by the City Commission. Although the Respondent had applied for and accepted engineering and design grants for the north GA ramp project, the Respondent had not submitted a grant application to the FAA to construct the designed project. [FAA Exhibit 1, Item 15, pages 11-12]

In addition to providing its Answer on May 24, 2011, the Respondent also provided a Reply to Complainant's Responses to FAA's Request for Additional Information. In this pleading, the Respondent recited its position regarding the leasehold location and again recounted it had offered the Complainant a lease that the Respondent "is willing and eager to sign and respectfully requested that Sun Valley sign the lease." [FAA Exhibit 1, Item 16, page 5] The Respondent also addressed the Complainant's characterizations of new proposed minimum standards establishing excessively prohibitive standards and the Respondent's failure to engage in discussions regarding them. Although the Respondent disputed portions of the Complainant's statements, it did not address the assertion that incumbent FBO would be exempted from complying with the new proposed minimum standards.[15] [FAA Exhibit 1, Item 15 Item 16, page 9]

The Complainant submitted its Reply to Respondent's Answers to FAA's Request for Additional Information on June 1, 2011. [FAA Exhibit 1, Item 17] In this pleading, the Complainant provided documentation supporting its contention that the lease offered by the Respondent was contingent on the Respondent applying for a grant and receiving FAA funding to construct the north GA ramp. The Complainant asserted that the lease offered by the Respondent did not identify a specific location. The Complainant averred the lease did not offer a location because, without the funding, the location would be not accessible and thus not suitable. Specifically the Complainant alleged:

> *The lease ultimately presented to SVA by the airport had all provisions for ramp space, road access, infrastructure, and parking removed. No street access, access to aircraft parking ramps, or access to the airport runway system would be provided, nor are any of the aforementioned items under*

[15] The Director notes the Respondent stated these new proposed minimum standards were not implemented. [FAA Exhibit 1, Item 16]

future consideration by VIA. In a December 22, 2010 meeting between Michael Browning, Gene McCullough, Clyde Kornegay and Michael Scaief; Mr. Browning and Mr. McCullough affirmed that the airport was willing to negotiate but had nothing to negotiate about, as all properties at VIA were currently under contract, there were no plans to develop the north ramp project, and that there was nothing left to do except wait for an FAA determination. Mr. Browning, in a previous meeting had stated that VIA could not execute a lease involving property for which the city commission had not approved development, thus making the lease presented to SVA nonexecutable, as there was no longer any discussion aimed at developing the north ramp area. SVA alleges that this non-executable "lease" was presented by VIA solely for the purpose of creating the appearance that the airport was attempting to demonstrate compliance with AIP Grant Assurances. There has been no further contact from VIA. [FAA Exhibit 1, Item 17, page 8]

The Complainant also included with its submission an email from Mr. Browning to Mr. Clyde Kornegay regarding the lease status. The email sent on December 15, 2010, states in its entirety:

> *Clyde; We have decided that the best course of action regarding the lease is to wait until we know what the city commission decides tonight. We will forward you a copy of the draft lease tomorrow as we should have clear guidance from the commission. [FAA Exhibit 1, Item 17, Exhibit C]*

Reviewing the submissions to date, the Director concluded the parties did not agree on pertinent facts regarding whether the lease was executable. Additionally, the Director required more details and supporting documentation to address questions of fact still unanswered in the supplemental pleadings. In an effort to obtain the most current and accurate information, on January 18, 2012, the Director took the unusual step of issuing a Notice of Investigative Action summoning the parties to meet on February 16, 2012. [FAA Exhibit 1, Item 20.]

4. FAA Investigative Action Meeting: February 16, 2012 – August 2012

On February 16, 2012, per the Notice of Investigative Action, FAA officials met with the Complainant and Respondent at the FAA's Southwest Regional Airports office in Ft. Worth, Texas. A document outlining the discussions, identified as Meeting Notes, has been added to the Record as FAA Exhibit 1, Item 22, Exhibit A. The document was predicated on a timeline structure created by the FAA investigating officer for this case based on submissions to date. The timeline was not objected to by either party. The meeting provided additional information to support the actions taken by both parties between November 2007 and February 16, 2012.

First, the FAA asked the Complainant to verify its statements regarding the January 2008 meeting at which time former Airport Board Chairman Vela suggested the Respondent would build new FBO facilities to accommodate SVA's request for access to the airport.

Complainant confirmed the offer had been made, and it submitted the requested documentation to the Respondent in a timely and complete manner. The FAA queried the Respondent regarding this exchange. The FAA asked the Respondent if it previously had funded such an investment on the airport. The Respondent affirmed it had and cited the north and south hangars presently occupied by the incumbent FBO, Gulf Aviation, as examples. The Respondent added that it secured bonds to do so and had intended to do precisely that again in offering to construct additional facilities in response to the Complainant's interest to operate on the airport. [FAA Exhibit 1, Item 22, Exhibit A]

The FAA confirmed with both parties that the Complainant met with the Respondent first in November 2007, then again in January 2008; however, the parties did not begin formal negotiations until April 2008. The Airport Board approved commencing negotiations in May 2008, and the Complainant complied with all requests for business plans and presentation materials by the end of June 2008. [FAA Exhibit 1, Item 22, Exhibit A]

The FAA confirmed that the Airport Board did not vote on the measure to support the Complainant's proposed project and recommend the City finance the project with Certificates of Obligations until November 2008. Thereafter, the City did not place this item on its City Commission agenda until the March 9, 2009 meeting. The measure required a supermajority, or four-fifths vote in favor, to pass in accordance with the city charter. The proposal received a 3-2 vote in favor; however, because it did not receive the four-fifths majority, it failed. [FAA Exhibit 1, Item 11, pages 17 and 18 and FAA Exhibit 1, Item 22, Exhibit A]

The Complainant and Respondent both agreed the Complainant proposed providing its own financing within days of the failed vote. [FAA Exhibit 1, Item 2, Exhibits I9-I11] The next month, the Airport Board appointed another committee to negotiate with the Complainant. [FAA Exhibit 1, Item 2, Exhibit C7] The FAA then asked the parties to explain why negotiations derailed in April 2009. The parties generally agreed that the Respondent ceased negotiations when Mr. Pat Kornegay sent a letter to the Airport Board expressing concern that Mr. Jim Solis, an Airport Board Member, may have had an inappropriate business relationship with the existing FBO and his involvement in the Complainant's lease negotiations might have been hindering the process. [FAA Exhibit 1, Item 22, Exhibit A and FAA Exhibit 1, Item 7, Exhibit C12]

At the meeting, the Respondent verified it did halt negotiations based on Mr. Pat Kornegay's letter. [FAA Exhibit 1, Item 22, Exhibit A and FAA Exhibit 1, Item 7, Exhibit C12] The FAA asked the Respondent if the Respondent queried the FAA regarding its concerns and decision to stop negotiations based on the letter. The Respondent's outside counsel, David Moran, replied the Respondent did not. [FAA Exhibit 1, Item 22, Exhibit A]

The FAA then asked about the issuance of the Special Prosecutor's Report on August 25, 2009. When asked why Tom Sullivan of Brownsville presided over the investigation that focused on allegations against Messrs. Solis and Ledesma, the Respondent stated that Mr. Sullivan was hired because the Harlingen City attorney's office declined to take the case. [FAA Exhibit 1, Item 22, Exhibit A]

The FAA reviewed the time period from August 25, 2009 through March 23, 2010. Both parties agreed that the City Commission meetings minutes submitted to the Record from August through November 2009 show the City Commission discussed the Report during several meetings. [FAA Exhibit 1, Item 2, Exhibit K] Although Commissioner Leftwich requested an investigation during the November 4, 2009 meeting, the subject and scope of the investigation was never revealed before the vote, which carried on a motion made by Commissioner Prepejchal. [FAA Exhibit 1, Item 2, Exhibit K3] At the next meeting on November 18, 2009, the minutes reflect there was discussion among the Commissioners regarding the November 4, 2009 minutes, specifically pertaining to the subject of the motion made by Commissioner Prepejchal to initiate an investigation. The minutes state: "Commissioner Marra then asked if the Commission was investigating Eddie Medrano. Commissioner Prepejchal replied yes." [FAA Exhibit 1, Item 2, Exhibit K4, page 2]

The Record lacked supporting documentation explaining what occurred between the November 18, 2009 meeting, during which it was confirmed that Mr. Medrano would be the subject of the investigation, and the March 23, 2010 Order assigning Mr. Sullivan "for the matter involving Pat Kornegay." [[FAA Exhibit 1, Item 2, Exhibit K4, page 2 and FAA Exhibit 1, Item 7, Exhibit C 13] During the Investigative Action Meeting, the FAA confirmed that the subject of the City Commission's motion became Mr. Kornegay sometime between November 2009 and March 2010. The Respondent acknowledged there is no documentation in the Record demonstrating when or how the City Commission changed the subject of the investigation.

The FAA then turned to the matter of the investigation of Mr. Pat Kornegay. Both parties agreed Mr. Pat Kornegay resigned as president of SVA in April 2010 so that the Complainant could attempt to restart negotiations. On September 15, 2010, Mr. Sullivan appeared before a Cameron County Grand Jury to present his case. The Grand Jury returned four indictments, two against Mr. Pat Kornegay[16] and two against Sun Valley Aviation[17]. [FAA Exhibit 1, Item 7. Exhibit I] Among other objections to the indictment, the Complainant alleged SVA had never been named a party to the investigation. The FAA confirmed with the Respondent that it had requested documentation that Mr. Pat Kornegay was no longer the president of SVA in July 2010. The Respondent did not expound upon its reasoning for including SVA in the indictment when its focus had been on Mr. Kornegay between March 23, 2010 and July 2010. [FAA Exhibit 1, Item 22, Exhibit A]

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[16] The Respondent did not submit to the Record the indictments returned by the Grand Jury against Mr. Pat Kornegay; however, the October 18, 2010 Order Quashing and Dismissing Indictments identifies the indictments generally as obstruction and retaliation. [FAA Exhibit 1, Item 7, Exhibit J, page 2] The Director surmises the indictments were similar, if not precisely the same, as those returned for Sun Valley Aviation. [*See*, FAA Exhibit 1, Item 7, Exhibit I] where?

[17] The indictments returned by the Grand Jury included the following charges against Sun Valley Aviation, citing Mr. Pat Kornegay's April 27, 2009 letter as the cause of action : 1) "intentionally and knowingly threatened to harm another, to-wit Jose "Jim" Santiago Solis, by an unlawful act, to-wit, by making a public accusation of unethical conduct, to prevent or delay the service of Jose "Jim" Santiago Solis as a public servant…"; and 2)) "intentionally and knowingly threatened to harm another, to-wit Jose "Jim" Santiago Solis, by an unlawful act, to-wit, by making a public accusation of unethical conduct, in retaliation for or on account of the service of Jose "Jim" Santiago Solis as a public servant…" [FAA Exhibit 1, Item 7, Exhibit I]

By July 2010, the FAA's Southwest Region had received the Complainant's informal Complaint and had contacted the Respondent regarding the allegations. The Respondent stated it sought guidance from the FAA regarding how it should handle the matter in its Answer to the informal Complaint in August 2010. [FAA Exhibit 1, Item 8, Exhibit G] Mr. Browning conveyed the guidance provided by the FAA in an email to Mr. McCullough dated August 17, 2010. The email reads in its entirety:

> *Gene – David Moran spoke with Mike Nicely at the Fort Worth FAA office. David asked Mike if it makes any difference to the FAA if Mr. Kornegay ends up being indicted. The answer was not really as it wouldn't change his qualifications or financial capability to own and operate a FBO.* [FAA Exhibit 1, Item 8, Exhibit V2]

Mr. Nicely of the FAA had provided similar guidance in his November 4, 2010 letter to the Respondent regarding the informal complaint. In that letter, Mr. Nicely stated it was "imperative" the Respondent engage in good faith negotiations to offer the Complainant a lease. [FAA Exhibit 1, Item 22, Exhibit A and FAA Exhibit 1, Item 7, Exhibit E] Before the letter was issued, the indictments had been dismissed and ultimately quashed by Order of a Cameron County Judge on October 22, 2010. [FAA Exhibit 1, Item 7, Exhibit J]

The next part of the formal discussions during the Investigative Action Meeting focused on the alleged lease offered to the Complainant by the Respondent on December 16, 2010. The statements presented by both parties in their respective pleadings were incongruent. The FAA reviewed statements in the Respondent's Rebuttal in which the Respondent asserted it had offered the Complainant a lease. This pleading was submitted on December 16, 2010, the same day the Respondent stated it offered the Complainant the lease. [FAA Exhibit 1, Item 11, Exhibit B and C] The FAA asked the Respondent if the lease offered was contingent on FAA funding the north GA ramp as the Complainant had alleged in its supplemental pleadings. [FAA Exhibit 1, Item 15 The Respondent initially denied this to be the case; however, the Respondent agreed the location discussed as the site for the Complainant's proposed FBO since January 2008 had not been developed and funds designated in the airport budget for this development had been removed by the City Council during the December 15, 2010 meeting. This is confirmed by the meeting minutes submitted to the Record as part of the Investigative Action Meeting, which state:

> *Commissioner Prepejchal made a motion to accept the amendment to the Airport budget with exclusions of the apron, which is the $75,000 that we had to put up for the grant and also the parking lot. Commissioner Ruiz seconded the motion and it carried by the following vote:*
>
> *Aye: Prepejchal, Ruiz, Leftwich*
>
> *Nay: Marra*
>
> *The motion carried 3 to 1.* [FAA Exhibit 1, Item 22, Exhibit D]

The remainder of the Investigative Action Meeting included discussions about locations on the airport where another FBO such as the Complainant could be facilitated based on the

existing ALP, previous grant applications and awards, as well as the status of the proposed lease at that time. The meeting concluded the same day.

The Respondent provided the FAA with additional documentation following the Investigative Action Meeting. These items have been added to the Record as FAA Exhibit 1, Item 23, Exhibits A-F. Specifically, the Respondent provided Airport Board and City Commission meeting minutes from February 20, 2012 stating the airport budget had been adjusted to include funding for the north GA ramp and associated infrastructure. [FAA Exhibit 1, Item 23, Exhibits A-B] On February 26, 2012, the Respondent issued an advertisement bidding the north GA ramp construction project. [FAA Exhibit 1, Item 23, Exhibit C] The airport budget was amended according to a March 26, 2012 email from Mr. Moran to reflect higher costs based on bids received. [FAA Exhibit 1, Item 23, Exhibit D]

On May 30, 2012, Mr. Moran advised the FAA that the Respondent had executed the grant agreement to construct the north GA ramp and associated facilities. Construction was slated to commence in June 2012. [FAA Exhibit 1, Item 23, Exhibit E]

On August 7, 2012, Mr. Clyde Kornegay emailed the FAA officials in attendance at the Investigative Action Meeting, Mr. Browning, and Mr. Moran. In his email, Mr. Kornegay expressed his concern that the construction had not yet commenced and there appeared to be little substantive action by the Respondent to demonstrate it was abiding by its commitments. [FAA Exhibit 1, Item 24]

On August 8, 2012, Mr. Browning advised Mr. Nicely that a lease had been executed with the Complainant and construction of the north GA ramp and associated facilities began the previous day. [FAA Exhibit 1, Item 23, Exhibit F]

On November 20, 2012, Mr. Moran sent an email advising the FAA official in attendance at the Investigative Action Meeting, Mr. Browning, and Mr. Kornegay of the status of the north GA ramp construction project and SVA lease. FAA Exhibit 1, Item 23, Exhibit G]

B. Procedural History

On August 27, 2010, Complainant attempted to file this Part 16 Complaint; however, FAA did not docket due to various procedural filing errors.

On September 13, 2010, Complainant filed an Amended Part 16 Complaint alleging the Respondent violated Grant Assurance 22, *Economic Nondiscrimination;* Grant Assurance 23, *Exclusive Rights,* and Grant Assurance 24, *Fee and Rental Structure.* [FAA Exhibit 1, Item 2.]

On October 1, 2010, the FAA provided an initial Notice of Docketing for the Complaint. [FAA Exhibit 1, Item 3.]

On October 14, 2010, Complainant filed a second Amended Complaint. [FAA Exhibit 1, Item 4.]

October 20, 2010, FAA issued a letter advising parties of electronic docketing system and Amended Notice of Docketing citing Complainant's second amended Complaint filed on October 14, 2010. [FAA Exhibit 1, Item 5.]

October 20, 2010, FAA issued a Notice of Extension of Time to Answer Complaint until November 19, 2010 citing Complainant's second amended Complainant. [FAA Exhibit 1, Item 6.]

November 19, 2010, Respondent filed its Motion to Dismiss and Answer. [FAA Exhibit 1, Item 7.]

On November 26, 2009, Complainant filed its Reply to Motion to Dismiss and Answer. [FAA Exhibit 1, Item 8]

On November 26, 2009, Complainant filed its Third Amended Complaint. [FAA Exhibit 1, Item 9.]

On December 13, 2010, FAA issued a Notice of Extension of Time for Respondent to file Rebuttal until December 16, 2010 in response to Respondent's request [FAA Exhibit 1, Item 10 and Item 10A.]

On December 16, 2010, Respondent filed its Rebuttal. [FAA Exhibit 1, Item 11]

On December 30, 2010, FAA added HRL Grant History dated December 30, 2010 to the Administrative Record. [FAA Exhibit 1, Item 12]

The initial round pleadings, as prescribed by 14 CFR, Part 16, concluded on December 16, 2010. On April 15, 2011, the Director of the FAA Office of Airports, Airport Compliance Division, issued a Request for Additional Information and Notice of Extension of Time. [FAA Exhibit 1, Item 13]

Complainant provided its response to the Director's request on May 6, 2010. [FAA Exhibit 1, Item 14]

On May 16, 2011, Respondent submitted its initial Response, in which it advised the Director additional submissions were owed but Respondent was not yet in possession of the requested information at the time of the initial submission. [FAA Exhibit 1, Item 15]

On May 24, 2011, Respondent submitted its Reply to Complainant's Responses to FAA's Request for Additional Information. [FAA Exhibit 1, Item 16]

On June 1, 2011, Complainant submitted a Reply to Respondent's Response to FAA Request for Additional Information. [FAA Exhibit 1, Item 17]

On June 9, 2011, Respondent submitted the outstanding documentation identified in its initial submission on May 16, 2011. [FAA Exhibit 1, Item 18]

On October 12, 2011, the FAA issued a Notice of Extension of Time for issuance of Director's Determination to on or about January 18, 2012. [FAA Exhibit 1, Item 19]

On January 20, 2010, the FAA issued a Notice of Investigative Action summoning the parties to meet on February 16, 2012. The Director's Determination issue date subsequently was extended to April 2, 2012. [FAA Exhibit 1, Item 20]

On February 16, 2012, per the Notice of Investigative Action, FAA officials met with the Complainant and Respondent to obtain additional information and clarify previous submissions and statements. As a result of the Investigative Action Meeting, Item 22, and its associated exhibits have been added to the docket. [FAA Exhibit 1, Item 22]

Respondent's post Investigative Action Meeting submissions and associated sub exhibits have been added to the docket as Item 23. [FAA Exhibit 1, Item 23]

Complainant's post Investigative Action Meeting submission has been added to the docket as Item 24. [FAA Exhibit 1, Item 24]

On April 2, 2012, the FAA issued a Notice of Extension of Time for issuance of Director's Determination to June 15, 2012. [FAA Exhibit 1, Item 25.]

On June 15, 2012, the FAA issued a Notice of Extension of Time for issuance of Director's Determination to July 31, 2012. [FAA Exhibit 1, Item 26.]

On July 30, 2012, the FAA issued a Notice of Extension of Time for issuance of Director's Determination to on or about October 1, 2012. [FAA Exhibit 1, Item 27.]

On September 27, 2012, the FAA issued a Notice of Extension of Time for issuance of Director's Determination to on or about December 1, 2012. [FAA Exhibit 1, Item 28.]

On December 5, 2012, the FAA issued a Notice of Extension of Time for issuance of Director's Determination to on or about December 14, 2012. [FAA Exhibit 1, Item 29.]

On December 11, 2012, the FAA issued this Director's Determination.

IV. ISSUES

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

- Determine whether the Respondent unreasonably denied access to Complainant in its attempt to establish an FBO on the airport in violation of Grant Assurance 22, *Economic Nondiscrimination.*

- Determine whether the Respondent unjustly discriminated against Complainant in its attempt to establish an FBO on the airport in violation of Grant Assurance 22, *Economic Nondiscrimination.*

- Determine whether the Respondent protected the incumbent FBO's position as the sole FBO on the airport offering services similarly proposed by the Complainant in violation of Grant Assurance 23, *Exclusive Rights*.

- Determine whether the Respondent took deliberate steps to compromise its self-sustainability in violation of Grant Assurance 24, *Fee and Rental Structure*.

V. APPLICABLE LAW AND POLICY

The Federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing Federal funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

The following is a discussion pertaining to the Airport Improvement Program, Airport Sponsor Assurances, the FAA Airport Compliance Program, enforcement of Airport Sponsor Assurances, and the complaint and appeal process.

A. The Airport Improvement Program

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

B. Airport Sponsor Assurances

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

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.[18] FAA Order 5190.6B, *FAA Airport Compliance Manual* (Order), issued on September 30, 2009, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to compliance with Federal obligations of airport sponsors. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

Three FAA grant assurances apply to the circumstances set forth in this Complaint: (1) Grant Assurance 22, *Economic Nondiscrimination;* (2) Grant Assurance 23, *Exclusive Rights; and* (3) Grant Assurance 24, *Fee and Rental Structure*.

(1). Grant Assurance 22, *Economic Nondiscrimination*

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

a. *(The airport owner/sponsor) will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.*

b. *In any agreement, contract, lease or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to*

    i. *Furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and*

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

ii. *Charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchases.*

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

f. *It will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees [including, but not limited to maintenance, repair, and fueling] that it may choose to perform.*

h. *(The airport owner/sponsor) may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.*

i. *The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport as such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.*

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

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [*See* FAA Order 5190.6B at Section 14-3.]

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

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

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

The FAA is charged with responsibility for monitoring and enforcing compliance with the provisions prohibiting exclusive rights set forth in section 303 of the Civil Aeronautics Act of 1938, as amended, and in section 308(a) of the FAA Act, as amended, 49 U.S.C., § 40103(e). These provisions exist as long as the airport is operated as an airport through surplus property conveyances as applicable and through Grant Assurance 23, *Exclusive Rights*, which implements the provisions of 49 U.S.C., §§ 40103(e) and 47107(a) (4) and requires, in pertinent part, that the owner or sponsor of a federally obligated airport:

> "...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public."
>
> "...will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities..."
>
> "...will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49 United States Code."

In FAA Order 5190.6B, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. *[See* e.g. Pompano Beach v FAA, 774 F2d 1529 (11th Cir, 1985).] An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce onto the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [*See* FAA Order 5190.6B; Section 11.2]

The assurance prohibiting the granting of an exclusive right does not penalize a sponsor for continuing an existing single provider when both of the following conditions exist:

> (1). It can be demonstrated that it would be unreasonably costly, burdensome, or impractical for more than one entity to provide the service, and
> (2). The sponsor would have to reduce the leased space that is currently being used for an aeronautical purpose by the existing provider in order to accommodate a second provider. [FAA Order 5190.6B; Section 8.7.a]

In the case of denying additional providers, the sponsor must have adequate justification and documentation of the facts supporting its decision acceptable to the FAA.
[FAA Order 5190.6B; Section 8.7.a]

In addition to FAA Order 5190.6B, FAA Advisory Circular 150/5190-6, *Exclusive Rights*, provides additional guidance on the application of the statutory prohibition against exclusive rights.

(3). Grant Assurance 24, *Fee and Rental Structure*

Grant Assurance 24, *Fee and Rental Structure*, addresses fees the owner or sponsor levies on airport users in exchange for the services the airport provides. Title 49 U.S.C., § 47107(a)(13) requires, in pertinent part, that the owner or sponsor of a federally obligated airport:

> *Will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection.*

Grant Assurance 24 satisfies the requirements of § 47107(a)(13) by addressing self-sustainability. The intent of the assurance is for the airport operator to charge fees that are sufficient to cover as much of the airport's costs as is feasible while maintaining a fee and rental structure consistent with the sponsor's other Federal obligations.

In addition, FAA Order 5190.6B states:

> *To aid in establishing uniform rates and charges applied to aeronautical activities on the airport, the sponsor should establish minimum standards to be met as a condition for the right to conduct an aeronautical activity on the airport.* [FAA Order 5190.6B at Section 9.6.e.]

(4). Surplus Property Obligations

Surplus property instruments of disposal are issued under the Surplus Property Act of 1944 (SPA). The Act authorizes conveyance of property surplus to the needs of the Federal Government. The FAA (or its predecessor, the Civil Aeronautics Administration [CAA]) recommends to the GSA (General Services Administration) which property should be transferred for airport purposes to public agencies. Such deeds are issued by the GSA that has jurisdiction over the disposition of properties that are declared to be surplus to the needs of the Federal government. Prior to the establishment of the GSA in 1949, instruments of disposal were issued by the War Assets Administration (WAA). [*See* FAA Order 5190.6B at Section 1.10.a.]

Public Law 80-289, approved July 30, 1947, amended Section 13 of the Surplus Property Act of 1944. This authorized the Administrator of WAA (now GSA) to convey to any state, political subdivision, municipality or tax-supported institution, surplus real and personal property for airport purposes without monetary consideration to the United States. These conveyances are subject to the terms, conditions, reservations and restrictions prescribed therein.

Surplus property instruments of transfer are one of the means by which the Federal Government provides airport development assistance to public airport sponsors. The conveyance of surplus Federal land to public agencies for airport purposes is administered by the FAA, in conjunction with the U.S. Department of Defense (DOD) and the GSA and pursuant to 49 U.S.C., §§ 47151, 47152, and 47153.

Public Law 81-311 specifically imposes upon the FAA the sole responsibility for determining and enforcing compliance with the terms and conditions of all instruments of transfer by which surplus airport property is or has been conveyed to non-Federal public agencies pursuant to the SPA. Furthermore, pursuant to 49 U.S.C., § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their Federal obligations.

All surplus airport property instruments of disposal, except those conveying only personal property, provide that the covenants assumed by the grantee regarding the use, operation and maintenance of the airport and the property transferred shall be deemed to be covenants running with the land. Accordingly, such covenants continue in full force and effect until released under Public Law 81-311 or other applicable Federal law.

Today, 49 U.S.C., § 47152 (2) and (3) contains the reasonableness and discriminatory requirements originally stipulated under the Surplus Property Act.

C. The FAA Airport Compliance Program

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

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

FAA Order 5190.6B, *Airport Compliance Manual*, dated September 30, 2009, sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures to be followed by FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for receiving Federal funds or Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor

assurances, addresses the application of the assurances in the operation of public-use airports, and facilitates the interpretation of grant assurances by FAA personnel.

The FAA Airport Compliance Program is designed to achieve voluntary compliance with Federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination of whether an airport sponsor currently is in compliance with the applicable Federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of an applicable Federal obligation to be grounds for dismissal of such allegation. [*See* e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket 16-99-10 (8/30/01); upheld in Wilson Air Center, LLC v. FAA, 372 F.3d 807 (C.A. 6, June 23, 2004) (Wilson)]

FAA Order 5190.6B outlines the standard for compliance, stating:

> *A sponsor meets commitments when: (1) The federal obligations are fully understood; (2) A program (e.g., preventive maintenance, leasing policies, operating regulations, etc.) is in place that the FAA deems adequate to carry out the sponsor's commitments; (3) The sponsor satisfactorily demonstrates that such a program is being carried out; and (4) Past compliance issues have been addressed.* [*See,* FAA Order 5190.6B at Section 2.8(b.)]

D. FAA Enforcement Responsibilities

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

E. The Complaint and Appeal Process

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

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

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedures Act (APA) and Federal case law. The APA provision [*See* 5 U.S.C., § 556(d)] states, "(e)xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." [*See also* Director, Office Worker's Compensation Programs, Department of Labor v. Greenwich Colleries, 512 US 267, 272 (1994) and Air Canada et al. v. Department of Transportation, 148 F3d 1142, 1155 (DC Cir, 1998).] Title 14 CFR, § 16.229(b) is consistent with 14 CFR, § 16.23, which requires the Complainant to submit all documents then available to support his or her complaint. Similarly, 14 CFR, § 16.29 states that, "(e)ach party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance."

Title 14 CFR, § 16.31(b-d), in pertinent parts, provides that "(t)he Director's determination will set forth a concise explanation of the factual and legal basis for the Director's determination on each claim made by the complainant. A party adversely affected by the Director's determination may appeal the initial determination to the Associate Administrator as provided in §16.33." In accordance with 14 CFR, § 16.33(b) and (e), upon issuance of a Director's determination, "a party adversely affected by the Director's determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination;" however, "(i)f no appeal is filed within the time period specified in paragraph (b) of this section, the Director's determination becomes the final decision and order of the FAA without further action. A Director's determination that becomes final because there is no administrative appeal is not judicially reviewable."

Title 14 CFR, § 16.247(a) defines procedural recourse for judicial review of the Associate Administrator's final decision and order, as provided in 49 U.S.C., § 46110 or section 519(b)(4) of the Airport and Airway Improvement Act of 1982, as amended, (AAIA), 49 U.S.C., § 47106(d) and 47111(d).

VI. ANALYSIS AND DISCUSSION

Prior to analyzing and discussing the pertinent issues in this case, it is relevant to restate that the FAA's Office of Airports, Airport Compliance and Management Analysis Division, reviews matters pertaining to a sponsor's current compliance with its Federal grant assurance agreements.[19] [*See* 14 CFR, § 16.1.] The agency does not replace or act on behalf of local

[19] Therefore, in addressing allegations of noncompliance, the FAA will make a determination of whether an airport sponsor currently is in compliance with the applicable Federal obligations. Consequently, the FAA will

law enforcement, civil courts, or other legal forums outside the scope of the FAA's Part 16 purview.

Respondent's Motion to Dismiss

In accordance with 14 CFR, § 16.23(j), the Respondent filed as a part of its Answer "a motion to dismiss" the Complaint. [FAA Exhibit 1, Item 7] The Respondent asserted the Complaint should be dismissed because:

(1) The Complainant did not provide the proper certifications per 14 CFR, §16.21(b) that "substantial and reasonable good faith efforts were made" to resolve the complaint and "that there appears to be no reasonable prospect for timely resolution of the dispute." [FAA Exhibit 1, Item 7, page 1]

(2) The Complainant "jumped the gun" by filing the Part 16 Complaint prior to the Texas ADO issuing its letter on November 4, 2010; or [FAA Exhibit 1, Item 7, pages 2 and 3] (and)

(3) VIA remained "fully engaged in the informal complaint process before Sun Valley filed its formal complaint and has acted in good faith by seeking guidance from the FAA under the unique and serious circumstances presented and by keeping the FAA informed about those circumstances every step of the way." [FAA Exhibit 1, Item 7, page 3]

With regard to its Motion to Dismiss, based on the documentation submitted to the administrative record, the Director finds the Complainant completed adequate steps in an attempt to pursue available remedies. The administrative record reflects that the Complainant had attempted to negotiate with the Respondent since November 2007, nearly three years before filing a formal complaint. While the Director recognizes certain circumstances may not result in immediate remedies or agreement between parties, based on a cursory review of the documentation submitted to the administrative record, the Director finds there are sufficiently substantiated allegations, which warrant adjudication under 14 CFR, Part 16.

The Director hereby denies Respondent's motion to dismiss.

A. ISSUE 1

The Complaint alleges the Respondent continuously delayed, obstructed, and denied all attempts by the Complainant to establish an FBO at Valley International Airport. The Complainant contends the Respondent's actions and inactions prevented the Complainant from obtaining an FBO lease, thus amounting to a violation of Grant Assurance 22, *Economic Nondiscrimination*. [FAA Exhibit 1, Item 2 and FAA Exhibit 1, Item 8]. The

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consider the successful action by the airport to cure any alleged or potential past violation of an applicable Federal obligation to be grounds for dismissal of such allegation. [*See* Wilson]

Director will examine two possible violations the Complainant's allegations raised under this assurance:

1. The Federal prohibition of unreasonable denial of access, under subsection (a) of Grant Assurance 22; and
2. The Federal prohibition of unjust economic discrimination, under subsection (h) of Grant Assurance 22.

The first issue addresses the allegations relevant to subsection (a); specifically, the Director will:

(1) Determine whether the Respondent unreasonably denied access to Complainant in its attempt to establish an FBO on the airport in violation of Grant Assurance 22, *Economic Nondiscrimination.*

The Complainant alleged that the Respondent "engaged in excessive delay and obstructions," which resulted in the Complainant being denied access to the Airport. [FAA Exhibit 1, Item 8, pages 8-9] Specifically, the Complainant alleged the Respondent's "continually changing requirements" resulted in the Complainant being denied access to operate a commercial aeronautical business at the Airport in violation of Grant Assurance 22. [FAA Exhibit 1, Item 8, page 9]

The Respondent repeatedly stated in its pleadings that any delays in lease negotiations were caused by Mr. Pat Kornegay's actions, including filing ethics complaints against former Airport Board Chairman Ledesma and former Airport Board Member Solis. The Respondent further asserted that Mr. Kornegay caused the City to investigate Mr. Kornegay himself, which resulted in further delays. [FAA Exhibit 1, Items 7, 11, and 15]

Additionally, in the Respondent's Rebuttal, the Respondent attributed further delays and obstructions to the Complainant by stating the Complainant failed to sign a lease offered on December 16, 2010.

In reviewing the Complainant's allegations pertaining to denial of access in violation of Grant Assurance 22, the Director will address this allegation within the context of events that occurred during five distinct time periods as recounted in detail in Section III Background. Although the parties have disagreed on why there have been delays in negotiations, which are the primary basis for the denial of access allegation, both parties have agreed to the timeline of events[20] that have unfolded since November 2007, when negotiations commenced.

[20] In reviewing the docket and creating the associated Index, which comprises the Administrative Record for the instant Complaint, the Director notes that the timelines and events pertaining to the allegations clearly and undisputedly have been documented in the Record, including supplemental information obtained during the Investigative Action Meeting. [See FAA Exhibit 1]

Period 1: November 2007 through May 2008 – Initial Negotiations

In November 2007, with the Gulf leases expiring in less than five months, and the option for Gulf to consolidate its operations into the south hangar[21], the Complainant approached the Respondent expressing interest in establishing an FBO by requesting a lease for the north hangar. [FAA Exhibit 1, Items 2, Item 7, Item 22, Exhibit A] The north and south hangars, as well as the abutting ramps, were constructed in 1988 with Airport and AIP funds and had been under sole control of Gulf since December 1996. [FAA Exhibit 1, Item 22, Exhibit A; Item 7, page 6; and Item 2, Exhibits E1 and E2]

The parties met again in January 2008. The Complainant and the Respondent agree the Respondent advised the Complainant the Gulf Aviation leasehold was not an option. The Complainant then suggested other options including a facility on the west side of the airport; and, the Respondent offered to construct facilities for the Complainant as it had with the Gulf leaseholds. The Respondent proposed developing the north GA ramp and constructing the new facilities there. [FAA Exhibit 1, Item 2; Item 7; and Item 22, Exhibit A] In a letter dated January 22, 2008, the Respondent informed the Complainant that the Complainant's proposal was being put on hold until the Gulf lease was completed. [FAA Exhibit 1, Item 7, Exhibit C7]

In April 2008, the Respondent commenced talks with the Complainant. The discussion focused on the Respondent's offer to develop and construct facilities on the north GA ramp, as there were no other options available on the Airport. In May 2008, the Respondent instructed the Complainant to create a presentation for the Airport Board based on this offer.

Findings and Conclusions for Period 1:
November 2007 through May 2008 – Initial Negotiations

The Respondent's decision to place negotiations with the Complainant on hold until the Respondent finalized the new lease with the existing FBO raises concerns. The Respondent should have been able negotiate more than one lease at a time. Moreover, the fact that the Respondent executed a lease with the Marine Military Air Wing during the summer of 2010, again placing the Complainant behind another entity, insinuates the Respondent purposefully took steps to deny the Complainant access. [FAA Exhibit 1, Item 2, Exhibit D10 and Item 22, Exhibit A]

During the Investigative Action Meeting, the FAA asked the Respondent if it had a methodology for its lease applications. Mr. Browning provided an overview of the process and advised leases usually are executed within 30 days after negotiations commence. Leases that require amendments to the airport budget must go to the City Commission for approval of the amended budget. This may take an additional month, thus extending the process to up to 60 days. [FAA Exhibit 1, Item 22, Exhibit A]

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[21] The Gulf lease for the south hangar included a provision allowing Gulf to move its operations from the north hangar to the south hangar, thereby allowing Gulf the option to vacate the north hangar. [FAA Exhibit 1, Item 7, page 6 and Item 2, Exhibit E1 and E2]

Requiring the Complainant to wait while the Respondent executed a lease for all existing available space with the incumbent FBO could be construed as the Respondent offering preferential treatment to the incumbent FBO. In Thermco Aviation, Inc., and A-26 Company v. City of Los Angeles, Los Angeles Board of Airport Commissioners, and Los Angeles World Airports, FAA Docket No. 16-06-07, (December 17, 2007) (Final Agency Decision) (Thermco), the FAA held the grant assurances and Federal obligations do not require that an airport sponsor recognize past occupancy as a preference for future occupancy. Nor do the Federal obligations require sponsors to adhere to the location preferences of current tenants when planning for future development. [*See* Thermco, page 19.]

Furthermore, the Respondent relied on the premise that because it had already engaged in good faith negotiations with the incumbent FBO, the Respondent did not have the obligation to consider the Complainant's request for a portion of the expiring Gulf leasehold. [FAA Exhibit 1, Items 7 and 11] In its Answer to the instant Complaint, the Respondent stated its position for choosing not to engage in negotiations with the Complainant by summarizing a January 22, 2008 letter authored by Mr. Browning. The Respondent wrote:

- *In June 2007, well before Sun Valley's first expression of interest, VIA's Board had already voted earlier to enter into negotiations with Gulf Aviation to amend and extend the current leases on the Property.*
- *VIA's Board had considered Sun Valley's proposal, but determined to keep its previous commitments and votes to negotiating in good faith with Gulf Aviation.*
- *All outstanding issues with Gulf Aviation would be present for VIA Board approval.*
- *If Sun Valley remained interested in opening a FBO, VIA was happy to work with you to make that a reality.*

[FAA Exhibit 1, Item 7, page 7]

The Respondent appears to have acted contrary to its Federal obligations when it disregarded the Complainant's proposal and allowed the incumbent FBO to be guaranteed the opportunity to continue and even expand its current operations without having to compete for opportunity. [Jimsair Aviation Services, Inc., v. San Diego County Regional Airport Authority, FAA Docket No. 16-06-8 (April 12, 2007) (Director's Determination) (Jimsair).

During this time period, the Respondent deviated from its standard and accepted leasing practices and gave priority to the incumbent FBO's requests. These actions raise questions of compliance with Grant Assurance 22(a). However, the Respondent opened the door to meetings its obligations[22] when it reconvened negotiations with the Complainant in April 2008 and the Airport Board voted to commence negotiations with the Complainant during its May 2008 meeting.

[22] This is not to say that the Respondent did not potentially grant an exclusive right. The Director will address that allegation under Issue #3, of this Determination.

The Director cautions the Respondent to be aware of its obligations and to recognize that undue delays[23] for non-substantive reasons may compromise its ability to maintain compliance with Grant Assurance 22(a).

Period 2: June 2008 through March 2009 – City Bonds

On June 30, 2008, the Complainant made a presentation to the Airport Board as requested.[24] [FAA Exhibit 1, Item 7, pages 19-20 and FAA Exhibit 1, Item 7, Exhibit C8] Five months later, in November 2008, the Airport Board approved the lease (although not unanimously[25]) with a recommendation to the City Commission to incur debt by issuing Certificates of Obligation in the amount of $1.5 million to construct the facilities offered in the proposed lease.

On March 9, 2009, the City Commission failed to pass the motion to issue Certificates of Obligation. The City Commission vote was 3-2; it failed because it did not meet the four-fifths requirement set by city code for obligating debt. [FAA Exhibit 1, Item 7, Exhibit C9]

Two days later, on March 11, 2009, the Complainant met with Mr. Browning to discuss the Complainant's offer to build and finance its own facilities on the north GA ramp, which was scheduled to be developed by the Respondent. [FAA Exhibit 1, Item 2, Exhibit I9 and I10 and FAA Exhibit 1, Item 15, Exhibit W] The Complainant and the Respondent both agreed there were no other location options on the Airport available for the Complainant to construct facilities. [FAA Exhibit 1, Item 22, Exhibit A]

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[23] Cases in which the FAA has found unreasonable delay constituting a constructive denial of access amounting to the grant of an exclusive right to the incumbent are instances in which the airport sponsor denied access for a much longer period of time than at hand during this time period in the instant Complaint. *See*, Jim Martyn v. Port of Anacortes, Wash., FAA Docket No. 16-02-03, at 31 (2003) (Director's Determination) (delay of three years); U.S. Constr. Corp. v. City of Pompano Beach, Florida, FAA Docket No. 16-00-14 at 18-19) (2001) (Director's Determination) (delay of over a year); Centennial Express Airlines v. Arapahoe County Pub. Airport Auth.; Kehmeier v. Arapahoe County Pub. Airport Auth.; Centennial Express Airlines v. Arapahoe County Pub. Airport Auth, FAA Docket No. 16-98-05, at. 27 (1998) (Director's Determination) (Delay had been in excess of 16 months and was still pending at the time of the Director's Determination). At this point, the time that has elapsed, (seven months) may not have been unreasonable on face value; however, the exigent reasons attributed to the delay are at issue.

[24] During the FAA's Investigative Action meeting, the FAA asked the Respondent if Mr. Vela's overture for the Airport to construct facilities was viable. The Respondent affirmed the Airport had been considering expanding its infrastructure, and Mr. Vela's offer was in fact a viable offer. The FAA then asked the Respondent whether the Airport had followed through on similar commitments, as offered by Mr. Vela, in the past. Again, the Respondent affirmed the Airport had previously constructed infrastructure, including buildings and ramp space, for general aviation aeronautical businesses. The structures constructed and maintained by the City, including buildings, ramps, and aprons, have been occupied exclusively by Gulf Aviation since December 13, 1996. [FAA Exhibit 1. Item 7, pages 4-7 Item 2, Exhibits E1 and E2; and Item 22A]

[25] The measure passed by a 3-2 margin with Airport Board Chair Pro-Tem Rick Ledesma and Airport Board Member Jim Solis voting against the proposal. [FAA Exhibit 1, Item 2, Exhibit B11]

Findings and Conclusions for Period 2:
June 2008 through March 2009 – City Bonds

During the June 30, 2008 Airport Board meeting the Complainant made a presentation at the request of the Respondent, detailing its proposal to operate a second FBO at the airport. [FAA Exhibit 1, Item 7, pages 19-20 and Item 7, Exhibit C8] The proposal was developed using the premise that the Respondent would finance construction of the leased facilities, as suggested by the Respondent in January 2008. The Airport Board did not act on the proposal until November 17, 2008, at which time it approved the lease[26] with a recommendation that the City Commission incur debt by issuing Certificates of Obligation in the amount of $1.5 million to construct the facilities. [FAA Exhibit 1, Item 2, Exhibit B11]

The Airport Board took nearly five months to vote on the proposal. However, even with the favorable vote by the Airport Board, the Complainant still did not have a lease since the City Commission had to vote on whether or not to provide the financing. The Respondent assured the Complainant it successfully had pursued this path in the past and cited the incumbent FBO's leasehold as evidence. [FAA Exhibit 1, Item 22, Exhibit A]

Another four months passed before the City Commission vote, which took place on March 9, 2009. The City Commission rejected the Airport Board's recommendation by voting against issuing the Certificates of Obligations and again leaving the Complainant without a lease. Nearly sixteen months had elapsed since the Complainant first approached the Respondent about obtaining a lease.

The Complainant alleged the Respondent's delays violated Grant Assurance 22, stating:

> *Our understanding of the FAA Grant Assurances for the Airport Improvement Program is that the FAA considers it to be in the public interest to foster airport infrastructure improvement and competition for the provision of aeronautical services on publicly funded airports.* [FAA Exhibit 1, Item 2, Summary of Facts, page 2]

Complainant's allegations align with guidance provided in FAA Order 5190.6B, which clearly explains an airport sponsor's obligation under Grant Assurance 22. Chapter 4, Paragraph 4-15 states an airport sponsor:

> *has the obligation to make available* ***suitable areas or space*** *on reasonable terms to those who are willing and otherwise qualified to offer flight services to the public.* [FAA Order 5190.6B, Sec. 4-15] (emphasis included)

The Director has affirmed this guidance and provided this direction in several determinations. For example, in Richard M. Grayson and Gate 9 Hangar, LLC v. DeKalb County, Georgia, FAA Docket No. 16-05-13, (February 1, 2006) (Director's Determination) (Gate 9), the Director stated:

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[26] The measure passed by a 3-2 margin with Airport Board Chair Pro-Tem Rick Ledesma and Airport Board Member Jim Solis voting against the proposal. [FAA Exhibit 1, Item 2, Exhibit B11]

> *If an aeronautical user requests available space, the airport owner should provide reasonable terms of access... Proposals of aeronautical development by potential leaseholders is evidence of aeronautical demand.* [See, Gate 9, page 13]

Grant assurance 22, Economic Nondiscrimination, obligates the airport sponsor to provide airport access. It does not obligate the airport sponsor to provide specific hangars or hangar types. Nonetheless, the airport sponsor does have an obligation to make available suitable areas or space on reasonable terms to those who are willing and otherwise qualified to offer flight services to the public or support services to aircraft operators. [See, Thermco, page 23]

FAA Order 5190.6B states: "The prime obligation of the owner of a federally-assisted airport is to operate it for the use and benefit of the public." [FAA Order 5190.6B Sec 4-15] With all existing infrastructure to host an FBO on the Airport leased to Gulf Aviation, the failed vote meant the Respondent's only path toward compliance was to offer available space with reasonable terms of access for the Complainant to develop facilities itself. The Complainant stepped forward and made that overture on March 11, 2009, when it offered to obtain its own financing. [FAA Exhibit 1, Item 2, Exhibit I9] At this point, the Respondent's obligation would have been satisfied had it moved to offer the Complainant a lease for suitable space on reasonable terms.

The documentation submitted to the Record clearly demonstrates the Respondent had placed two obstacles in the Complainant's path by this point: 1) preferential negotiations for the Gulf lease, and 2) the vote on the financing. Together, these actions denied the Complainant access to the airport for more than sixteen months to date. The Complainant's offer to finance its own facilities provided the Respondent with an immediate and clear path to compliance; however, the Respondent did not act. In Gate 9, the Director held that "inaction or omission can be the means by which unreasonable denial of access might be achieved." [See, Gate 9, page 12] Once again, the Respondent was at the doorstep of compliance; however, its continued delays and inaction constituted an unreasonable denial of access in violation of Grant Assurance 22(a).

Period 3: April 2009 through October 2010 – the Investigations

Over the next few weeks, the Complainant continued taking the necessary steps towards developing its proposal to finance its own facilities. On or about April 9, 2009, the Respondent advised the Complainant that negotiations had ceased. This notice came via an email from then Airport Board Chairman Rick Ledesma to Mr. Pat Kornegay, which stated in pertinent part: "there won't be a need for a meeting at this point." [FAA Exhibit 1, Item 2, Exhibit J15]

Later that month, on April 27, 2009, Mr. Kornegay sent a letter to Mr. Ledesma and Mr. Brendan Hall, then City Attorney, outlining his concerns with Airport Board member Jim Solis potentially having a conflict of interest. The Record is clear on the point that Mr. Ledesma would not allow further negotiations with the Complainant until Mr. Kornegay

withdrew his April 27, 2009 letter in writing. [FAA Exhibit 1, Item 7, Exhibit C12 and Item 22, Exhibit A]

Mr. Hall and Mr. McCullough explained to Messrs. Ledesma, Browning, and Kornegay that the April 27 letter did not meet the standard of a formal complaint[27]. However, Mr. Ledesma still decided to halt negotiations pending Mr. Kornegay conceding to retract the letter in writing. Instead, Mr. Kornegay filed a formal ethics complaint against Mr. Solis, as well as Mr. Ledesma at which point the City commenced a joint ethics investigation of the two. The aforementioned Special Prosecutor's Report, issued on August 25, 2009, subsequently cleared Messrs. Solis and Ledesma. [FAA Exhibit 1, Item 7, Exhibit C12]

In the following months, Commissioner Robert Leftwich seized upon a single sentence in the Special Prosecutor's Report, which became the crux of the next investigation. The sentence in question read:

> *The timing of the allegation of unethical conduct (against Messrs Ledesma and Solis) strikes this investigation as retaliatory and an effort to coerce or at least influence a public servant in the specific performance of his official duty.* [FAA Exhibit 1, Item 7, Exhibit C12, page 23]

Citing this sentence, Commissioner Robert Leftwich called for the Special Prosecutor's Report to be an agenda item on the City Commission's November 4, 2009 meeting. During that meeting, Commissioner Leftwich stated he believed the City should initiate an ethics investigation based on the Report. When questioned by other City Commissioners who would be investigated, the meeting minutes state: "Commissioner Leftwich replied that he thinks at this time it probably is not appropriate to reveal that." [FAA Exhibit 1, Item 2, exhibit K3] Commissioner Prepejchal made a motion to initiate an investigation and the motion carried, although the subject of the investigation had not been identified at that time. [FAA Exhibit 1, Item 2, exhibit K3]

The minutes from the next City Commission Meeting, held on November 18, 2009, clearly show that Commissioner Prepejchal confirmed Mr. Eddie Medrano was the subject of his motion to initiate an investigation during the November 4, 2009 meeting. However, the Order for Attorney Pro Tem appointing Mr. Tom Sullivan, which was signed by a Cameron County judge on March 23, 2010, contradicts Commissioner Prepejchal's answer. The Order shows Mr. Sullivan was appointed to investigate "for the matter involving Pat Kornegay." [FAA Exhibit 1, Item 7, Exhibit C13]

Although the investigation requested by Commissioner Prepejchal initially was based on the City's ethics ordinance, and Commissioner Prepejchal stated Mr. Medrano was the subject, the scope and subject of the Order vastly changed at some point, which is not documented in

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[27] In the Special Prosecutor's Report published on August 25, 2009, the investigators concluded: "Contrary to the assertion in Mr. Kornegay's formal sworn complaint of May 13, 2009 at paragraph 7, there is no substantive allegation made against Mr. Ledesma expressed in the April 27 letter." [FAA Exhibit 1, Item 7, Exhibit C12, pages 23 and 24]

the Record. Mr. Kornegay was not and never had been a City Official, and thus not legally eligible to be the subject of a city ethics ordinance investigation. [FAA Exhibit 1, Item 2, exhibit K4] This fact was a significant topic of discussion during the November 18, 2009, City Commission meeting and in an email sent by the former City Manager Craig Lonon to the Commissioners. Mr. Lonon's November 11, 2009, email advised the City Commissioners and Mr. Browning as follows:

> *The City Charter provision that allows for investigations by the City Commission states:*
>
> > *"The Commission may investigate the financial transaction of any office or department of the city government, and the act and conduct of any official or employee."*
>
> *Mayor Pro tempore Leftwich was clear that the investigation would be of a city official... and Mr. Kornegay is not a city employee or official of the City of Harlingen. [FAA Exhibit 1, Item 7, exhibit J24]*

Mr. Lonon reiterated his conclusion that Mr. Kornegay could not be the subject of an ethics investigation during the November 18, 2009 meeting. [FAA Exhibit 1, Item 2, exhibit K4] Mr. Lonon was fired on a motion made by Commissioner Leftwich at the next City Commissioners meeting, held on December 2, 2009, during which Commissioner Leftwich criticized Mr. Lonon's email. [FAA Exhibit 1, Item 2, Exhibit K5]

There is nothing in the Record to show any action was taken on this matter for nearly five months. Then, on March 23, 2010, Mr. Tom Sullivan was appointed Attorney Pro Tem to lead the Respondent's investigation of Mr. Pat Kornegay. [FAA Exhibit 1, Item 8, Exhibit R] Six months later, the investigation concluded when Mr. Sullivan presented his findings to a Cameron County Grand Jury on September 15, 2010. Mr. Sullivan brought charges to indict Mr. Kornegay, as well as Sun Valley Aviation. [FAA Exhibit 1, Item 7, Exhibit I]. The Director confirmed that Sun Valley Aviation was never named as a subject of the investigation in the order appointing Mr. Sullivan. [FAA Exhibit 1, Item 7, Exhibit C13 and FAA Exhibit 1, Item 22, Exhibit A]

On October 22, 2010, a Judge Dismissed, and more importantly, quashed,[28] the indictments against Mr. Patrick Kornegay and Sun Valley Aviation. The Judge's Motion to Dismiss and Quash stated:

> *The Court received stipulated evidence that no physical harm or unlawful acts were committed by the Defendants... The only acts forming the basis of the Indictments are the filing of the complaints of unethical conduct... with the City of Harlingen as required by City Ordinance 39.*

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[28] The record reflects that a Motion to Quash was filed and requested the Court to nullify the indictment. The Court granted the motion and the Director understands that the indictment was deemed null and void. [See Black's Law Dictionary (9th ed. 2009)]

> *The Court therefore GRANTS the Defendants' Motion to Quash the following Indictments for failure to allege a penal offense and orders that each of the below listed indictments is quashed for failure to allege a penal offense....* [FAA Exhibit 1, Item 7, Exhibit J]

Findings and Conclusions for Period 3:
April 2009 through October 2010 – the Investigations

Although the Complainant had offered to finance its own facilities, the Respondent did not pursue that option. Instead, on or about April 9, 2009, negotiations ceased when Mr. Ledesma sent an email advising Mr. Pat Kornegay "there won't be a need for a meeting at this point." [FAA Exhibit 1, Item 2, Exhibit J15] The Record is clear that Mr. Ledesma would not allow further negotiations with the Complainant until Mr. Kornegay rescinded informal allegations he made in the letter dated April 27, 2009, regarding Mr. Solis' relationship with Gulf Aviation. [FAA Exhibit 1, Item 7, Exhibit C12 and FAA Exhibit 1, Item 22, Exhibit A]

Mr. Kornegay refused; he then filed formal complaints against Mr. Solis, as well as Mr. Ledesma alleging:

> *Mr. Rick Ledesma's offer to do something for me that would facilitate my lease with the airport, on his authority as Airport Board Chairman, conditioned on my withdrawing my grievance against him and Mr. Solis, a clear solicitation of a bribe by a public official and a crime under the State of Texas' Penal Code Sec. 36.02* [FAA Exhibit 1, Item 7, Exhibit C10]

Mr. McCullough, the Airport attorney, advised the Respondent to cease negotiations with the Complainant until the allegations against Messrs. Ledesma and Solis were investigated. The investigation concluded with the issuance of a Special Prosecutor's Report on August 25, 2009, which cleared Ledesma and Solis. [FAA Exhibit 1, Item 7, Exhibit C12]

In November 2009, the Harlingen City Commission ordered an investigation pertaining to unethical conduct by a city official or employee. [FAA Exhibit 1, Item 2, exhibit K3] Despite the fact that the City Commission named Mr. Medrano as the subject of the investigation on November 18, 2009, the City later identified Mr. Pat Kornegay as the subject five months later.[29] [FAA Exhibit 1, Item 7, exhibit C13] The Record is silent on when the change was made, by whom, under what procedures, and under what circumstances.

Nearly six months after his appointment, Mr. Sullivan presented the findings from his investigation of Mr. Pat Kornegay to a Cameron County Grand Jury on September 15, 2010. Again, Mr. Sullivan inexplicably added Sun Valley Aviation to the investigation without justification, documentation, or approval by the City of Harlingen. [FAA Exhibit 1, Item 7, Exhibit I and FAA Exhibit 1, Item 8, Exhibit R] The Grand Jury returned four indictments,

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[29] The March 23, 2010 Order appointed Mr. Sullivan to serve as Attorney Pro Tem "for the matter involving Pat Kornegay." [FAA Exhibit 1, Item 7, Exhibit C13]

two each against Mr. Kornegay and Sun Valley Aviation. [FAA Exhibit 1, Item 7, Exhibit I]. The next month, on October 22, 2010, the indictments were dismissed and ultimately quashed by a Cameron County Judge. [FAA Exhibit 1, Item 7, Exhibit J]

In its pleadings, the Respondent consistently laid blame for the delays during the period between April 2009 and October 2010 at the feet of Mr. Kornegay, and at one point, even stated any delays were attributable to "acts or omissions of Sun Valley or third parties over whom VIA has no control." [FAA Exhibit 1, Item 7, page 23] The Respondent failed to identify the third party that may have interfered with its ability to offer the Complainant a lease. However, it appears the Respondent was alluding to the Cameron County District Court's investigation of Mr. Pat Kornegay caused delays. [FAA Exhibit 1, Item 11, page 22] The documentation submitted to the Record clearly shows Harlingen City Commissioners Leftwich and Prepejchal moved to initiate the City's investigation. [FAA Exhibit 1, Item 2, Exhibits K3 and K4] This investigation subsequently was turned over to the County, who then contracted with Mr. Sullivan, when the City Attorney declined to take the case. [FAA Exhibit 1, Item 22, Exhibit A] Despite these facts, the Respondent stated it had no control over this investigation. [FAA Exhibit 1, Item 11, page 22]

The Respondent did consult with the FAA in August 2010 seeking guidance on the matter. The FAA appropriately advised the Respondent that allegations, even indictments, are not grounds for abrogating the sponsor's obligations in this case; however, the Respondent still maintained its position that Mr. Kornegay was at fault. [FAA Exhibit 1, Item 8, Exhibit V2] Again, in the November 4, 2010 letter from Mr. Nicely, the FAA reiterated its direction to the Respondent on clear terms, stating:

> *It is now imperative the City of Harlingen to continue negotiations with Sun Valley Aviation, Inc....*
>
> *Failure by the city to negotiate in 'good faith' to reach an agreement could have serious implications to the City of Harlingen with regard to future AIP grant funding.*
>
> *Indictments are not regarded as convictions and should have no bearing on the sponsor's ability to comply with all the grant assurances and obligations.*
> [FAA Exhibit 1, Item 7, Exhibit E]

Rather than heeding the advice provided by the FAA, the Respondent chose not to act accordingly and compliantly. Instead, the Respondent ignored FAA's direction and misrepresented it actions in its Answer, stating:

> *... requested guidance at every turn from the FAA in light of the serious circumstances surrounding Sun Valley and Kornegay and has repeatedly stated its willingness to follow any and all FAA guidance so as to remain in full compliance with its agreements and obligations.* [FAA Exhibit 1, Item 7, page 14]

FAA Order 5190.6B states: "The prime obligation of the owner of a federally-assisted airport is to operate it for the use and benefit of the public." [FAA Order 5190.6B Sec 4-15] In his November 4, 2010 letter, Mr. Nicely appropriately advised the Respondent not to withhold unreasonably available land and/or buildings for lease to potential tenants. [FAA Exhibit 1, Item 7, Exhibit E] This guidance is consistent with past precedent, wherein the FAA has held:

> *Operating the airport for aeronautical use is not a secondary obligation; it is the prime obligation. This prime obligation includes the opportunity for leaseholders to develop airport property for aeronautical use.* [United States Construction Corporation v. City of Pompano Beach, FL, FAA Docket No. 16-00-14, (July 10, 2002) (Final Agency Decision) (Pompano), page 21]

The documentation submitted to the Record supports the Complainant's allegations that the Respondent conspired to delay and obstruct the presence on the airport of a new Fixed Base Operation. [FAA Exhibit 1, Item 2, page 6] Even when the Respondent finally sought guidance from the FAA, the Respondent chose to ignore the FAA's counsel on not one but two occasions. The Respondent defied the FAA's guidance in both its Answer and Rebuttal by continuing to employ the guise of a "pending investigation" as a legitimate reason for delaying negotiations with the Complainant. [FAA Exhibit 1, Items 7 and 11] Preventing the development of the airport to support aeronautical demand for the use and benefit of the public is a violation of the sponsor's Federal obligations, both under Grant Assurance 22(a) and the Surplus Property Act.

Period 4: November 2010 through February 2012 – Formal Complaint

Following Mr. Kornegay's and SVA's exoneration, the Respondent and Complainant resumed negotiations for a new lease agreement in November 2010. Mr. Nicely's November 4, 2010 letter advised the Respondent it was imperative to resume good faith negotiations. [FAA Exhibit 1, Item 7, Exhibit E] During the November 15, 2010 Airport Board Meeting, the Board approved a lease; however, the lease had been amended. Most significantly, the lease did not include an Exhibit A or any metes and bounds citations identifying where the proposed leasehold would exist. Instead, the lease stated certain proposed facilities would be covered and the associated fees, but it did not identify any location on the airport for these facilities to be constructed or for them to actually exist.[30] Summarily, all references to the north GA ramp had been deleted. [FAA Exhibit 1, Item 2, Exhibit Q]

During the FAA's Investigative Action Meeting, the FAA asked the Respondent if the lease was contingent upon the City Commission approving financing of the north GA ramp as alleged by Complainant. [FAA Exhibit 1, Item 22, Exhibit A] The Respondent stated the lease could be signed at any time but did not refute the Complainant's statement that the Airport's ability to implement the amended lease was contingent upon City Commission approval to amend the Airport budget to obtain matching grants and develop the necessary

[30] The Complainant would be responsible for financing the construction of all buildings and the fuel farm covered by the lease. [FAA Exhibit 1, Item 2, Exhibit Q]

infrastructure that would provide access to the airport from the proposed leasehold. [FAA Exhibit 1, Item 22, Exhibit A].

During the December 15, 2010, City Commission Meeting, the Commission rejected the budget passed by the Airport Board the previous month. The Commission amended the budget to exclude the funds required to develop the north GA ramp. This was an intentional move by the Commission as reflected in the meeting minutes. [FAA Exhibit 1, Item 22, Exhibit D].

The FAA confirmed via the parties' Answers and Responses to FAA's Request for Additional Information, that no other offers or proposals had been exchanged since December 16, 2010, when the Respondent made the offer of a the lease without an identified leasehold. [FAA Exhibit 1, Items 14, 15, 16, and 17]

Findings and Conclusions for Period 4:
November 2010 through February 2012 – Formal Complaint

With the direction to engage in good faith negotiations in hand, the Respondent stated in its Rebuttal that it had offered the Complainant a lease, which it was ready and willing to sign and execute. [FAA Exhibit 1, Item 16, page 9] Reviewing the initial round of pleadings, both parties averred positions that not only were incongruent, but also appeared to be based on two completely opposing perceptions of facts. To better assess the issues and ascertain the facts, the Director issued a Request for Additional Information on April 15, 2011. In his request, the Director asked both parties to define the status of negotiations at that point. Again, the parties had diverging viewpoints. The Respondent reiterated it offered "a forty-year lease to Sun Valley for it to build its FBO facility, and it has done so on fair and reasonable terms." [FAA Exhibit 1, Item 15, page 8] The Complainant asserted the proposed lease was not executable and cited a December 20, 2010 meeting held with Mr. Browning and Mr. McCullough during which the Respondent:

> *affirmed that the airport was willing to negotiate but had nothing to negotiate about, as all properties at VIA were currently under contract, there were no plans to develop the north ramp project, and that there was nothing left to do except wait for an FAA determination.* [FAA Exhibit 1, Item 17, page 8]

Again, the pleadings did not include aligned representations of required facts. Therefore, the FAA convened an Investigative Action Meeting on February 16, 2012. During this meeting, the FAA asked the Respondent if the lease it proposed was contingent upon the City Commissioner approving financing of the north GA ramp as alleged by Complainant. [FAA Exhibit 1, Item 22, Exhibit A] The Respondent stated the lease could be signed at any time but did not refute the Complainant's statement that the Respondent's ability to execute the proposed lease was contingent upon the Respondent (City Commission) approving an Airport budget amendment for matching grant funding. [FAA Exhibit 1, Item 22, Exhibit A].

During the December 15, 2010 City Commission Meeting, the Commission did not approve the Airport budget to include the funds required to construct the north GA ramp. Instead, the

City Commission specifically excluded these line items from a budget passed by the Airport Board the previous month. [FAA Exhibit 1, Item 22, Exhibit D].

FAA Order 5190.6B clearly explains an airport sponsor's obligation under Grant Assurance 22. Chapter 4, Paragraph 4-15 states an airport sponsor:

> *has the obligation to make available* ***suitable areas or space*** *on reasonable terms to those who are willing and otherwise qualified to offer flight services to the public . . . or support service (i.e. fuel, storage, tie down, flight line maintenance, etc.) to aircraft operators. This means that unless it undertakes to provide these services itself, the airport owner has a duty to negotiate in good faith for the lease of such premises as may be available for the conduct of aeronautical activities.* [FAA Order 5190.6B, Sec. 4-15] (emphasis included)

In its Rebuttal, the Respondent stated:

> *As a point of emphasis, Sun Valley's assertion that VIA must present the lease to the City Commission for approval is incorrect. Under the Charter of the City of Harlingen, Title XV, Section 157.17, VIA's Board and its airport director have final approval on leases, not the City Commission. Thus, contrary to Sun Valley's assertion, its lease has not gone to the City Commission for approval, and there is no ordinance or other requirement that the City Commission must approve it.* [FAA Exhibit 1, Item 11, page 4]

An airport sponsor has "the obligation to make suitable areas or space available on reasonable terms to those who are willing and otherwise qualified to offer the needed services." [Jim Martyn v. Port of Anacortes, Washington, FAA Docket No. 16-02-03, (April 14, 2003) (Director's Determination) (Jim Martyn), page 31] The Respondent's pleadings fail to recognize that the lease offered is not feasible unless there is a north GA ramp. Although the lease itself was not subject to City Commission approval, the ability for the City, as the airport sponsor, to provide a suitable location was. The City, through the Airport Board Charter, delegates much of the day-to-day operational oversight to the Airport Board, including executing leases. In this instance, the Airport Board could approve a lease in theory but the City retained control of providing the funding that would make the proposed lease viable. The only way to make the proposed lease viable was to obtain funding approval for a suitable location, which the City, as the airport sponsor, withheld.

Furthermore, the Respondent's failure to develop the airport to meet aeronautical demand is contrary to its obligations. In Gate 9, the Director held an airport sponsor pursuing:

> *... lease terms, plans, or managerial processes, that unnecessarily limit the airport's aeronautical utility by restricting development is inconsistent with the City's Federal obligations. It is unreasonable for an airport operator to refuse to develop a Federally-obligated airport in response to aeronautical demand, as the airport was conveyed for this very purpose and Federal grant*

funds have been expended for the purpose of enhancing the aeronautical utility of the airport. [Gate 9, pages 13-14]

In its pleadings, the Respondent appears not to understand that offering a lease without identified space and suitable access equates to a denial of access. The Director construes the Respondent's repetitive assertions that it offered a lease to be a misrepresentation of the facts to the point of being disingenuous. [See, Jim Martyn, page 32] There can be no lease without identification of a suitable location. The Respondent refused to offer a suitable location. Offering access in theory by dangling a lease with a phantom leasehold only served to supplement the Respondent's ongoing delay and obstruction tactics that denied Complainant from obtaining access to the Airport.

Period 5: February 2012 through August 2012 – Post Meeting

Following the February 16, 2012 Investigative Action Meeting, the Airport Board passed a budget amendment for construction of the north GA ramp on February 20, 2012. [FAA Exhibit 1, Item 23, Exhibit A and B] A grant agreement subsequently was executed between the FAA and the City of Harlingen on May 8, 2012. [FAA Exhibit 1, Item 23, Exhibit F] Construction of the north GA ramp commenced on August 7, 2012. [FAA Exhibit 1, Item 23, Exhibit F] A lease with the Complainant was executed on August 8, 2010. [FAA Exhibit 1, Item 23, Exhibit F]

Findings and Conclusions for Period 5:
February 2012 through August 2012

On February 20, 2012, the Airport Board and City Commission passed a budget amendment to include construction of the north GA ramp. [FAA Exhibit 1, Item 23, Exhibit A and B] The bid for the project was advertised on February 26, 2012 and a grant agreement subsequently was executed between the FAA and the City of Harlingen on May 8, 2012. [FAA Exhibit 1, Item 23, Exhibits C and E] Construction of the north GA ramp commenced on August 7, 2012 and the Respondent executed a lease with the Complainant on August 8, 2012. [FAA Exhibit 1, Item 23, Exhibit F]

The FAA does not require an airport sponsor to seek and spend AIP funds for development of it facility; however, the City's Federal obligations compel it, as the airport sponsor, to provide eligible and qualified aeronautical service providers with a suitable location.[31] [*See*, Gate 9] The Director reminds the Respondent it still must meet its obligations whether or not it chooses to pursue Federal funding.

FAA Order 5190.6B outlines the standard for compliance, stating:

> *A sponsor meets commitments when: (1) The federal obligations are fully understood; (2) A program (e.g., preventive maintenance, leasing policies,*

[31] See FAA Advisory Circular 150/5190-6, *Exclusive Rights at Federally Obligated Airports*, and 49 U.S.C., § 47107(a)(4) (A and B).

operating regulations, etc.) is in place that the FAA deems adequate to carry out the sponsor's commitments; (3) The sponsor satisfactorily demonstrates that such a program is being carried out; and (4) Past compliance issues have been addressed. [*See,* FAA Order 5190.6B at Section 2.8(b.)]

The Respondent's actions since February 20, 2012, demonstrate the Respondent has come to understand its obligations, has identified and pursued a plan to fulfill its obligations, and, with the execution of the lease and providing access to a suitable location, has taken the necessary steps to achieve voluntary compliance. In Drake Aerial Enterprises, LLC. d/b/a Air America Aerial Ads and James Miller v. City of Cleveland, OH, FAA Docket No. 16-09-02 (February 22, 2010) (Director's Determination) (Drake) the Director opined on current compliance, stating:

> *The FAA considers the successful action by the airport sponsor to cure any alleged or potential past violation of its grant assurances to be grounds for dismissal of such allegations. (See, Wilson) The FAA policy and citation to Wilson are commonly included in Part 16 decisions and speak to the import of current compliance. [See Clarke v. City of Alamogordo, FAA Docket No. 16-05-19 (September 20, 2006) (Director's Determination), at 11; Ingram v. Port of Oakland, FAA Docket No. 16-03-12 (April 7, 2006) (Final Decision and Order), at 21; Roadhouse Aviation v. City of Tulsa, FAA Docket No. 16-05-08 (December 14, 2006) (Director's Determination), at 31; and, Atlantic Helicopters Inc./Chesapeake Bay Helicopters v. Monroe County, Florida, FAA*
>
> *Docket No. 16-07-12 (September 11, 2008) (Director's Determination), at 26] FAA Airports' compliance policy is directed at ensuring 'current compliance' and also 'voluntary compliance.'* [*See*, Drake, pages 11-12]

Accordingly, at this time, the Director finds the Respondent is in compliance with Grant Assurance 22(a).

B. ISSUE 2

The Complainant's second allegation pertains to the Federal prohibition of unjust economic discrimination, under subsection (h) of Grant Assurance 22, *Economic Nondiscrimination*, which states:

> *(h) The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.*

Specifically, the Complainant alleged the Respondent unjustly discriminated against the Complainant by "continually changing requirements for SVA to operate commercially at VIA in excess of VIA minimum standards and with discriminatory lease contingencies and requirements." [FAA Exhibit 1, Item 8, page 9] The Complainant alleged the Respondent

imposed unreasonable and unjustly discriminatory conditions of tenancy on the Complainant in violation of Grant Assurance 22. [FAA Exhibit 1, Item 8]

Under this issue, the Director will address the allegations relevant to subsection (h) to:

(2) Determine whether the Respondent unjustly discriminated against the Complainant in its attempt to establish an FBO on the airport in violation of Grant Assurance 22, *Economic Nondiscrimination.*

Under Issue #1, the Director deliberated over whether the Respondent had unreasonably denied access to the Complainant by continuously changing requirements and parameters to negotiate terms of tenancy and asserting false premises as reasons for denial of access. Under this issue, the Director will determine whether the Respondent imposed unreasonable and unjustly discriminatory terms and conditions of tenancy on the Complainant in violation of Grant Assurance 22(h).

In the instant Complaint, the Complainant alleged the lease approval process to which it had been subjected was unreasonable and unjustly discriminatory. Specifically, the Complainant alleged the Respondent stepped outside its own procedures for approving leases by subjecting the accessibility of the proposed location of the leasehold to City Commission approval. The Complainant characterized the Respondent's actions as unreasonable and unjustly discriminatory, by stating:

> *To our knowledge, this is the first time a lease has ever needed to be 'presented' to the Harlingen City Commission as it is well within the powers of VIA to negotiate leases and is in fact standard operating procedure for leases at VIA.* [FAA Exhibit 1, Item 8, page 7]

The Respondent denied the Complainant's allegation that the City Commission had to approve the proposed lease and thereby it imposed unreasonable or unjustly discriminatory terms and conditions of tenancy on the Complainant. In its Rebuttal, Respondent stated:

> *… contrary to Sun Valley's assertion, its lease has not gone to the City Commission for approval, and there is no ordinance or other requirement that the City Commission must approve it.* [FAA Exhibit 1, Item 11, page 4]
>
> *Sun Valley now chiefly contends that VIA has engaged in discriminatory conduct by making its lease contingent upon VIA successfully obtaining FAA funding to build an apron because that provision is not included in Gulf Aviation lease. (Resp. to MTD at 6) But that contention is erroneous. The proposed lease to Sun Valley contains has no contingency at all. (See Ex. C hereto).* [FAA Exhibit 1, Item 11, page 5]

Although the Respondent stated numerous times that the lease had no contingencies, it did concede that funding for the north GA ramp project had been removed from the Airport budget by the City Commission. [FAA Exhibit 1, Item 11, page 26] In its supplemental

pleadings responding to the Director's Request for Additional Information, the Respondent acknowledged:

> *The VIA Board included in its FY11 Capital Budget the construction cost for the proposed expansion of the GA North Apron. The budget for the project included FAA – AIP Grant monies on a 95% - 5% basis. The City Commission would not approve the Airport's budget that included this project. Accordingly, the VIA Board amended the budget so that it did not include the GA North Apron project, although the engineering costs associated to the project remained in the budget.* [FAA Exhibit 1, Item 15, pages 11-12]

The Complainant concurred with the Respondent's admission that the City Commission "line item vetoed" the provision in the Airport budget that pertained to development of the north GA ramp, which would have made the proposed leasehold accessible to the airport's infrastructure. [FAA Exhibit 1, Item 17, page 7] Although the Respondent admitted the budget specifically had been amended to exclude the north GA ramp, in its next pleading the Respondent maintained the lease was still executable and therefore, the Respondent was not in violation of its obligations:

> *VIA offered a written lease to Sun Valley in December 2010 and remains ready, willing, and able to lease the space that Sun Valley has stated it is interest in – the property north of Gulf Aviation's the (sic) North Hangar. VIA remain willing and eager to negotiate further with Sun Valley.* [FAA Exhibit 1, Item 16, page 9]

Findings and Conclusion

Throughout the supplemental pleadings, the parties battled over a key allegation disputed in the initial pleadings: whether the lease offered by the Respondent was done so with terms and conditions that were unreasonable and unjustly discriminatory. The Complainant alleged the proposed lease hinged on the condition that the City Commission approve a request to obtain Federal funding to provide a suitable location for the leasehold. The Complainant stated such a contingency imposed unreasonable and unjustly discriminatory terms and conditions. The Respondent deemed its lease offer to be free of any contingencies and therefore compliant with its obligations. [FAA Exhibit 1, Item 11]

Grant Assurance 22, *Economic Nondiscrimination*, deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Specifically, Grant Assurance 22(h), which is codified at 49 U.S.C., § 47107(a)(1), states:

> *The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.*

In the instant Complaint, the Complainant requested suitable leasehold upon which it could construct its FBO facilities. The Respondent avers it offered a lease compliant with its obligations.

The Director reviewed the lease submitted to the Record by the Respondent. The lease did not include any drawings, identification of metes and bounds, or corresponding exhibits identifying the proposed lease location. [FAA Exhibit 1, Item 11, Exhibit C] In other words, the Respondent offered the Complainant a lease without land, which, in effect, is no lease at all. The Director also reviewed the December 15, 2010, City Commission Meeting Minutes, which were obtained through the February 16, 2012 Investigative Action Meeting to determine if the City Commission vote had any bearing of the leasehold as alleged by the Complainant. [FAA Exhibit 1, Item 22, Exhibit D] The meetings minutes confirm the City Commission did line item veto the airport budget to extract funding for the north GA ramp project. This project would have made the proposed leasehold accessible to the airport infrastructure and thus fulfill the suitability of the location. The question before the Director is whether this condition of tenancy is unreasonable and unjustly discriminatory.

Grant Assurance 22(h) speaks to the requirement that airport sponsors set terms and conditions of tenancy that are reasonable and not unjustly discriminatory. In past precedent, the FAA consistently has held that:

> *A complainant making the argument that an airport sponsor's requirements for obtaining a lease agreement are so unreasonable or burdensome as to deny the complainant access, has the responsibility to demonstrate, with supporting documentation and information, that the requirements are in fact unreasonable and burdensome.* [ALCA, The Cylinder Shop/Wayman Aviation, Suncoast Aviation, National Aviation v. Miami-Dade County, Florida, FAA Docket No, 16-08-05, (August 31, 2010) (Director's Determination) (ALCA), page 27; *See also*, Airborne Flying Service, Inc. v City of Hot Springs, Arkansas, FAA Docket No. 16-07-06, (May 2, 2008) (Final Decision and Order), page 16 (Airborne Flying Service)]

The facts align with the Complainant's assertion that the Respondent offered a phantom lease for a location that only would be accessible to the airport's infrastructure if the City Commission approved amending the Airport budget to request FAA funding for the north GA ramp. [FAA Exhibit 1, Item 8] In fact, Respondent admitted there were no other available locations on the Airport to host a second FBO as proposed by the Complainant. [FAA Exhibit 1, Item 15, Exhibit S]

While Grant Assurance 22 prohibits an airport sponsor from denying aeronautical access unreasonably or in a manner that is unjustly discriminatory, the FAA recognizes and supports an airport sponsor's proprietary right to develop and implement policies and procedures to manage its airport in compliance with its Federal obligations. However, when an airport sponsor fails to implement or administer its policies and procedures consistently and in an unjustly discriminatory manner, the sponsor may jeopardize its ability to meet its obligations

under Grant Assurance 22. [Warbird Sky Ventures v. Sumner County Regional Airport Authority, FAA Docket No. 16-07-16 (July 13, 2010) (Final Decision and Order) (Warbird)]

The Respondent's decision to make a suitable location for the leasehold contingent upon funding approval[32] was a deviation from the "Charter of the City of Harlingen, Title XV, Section 157.17." [FAA Exhibit 1, Item 11, page 4 and Item 22, Exhibit A]

Additionally, the Respondent has surplus property obligations. The majority of the land comprising the airport was transferred to the City of Harlingen, the Respondent, as surplus property. The property identified for the north GA ramp development project is part of the surplus property conveyed. The FAA expects that property conveyed for airport purposes be made available for development and achievement of such purposes. [Boca Raton Jet Center, Inc. v. Boca Raton Airport Authority, FAA Docket No. 16-97-06, (August 20, 1999) (Final Director's Determination) (Boca Raton Jet Center)]

The Respondent offered the Complainant a shell of a lease that included an "access in theory" provision predicated on actions that the Respondent itself had to take. The Respondent's purposeful, specific actions and inactions to prevent development of the north GA ramp[33] unnecessarily and unreasonably limited the airport's aeronautical utility. [See Gate 9, pages 13-14] By requiring City Commission approval to develop the Airport in accordance with its Federal obligations, the Respondent imposed unreasonable and unjustly discriminatory terms on the Complainant. These actions are not consistent with its Federal surplus property and grant assurance obligations.

Although these findings are significant and amount to a finding of noncompliance, the Respondent's recent actions have persuaded the Director that it has achieved an acceptable plateau of voluntary compliance as of the issuance of this Determination based upon its actions beginning in February 2012. [FAA Exhibit 1, Item 22, Exhibits B-F] The FAA Airport Compliance Program is designed to achieve voluntary compliance with Federal obligations and in addressing allegations of noncompliance, the FAA will make a determination of whether an airport sponsor currently is in compliance with the applicable Federal obligations. [*See*, Wilson]

The Director finds the Respondent has exhibited a compliant posture by taking specific steps to provide reasonable and not unjustly discriminatory terms for the Complainant to be granted access to the airport in compliance with its obligations under Grant Assurance 22 and its surplus property conveyance agreement.

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[32] As the Director clarified in Section II.A. *Infra*, the City is the airport sponsor. Thus, the City withheld funding approval. Although the City Charter permits the Airport Board to execute leases, the Airport Board is prohibited from expending funds not budgeted. [, FAA Exhibit 1, Item 22, Exhibit A2] As such, the Respondent failed to permit funds be budgeted to provide a suitable location.

[33] As clearly supported by the Record, the north GA ramp has been identified on the airport's master plan for development to facilitate future aeronautical activities. [FAA Exhibit 1, Item 15, Exhibit W] Additionally, the Respondent had requested and received engineering grants as recently as 2009 to perform the requisite siting to develop this particular apron in pursuit of this goal. [FAA Exhibit 1, Item 22, Exhibits B, C, and D]

C. ISSUE 3

The Complainant alleged the Respondent took deliberate steps to deny the Complainant access to the airport as an FBO to "protect the monopoly on fuel and aviation services at VIA by the incumbent FBO." The Complainant asserted the Respondent's actions led to the constructive granting of an exclusive right in violation of Grant Assurance 23, *Exclusive Rights*. [FAA Exhibit 1, Item 2, page 2 and FAA Exhibit 1, Item 8] The Respondent denied it acted in a manner contrary to its obligations. [FAA Exhibit, Items 7 and 11]

Accordingly, under this issue the Director will:

(3) Determine whether the Respondent protected the incumbent FBO's position as the sole FBO on the airport offering services similarly proposed by the Complainant in violation of Grant Assurance 23, *Exclusive Rights*.

The Complainant cited in its Complaint and Reply several actions by the Respondent the Complainant believed illustrated a series of steps the Respondent took to proactively protect the incumbent FBO, Gulf Aviation, from competition. The Director will address the Complainant's allegations of exclusive rights as they were alleged in accordance with the same time periods used under Issue #1.

Period 1: November 2007 through May 2008 – Initial Negotiations

In November 2007, the Complainant requested to bid on one of the two facilities that would become available at the expiration of the previous Gulf lease on March 31, 2008. [FAA Exhibit 1, Item 8, pages 10-11] In a January 22, 2008, letter, the Respondent advised the Complainant that lease negotiations with the incumbent FBO were nearing completion and "if the Board approves the amendments as expected, both the north and south hangars will continue to be occupied by Gulf." [FAA Exhibit 1, Item 7, Exhibit C7]

The Respondent approved a new lease with the incumbent FBO, Gulf Aviation, on February 18, 2008,[34] which allowed Gulf to occupy all the existing facilities on the east side of the airport constructed by the Respondent with a combination of Federal funds and sponsor revenue. [FAA Exhibit 1, Item 11, page 10 and Item 22, Exhibit A]

Findings and Conclusion for Period 1:
November 2007 through May 2008 – Initial Negotiations

The Respondent agreed that it did not allow the Complainant to bid on either of the two FBO facilities it offered to Gulf and asserted it was not required to solicit bids. [FAA Exhibit 1, Item 11, page 11-12 and FAA Exhibit 1, Item 2, page 6] The Respondent based its position on two letters it received from the FAA Southwest Region (ASW) Airport Compliance Program Manager, Mr. Ed Chambers, in 2007. In the first letter dated March 9, 2007, Mr. Chambers wrote:

[34] The Respondent stated the lease was effective March 1, 2008. [FAA Exhibit 1, Item 22, Exhibit A]

> *The presence on an airport of only one enterprise engaged in commercial aeronautical activity is not considered a violation of (FAA) policy if there is no understanding, commitment, express agreement, or apparent intent to exclude other reasonably qualified enterprises.*
> *... Re-leasing the hangars to the current tenant without soliciting bid proposals would be viewed as the granting of an exclusive right in violation of federal law. If no other bids are received or if the current tenant submits the best proposal, then there would be no problem with re-leasing the hangars to the current tenant.* [FAA Exhibit 1, Item 2, Exhibit I1]

In its Answer and Rebuttal, the Respondent admitted "it had leased two FBO facilities to Gulf Aviation, the only provider of aeronautical services at VIA." [FAA Exhibit 1, Item 11, page 9] The Respondent asserted it was within its rights to allow Gulf to continue to lease the facilities by stating the action was simply a lease extension as opposed to a new lease. [FAA Exhibit 1, Item 11, pages 11-12]

In the second letter, dated, April 16, 2007, Mr. Chambers addressed the question of whether a lease extension, cast as an amendment, would be acceptable. He wrote: "There is no objection to the proposed lease amendment as long as there are no proposed FBOs being denied the right to serve as an FBO on the airport." [FAA Exhibit 1, Item 2, Exhibit I2]

The Complainant demonstrated through documentation submitted to the Record that the Respondent had been made aware of its proposal to establish a second FBO at the Airport in late 2007. [FAA Exhibit 1, Item 2 and Item 11] The Respondent acknowledged and conceded to this fact in its pleadings. The Complainant then asserted that the Respondent, fully aware of its obligations as explained precisely and applicably by Mr. Chambers, acted intentionally to protect Gulf Aviation's exclusive standing as the sole FBO at the Airport by denying the Complainant the opportunity to lease either of the existing facilities reserved for Gulf Aviation. [FAA Exhibit 1, Item 8, pages 18-20 and Item 11, page 11]

Grant Assurance 23, *Exclusive Rights*, prohibits an airport sponsor from permitting an "exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public." This is codified at 49 U.S.C., § 47107(a)(4). The grant assurance describes the two statutory exceptions to this prohibition:

> *(A) if the right would be unreasonably costly, burdensome, or impractical for more than one fixed-base operator to provide the services; and*
> *(B) if allowing more than one fixed-base operator to provide the services would require reducing the space leased under an existing agreement between the one fixed-base operator and the airport owner or operator.*

The Respondent's decision to re-lease all existing facilities to the incumbent FBO does not appear to be congruent with this requirement. When an airport sponsor denies access to additional providers, it may only do so when it meets **both** conditions under the statutory exceptions. In such circumstances, the sponsor must have adequate justification and documentation of the facts supporting its decision. [See, FAA Order 5190.6B, Section 8.7]

In the instant Complaint, the Respondent did not meet that burden. Instead, the Respondent stated it "only went forward with negotiating with Gulf Aviation after it had first obtained written guidance from the FAA that its actions were consistent with its grant assurances." [FAA Exhibit 1, Item 11, page 11]

The Respondent's actions were not consistent with the guidance provided in Mr. Chambers' letters. The Respondent specifically was advised that re-leasing the hangars without bids and denying access to interested service providers equated to exclusive rights violations. [FAA Exhibit 1, Item 2, Exhibits I1 and I2] However, the Respondent retained the opportunity to achieve a compliant posture by offering the Complainant a suitable location on which facilities could be constructed. The Respondent appears to have taken steps towards developing a compliant posture when it engaged in negotiations with the Complainant in May 2008.

Period 2: June 2008 through March 2009 – City Bonds

The Respondent offered to construct facilities for the Complainant in an area termed the north GA ramp. The Respondent averred it previously had constructed facilities for FBOs and cited the Gulf leaseholds as a successful example of its offer. [FAA Exhibit 1, Item 11 and Item 22, Exhibit A] [*See*, MAP 1 on page 4, infra.]

The Respondent failed to act on the lease proposal submitted by the Complaint from June 30, 2008 until November 17, 2009, when the Airport Board approved the proposal and recommended it to the City Commission. [FAA Exhibit 1, Item 8, page 25 and Item 2, Exhibit B2] The City Commission took up the issue during its March 9, 2009 Meeting. At that time, the Commission voted against the proposal. [FAA Exhibit 1, Item 11, page 17]

Findings and Conclusion for Period 2:
June 2008 through March 2009 – City Bonds

The Respondent's inaction and ultimate denial of the proposed lease raises questions about whether the Respondent intended to comply with its obligation to offer a suitable location and thereby permit a qualified second FBO to obtain access to the Airport. FAA Advisory Circular 5190-6, Exclusive Rights at Federally Obligated Airports, [FAA A/C 5190-6] provides a clear and concise explanation of the sponsor's obligations. Specially, FAA A/C 5190-6 states:

> *The fact that a single business or enterprise may provide most or all of the on-airport aeronautical services is not, in itself, evidence of an exclusive rights violation. What is an exclusive rights violation is the denial by the airport sponsor to afford other qualified parties an opportunity to be an on-airport aeronautical service provider.* [*See*, FAA A/C 5190-6, Section 1.3(b)(2)]

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 any standard that is applied in an unjustly discriminatory

manner may constitute the constructive grant of an exclusive right. The Courts have found a sponsor may grant an exclusive right when it places a significant burden on one competitor that is not placed on another. [*See,* e.g. Pompano Beach v FAA, 774 F2d 1529 (11th Cir, 1985) and Jim Martyn, page 22]

The requirement to offer a suitable location is placed upon the Respondent, not the proponent. An airport sponsor is obligated to make available suitable areas or space on reasonable terms to those who are willing and otherwise qualified to offer flight services to the public or support services to aircraft operators. [*See,* Thermco) However, the sponsor is not obligated to construct hangars and terminal facilities. [FAA Order 5190.6B Sec. 4-15]

The fact that the Respondent's offer for a suitable location hinged upon City Commission approval sits at the threshold of placing a significant burden on the Complainant that had not been placed on other entities proposing to provide aeronautical services on the airport. Sixteen months after the Complainant first expressed an interest in establishing a lease for a second FBO, the City Commission voted against the proposal promulgated and recommended by the Airport Board. No other lease option had been offered to the Complainant by the Respondent in the course of those 16 months. Moreover, during this time, the Respondent obligated all available space to the incumbent FBO. [FAA Exhibit 1, Item 15 Exhibit S] Together, these actions equate to the granting of a constructive exclusive right.

Periods 3 and 4: April 2009 through February 2012

During this expanse of time, the Complainant alleged "delays and obstructions caused by the VIA counsel, staff, and board, along with the Harlingen City Commission has (sic) been successful in protecting the exclusive right of Gulf Aviation." [FAA Exhibit 1, Item 2, pages 2 and 3] The Complainant cites two courses of action the Respondent pursued during these time periods, which it alleged caused the Respondent to violate Grant Assurance 23, *Exclusive Rights*.

First, the Complainant alleged the incumbent FBO and its paid consultant were permitted to "interrupt and interfere at every juncture in the presentations and negotiations between" the Complainant and the Respondent. [FAA Exhibit 1, Item 2, page 3] The Complainant averred these actions by Gulf, permitted by the Respondent, contributed to the Respondent perpetuating Gulf's exclusive use and resulted in the Respondent failing to "foster airport infrastructure improvement and competition for the provision of aeronautical services on publicly funded airports". [FAA Exhibit 1, Item 2, page 2]

Secondly, the Complainant alleged the Respondent's action to remove the north GA ramp project, which was the location identified by the Respondent for the Complainant's proposed leasehold, from the Airport's budget caused the Respondent to violate Grant Assurance 23. Specifically, the Complainant averred:

> *Due to pressure from Mr. Garza and his supporters, this project has been all but abandoned in favor of rehabilitation and expansion of Gulf Aviation's*

south GA ramp and the development of a 40 acre tract behind Gulf Aviation's south hangar for which there are no proposed lease holders.

... The net effect of this re-direction of FAA Airport Improvement Program grant money is to delay any possibility of further FBO development on the airport.

[FAA Exhibit 1, Item 2, pages 3-4]

Responding to the allegations regarding Gulf Aviation and its hired consultant, Aviation Management Consulting Group (AMCG), the Respondent admitted it allowed Mr. Garza to speak "on matters of public concern" and admitted he was allowed to distribute materials. [FAA Exhibit 1, Item 7, page 22] The Respondent stated that it understood "it is generally in the public interest to foster airport improvements and competition" and that the Respondent's actions "are consistent with that understanding." [FAA Exhibit 1, Item 7, page 22]

The Record includes several references to presentations and submissions by a consultant hired by the incumbent FBO. The Respondent acknowledges it allowed Mr. Jeff Kohlman of AMCG to appear before the Airport Board and Harlingen City Commission as a consultant hired by Gulf Aviation on several occasions as well as distribute materials. The Record shows that among those materials distributed was a position paper authored by Mr. Kohlman on behalf of his client, Gulf Aviation, dated May 28, 2008, entitled: "White Paper – FBO Competition." [FAA Exhibit 1, Item 2, Exhibit H] The position advocated by Mr. Kohlman in this paper was that FBO "competition is not normal." [FAA Exhibit 1, Item 2, Exhibit H] Mr. Kohlman's paper included the following excerpts:

The FAA is often quoted as saying "every FBO has the right to go broke." However, this does not imply that the airport sponsor must lease land and/or improvement to an entity that will, most likely, go broke (based upon the entity's business plan or lack there). In addition, it does not mean that an airport sponsor must lease land and/or other improvements to entities desirous of engaging in activities when such activities are expected to have a detrimental impact on the overall range, level, and quality of providers, services, and facilities (and/or the manner provided) at the airport – even if the entity is willing to meet the airport's minimum standards.

... In a competitive market (where operators compete for marketshare), operator revenue and margins typically decline as a result of competitive factors.

... it is highly recommended that the decision to add capacity not be made "by the seat of the pants or through "trial and error." Too often, when these approaches are used, airport sponsors, FBOs, aviation consumers, and the community all end up losing – big time. Instead, airport sponsors, airport managers, and FBO owners and operator are strongly encouraged to utilize the most appropriate analyses, approaches, and methodologies to help them

make an informed and educated decision regarding how many FBOs should an airport have (or be able to support).

[FAA Exhibit 1, Item 2, Exhibit H, at 6, 9 and 12]

Additionally, the December 15, 2010 City Commission Meeting minutes include a summary of Mr. Kohlman's presentation to the Commission prior to the board voting to line item veto the north GA ramp project from the Airport's budget. Mr. Kohlman opined on the vote before the Commission. Summarily, the minutes reflect he made the following comments:

> *(Mr. Kohlman) asked what is the Airport's requested budget amendment based on? He asked is it the need for additional FBO services? He replied no. He asked is it the liability for Sun Valley Aviation's plan? He replied no. He asked is it the ban (?) capacity analysis that wasn't done to determine the need for additional apron? He replied no. ...*
>
> *... From his professional experience voting against this budget amendment associated with the apron would not put the airport in violation tomorrow.*
>
> [FAA Exhibit 1, Item 22, Exhibit D]

Regarding the Complainant's allegation that the Respondent acted purposefully to favor the incumbent FBO by funding projects that only benefitted Gulf Aviation the Respondent denied it actions amounted to an exclusive rights violation. The Respondent did agree with the Complainant's assertion that "Rick Ledesma and other Harlingen City Commissioners have voted in the past to remove the north GA ramp improvement project from the VIA budget." [FAA Exhibit 1, Item 11, page 26] The Respondent also stated in its Answer, submitted on November 19, 2010, and re-affirmed in its Rebuttal, submitted on December 16, 2010, that it "considered rehabilitating and expanding" the areas abutting the Gulf leasehold; however, the Respondent denied its actions favored Gulf and that it protected Gulf's exclusivity as the single FBO on the Airport. [FAA Exhibit 1, Item 11, pages 26-27] The Respondent also averred that "the work and projects that have been done to date correspond to when and where there was an existing aviation need for the work." [FAA Exhibit 1, Item 11, page 27]

Findings and Conclusions for Periods 3 & 4:
April 2009 through February 2012

The Complainant alleged that the incumbent FBO lobbied Airport Board members and the City Commission to protect its interests as well as hired a consultant to make presentations and hand out white papers, which resulted in the Respondent protecting Gulf's exclusive right to serve as the single FBO on the Airport. [FAA Exhibit 1, Item 2 and Exhibit 1, Item 8] The Respondent admitted the incumbent FBO was permitted to speak against allowing the Complainant's interest to become a second FBO at the Airport. However, the Respondent denied allowing Gulf time to speak was a violation of its obligations. [FAA Exhibit 1, Item 7 and Exhibit 1, Item 11]

The Director generally agrees with the Respondent's interest to invite public input on matters involving the Airport. However, the Record shows the Respondent's actions clearly substantiate the Complainant's allegation that it protected the incumbent FBO from competition.

Mr. Kohlman's position paper, as well as the comments he made during the December 15, 2010 City Commission Meeting, portray an inaccurate and flatly contradictory interpretation of grant assurance obligations, statute, and FAA policy and guidance. The theory that FBO competition may decrease one FBO's bottom line is not relevant to the grant assurances. The fact that an airport sponsor denied an eligible and qualified entity from engaging in an aeronautical activity is relevant as it demonstrates disregard of the obligation to "permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public." [*See*, Airport Sponsor Assurance 23, *Exclusive Rights*]

> *A sponsor's Federal obligations do not relieve aeronautical businesses on the sponsor's airport from their assumption of standard business risk. This risk includes the risk of competition, present and future, anticipated and unanticipated. Economic advantage being held by one competitor, alone, is not sufficient evidence of a sponsor's violation of its Federal commitments. Airport businesses frequently pursue business strategies designed to disadvantage their competition... The existence of a competitive advantage can be considered supporting evidence to other evidence regarding the sponsor's actions; however, the FAA's requirement in analyzing the allegation of noncompliance is to review the sponsor's actions and omissions to determine if they have violated their Federal obligations.* [United Aircraft Services, Inc. v. Hancock County Port and Harbor Commission and Hancock County Board of Supervisors, FAA Docket No. 16-00-04, (October 12, 2000) (Director's Determination), page 12]

Perhaps more difficult for the Director to understand is the fact that the Respondent had received cogent and appropriate guidance from the Respondent's outside counsel. In an April 28, 2010 memorandum to the Respondent, Mr. David Moran wrote: "VIA would find little comfort in denying a second FBO provided that the operator is 'reasonably qualified." [FAA Exhibit 1, Item 8, exhibit S]

When an airport sponsor is faced with the questions of whether only one FBO is needed due to aeronautical demand, FAA Advisory Circular 5190-6, Exclusive Rights at Federally Obligated Airports, [FAA A/C 5190-6] provides a clear and concise explanation of the sponsor's obligations. Specially, FAA A/C 5190-6 states;

> *The fact that a single business or enterprise may provide most or all of the on-airport aeronautical services is not, in itself, evidence of an exclusive rights violation. What is an exclusive rights violation is the denial by the airport sponsor to afford other qualified parties an opportunity to be an on-airport aeronautical service provider.* [*See*, FAA A/C 5190-6, Section 1.3(b)(2)]

Regarding Complainant's allegations that the Respondent took deliberate steps to protect the incumbent FBO's exclusive right to serve as the single FBO on the Airport by funding projects that only benefitted Gulf Aviation, the Director looks no further than the Respondent's actions and the Record. First, the December 15, 2010 City Commission Meeting Minutes show the Respondent line item vetoed funding for the north GA ramp project. [FAA Exhibit 1, Item 22, Exhibit D] The veto curtailed funding for the development of the north GA ramp needed to make the proposed leasehold accessible to the airport's infrastructure. Second, during the Investigative Action Meeting, the FAA requested more details pertaining to the Complainant's allegations that the Respondent deliberately chose not to develop infrastructure to support aeronautical demand and instead, fund the south ramp and the 40-acre tract behind Gulf's leasehold. The Director asked the Respondent if these areas had been developed. The Respondent specifically stated in its November 19, 2010 pleading that it "considered the rehabilitation and expansion of Gulf Aviation's south GA ramp and the development of the property behind Gulf Aviation's south hangar." In its December 16, 2010 pleading, the Respondent reiterated its position that these projects had been considered. [FAA Exhibit 1, Item 11, page 26] The record reflects actions are much more significant than mere consideration of development of the south ramp.

During the Investigative Action Meeting, the Director noted the Respondent had submitted a grant application package on July 8, 2010. That application included the North General Aviation Expansion, Engineering Only, in addition to the following projects: Taxiway Bravo and Delta Rehabilitation; Perimeter Fence; Rehabilitation and Expansion of South General Aviation; Taxiway Hotel Overlay; Construction of East General Aviation; Taxiway Echo Demolition; Wildlife Assessment; and 17R Extension Feasibility Study. [FAA Exhibit 1, Item 22, Exhibit C] The Respondent's stated that it only "considered" these projects. However, the inclusion of the south general aviation and east general aviation projects in the application show the Respondent's statement bordered on misleading. However, the fact that the FAA issued and the Respondent executed the grant for these projects on July 13, 2010, demonstrates the Respondent acted upon the consideration. [FAA Exhibit 1, Item 22, Exhibit C] The grant package totaled $5,517,671. The following chart illustrates the grant and matching funds allocated to the three projects at issue in the instant Complaint:

Project	Federal Grant Amount	Local Share
South General Aviation	$980,144.00	$51,586.00
East General Aviation	$1,965,618.00	$103,453.00
North General Aviation – *Engineering only*	$123,500.00	$6,500.00

[FAA Exhibit 1, Item 22, Exhibit C]

During the December 15, 2010 City Commission Meeting, the Commission removed the $75,000 from the Airport budget, which were the matching funds that would have allowed the Airport to pursue the *construction* of the north GA ramp. This occurred the day before the Respondent submitted it Rebuttal. [FAA Exhibit 1, Item 22, Exhibit C and FAA Exhibit 1, Item 11]

The Respondent made statements that are contradicted by facts, as explained by documentation submitted to the Record. This leads the Director to question whether the Respondent intentionally misled the Director.

Whether or not this is the case, the Director concurs with the Complainant's allegations, which accurately portray the Respondent's actions as favoring Gulf and, more importantly, served to protect Gulf's exclusive right to serve as the single FBO on the Airport.

As previously stated, FAA guidance and past precedent sustains: "A sponsor is not required to develop any and all parcels of land in a manner consistent with the wishes of any one party, but rather may exercise its proprietary rights and powers to develop and administer the Airport's land in a manner consistent with the public's interest." [Santa Monica Airport Association (SMAA), Krueger Aviation, and Santa Monica Air Center v. County of Santa Monica, *CA*, FAA Docket No. 16-99-21 (February 4, 2003), *(SMAA)* FAD at 19] Consistent with the findings in Gate 9, the Director distinguishes the instant Complainant from Santa Monica by noting that the sponsor has put forth no value or priority in pursuit of the public's interest in civil aviation, nor provided any other option for competitive FBO development. [*See*, Gate 9, pages 14-15; *See also*, Pacific Coast Flyers Inc., et al. v. San Diego, CA, FAA Docket No. 16-04-08, Director's Determination (July 25, 2005) (Pacific Coast Flyers)]

Is it not relevant to the Director whether the Respondent acted based upon the numerous erroneous statements made in the AMCG White Paper or due to pressure by the incumbent FBO. What is relevant is that the Respondent acted in a manner that protected the incumbent FBO from competition, and in doing so, violated Grant Assurance 23, *Exclusive Rights*.

Period 5: February 2012 through August 2012 – Post Meeting

As previously noted, during the February 16, 2012 Investigative Action Meeting, the FAA discussed possible locations on the airport where another FBO, such as the Complainant, could be facilitated based on the existing ALP, previous grant applications and awards, as well as the status of the proposed lease at that time. On February 20, 2012, the Airport Board passed a budget amendment to include local match funding for construction of the north GA ramp. [FAA Exhibit 1, Item 23, Exhibit A and B] A grant agreement subsequently was executed between the FAA and the City of Harlingen on May 8, 2012. [FAA Exhibit 1, Item 23, Exhibit F] Construction of the north GA ramp commenced on August 7, 2012. [FAA Exhibit 1, Item 23, Exhibit F] A lease with the Complainant was executed on August 8, 2010. [FAA Exhibit 1, Item 23, Exhibit F]

Findings and Conclusions for Period 5:
February 2012 through August 2012

The Respondent advised the FAA that on August 7, 2012, construction on the north GA ramp had commenced. Additionally, the Respondent stated it had executed a lease with the Complainant on August 8, 2012. [FAA Exhibit 1, Item 23, Exhibit F]

Once again, the Director makes determinations regarding current compliance. [*See*, Wilson, page 4.] The Part 16 process does not penalize sponsors for past compliance violations that it subsequently cured or is in the process of curing. [Goodrich Pilot Training Center, LLC, and Aviation Management Group, LLC v. Village of Endicott, New York, FAA Docket No. 16-08-03 (Director's Determination issued April 3, 2009)]

The Director finds that, as of the date this Determination is issued, the Respondent has taken the steps necessary to cure the actions that caused it to be in violation of Grant Assurance 23, *Exclusive Rights*.

D. ISSUE 4

The Complainant alleged the Respondent created an environment that prevented it from becoming as self-sustaining as possible and thereby violated Grant Assurance 24, *Fee and Rental Structure*. [FAA Exhibit 1, Items 2 and 8] The Respondent denied it acted in a manner contrary to its obligations. [FAA Exhibit, Items 7 and 11]

Under this issue, the Director will:

(4) Determine whether the Respondent took deliberate steps to compromise its self-sustainability in violation of Grant Assurance 24, *Fee and Rental Structure*.

In its Complaint and Reply, the Complainant alleged the Respondent actively prevented the Complainant from obtaining a lease in order to protect the incumbent FBO's monopoly as the sole FBO on the Airport. Specifically, the Complainant alleged the Respondent violated Grant Assurance 24, when it deliberately and purposefully removed from the Airport budget:

> *those improvements that would be necessary for a competing (FBO) enterprise in favor of rehabilitating and expanding the incumbent FBO's ramp and also for initiating a project to build a (sic) east GA ramp behind the existing FBO for which there are no interested tenants.* [FAA Exhibit 1, Item 8, page 13]

The Respondent denied the Complainant's allegations and asserted it:

> *has been self-sustaining at all material times. VIA's decisions, including those regarding Sun Valley, have always carefully taken into account its obligation to be self-sustaining. In its effort to be a prudent airport operator, VIA's Board has a long-established process of maintaining approximately $3,500,000 in operating reserves... In any event, VIA has acted prudently and has taken no action jeopardizing its strong commitment to remain self-sustaining.* [FAA Exhibit 1, Item 11, page 7]

Under Grant Assurance 24, an airport sponsor has the obligation to:

> *maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the*

circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection.

The Record supports the Complainant's allegation that the Respondent line item vetoed the $75,000 from the Airport budget identified to be used as the local match for an FAA AIP grant to construct the north GA ramp[35]. [FAA Exhibit 1, Item 11 and FAA Exhibit 1, Item 22, Exhibits A and D] The Record also supports the Complainant's allegation that the Respondent, instead, chose to invest in rehabilitating and developing the south GA ramp and the property east of Gulf Aviation's south hangar, further away from the airfield. [FAA Exhibit 1, Item 22, Exhibit C]

The Director reviewed the costs associated with the south and east general aviation projects.

Project	Federal Grant Amount	Local Share
South General Aviation	$980,144.00	$51,586.00
East General Aviation	$1,965,618.00	$103,453.00

[FAA Exhibit 1, Item 2, Exhibit K6 and FAA Exhibit 1, Item 22, Exhibits C]

The total amount invested in the two projects abutting the Gulf leasehold cost the Respondent more than $150,000 in local matching funds. The Record is not clear whether Gulf's monthly lease payments increased, or were slated to increase, to include the additional space these projects and improvements added to its leasehold.

The Record is clear that the local match for the north GA ramp was $75,000, according to the proposed amendment to the Airport budget submitted in December 2010.[36] Based on the proposed lease included in the Record, the Respondent would have recovered its investment of $75,000 in these infrastructure improvements in less than a year and a half. This estimate relies on the assumption that the rate base per square foot remained at $.15 per month and the Complainant did not pursue either option to expand its footprint that was provided for in the lease.[37] [FAA Exhibit 1, Item 11, Exhibit C]

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[35] According to the December 15, 2010 City Commission Meeting Minutes, the local match for the north GA ramp was $75,000. The parties also reference funding for a local matching share to develop an associated parking lot at times in addition to the north GA ramp project; however, that amount was not identified or referenced in the Dec 15 2010 City Commission Meeting. [FAA Exhibit 1, Item 22, Exhibit D]

[36] On February 14, 2012, the President signed into law the FAA Modernization and Reform Act of 2012 (the Act). Section 137 of this Act allowed a provision that originated under a previous authorization, which increased the Federal share of new projects from 90 percent to 95 percent to sunset. Therefore, AIP grants applied for and executed after the date of enactment of this Act are subject to the higher local match, pursuant to 49 U.S.C., § 47109. In the instant Complaint, the Respondent's estimated local match was calculated using the formula applicable at that time, which was prior to the enactment of the Act.

[37] According to the lease submitted to the Record at FAA Exhibit 1, Item 11, Exhibit C, the Complainant's base leasehold included approximately 25,400 square feet, excluding the fuel farm. See page 2. The base rate per square foot was set at $.15 per month, with an annual escalation clause based on increases in the consumer price index. See page 6. The base rate for the fuel farm was set at $600 per month. Multiplying 25,400 square feet by $.15 per square foot = $3,810 per month rent plus $600 per month for the fuel farm equals $4,410 per month. Taking the total estimated local match of $75,000 and dividing that by $4,410, the result is 17 months or less than a year and a half. Again, these estimates assume no base rent increases over the course of the first four years of the lease.

Findings and Conclusion

The Respondent made the decision to improve portions of the Airport that could not be a suitable location to host a second FBO. [FAA Exhibit 1, Item 15, Exhibit S and Item FAA Exhibit 1, Item 22, Exhibits A and D] The Respondent also chose not to develop a suitable location to provide access to an eligible and qualified aeronautical service provider. [FAA Exhibit 1, Item 22, Exhibits A and D] In reviewing whether these actions, separately and jointly, constituted a violation of Grant Assurance 24, *Fee and Rental Structure*, the Director must assess the intent of this obligation and its applicability to these specific set of facts.

First, the Director notes that Grant Assurance 24 does not require the sponsor to establish a fee and rental structure designed to maximize the Airport's profit potential. [*See* Valley Aviation Services, at 59] Instead, FAA guidance states:

> *Airports must maintain a fee and rental structure that makes the airport as financially self-sustaining as possible under the particular circumstances at that airport. The requirement recognizes that individual airports will differ in their ability to be fully self-sustaining, given differences in conditions at each airport. The purpose of the self-sustaining rule is to maintain the utility of the federal investment in the airport.* [See, FAA Order 5190.6B, Section 17.15]

With the construction of the north GA ramp and leasing of this space to a new FBO, specifically the Complainant, under the terms of the lease the Respondent submitted to the Record, it is clear that more revenue would have been directed to the Airport. By choosing to improve and expand the current operational area used by Gulf Aviation, the Respondent effectively reduced the amount of income it would have derived from the lease in place for the north GA ramp. However, the FAA will not dictate to an airport sponsor the manner in which it should expand or improve its infrastructure. In Pacific Coast Flyers, the FAA found it must rely on the sponsor's judgment and its proprietary right as the airport sponsor to achieve planned development at the airport.

In the instant Complaint, the Respondent's action of removing the north GA ramp from the Airport budget does not appear to have created an insolvent airport. The Director notes that the barometer for self-sustainability pivots on numerous variables such as the size of the airport, market conditions, and general economic factors such as demand. [See, FAA Order 5190.6B, Chapter 17] While the facts support the Respondent's claim that it maintained solvency with a surplus, those facts are not wholly relevant to this allegation. What is relevant is that the Respondent failed to recognize "*the purpose of the self-sustaining rule is to maintain the utility of the federal investment in the airport.* [See, FAA Order 5190.6B, Section 17.15] The Respondent took deliberate action to avoid developing infrastructure in support of its prime obligation. [*See*, Pompano, page 21] Moreover, the Respondent's failure to meet this obligation resulted in loss of lease income. Although the Director finds the Respondent's actions conflict with the purpose of the self-sustainability

obligation, the Director does not find the Respondent violated this assurance itself.[38] First, it is not readily evident through the documentation submitted to the Record that the potential income from the Complainant's proposed lease would have affected the airport's ability to be self-sustaining. Second, the lack of documentation pertaining to whether or not Gulf's lease rates increased with the addition of this new infrastructure does not conclusively support the allegation that the Respondent failed to enhance its leasing opportunities.[39]

Each concern, separately and jointly, are speculative at best and not germane to the question of the Respondent's current compliance. [*See* Thermco DD, page 22; *See also*, The Aviation Center, Inc. v. City of Ann Arbor, Michigan, FAA Docket No. 16-05-01, (December 16, 2005) (Director's Determination), page 8] The fact that the Respondent has commenced construction of the north GA ramp and executed a lease with the Complainant assures the Director that the Respondent has embraced the purpose of Grant Assurance 24, *Fee and Rental Structure*, and has taken steps to achieve a compliant posture[40]. The Director cautions the Respondent to ensure its leasing practices, including the leasing of ramp space adjoining a tenant's leasehold, is consistent with its obligations.

VII. FINDINGS AND CONCLUSION

Upon consideration of the submissions, responses by the parties, the Administrative Record herein, applicable law and policy, and for the reasons stated above, the Director of the FAA Office Airport Compliance and Management Analysis finds and concludes:

- The Respondent has achieved a status of current compliance with regard to Grant Assurance 22(a), *Economic Nondiscrimination,* by ceasing to unreasonably deny access to the Complainant.

- The Respondent has achieved a status of current compliance with regard to Grant Assurance 22(h), *Economic Nondiscrimination*, by ceasing to unjustly discriminate against the Complainant.

- The Respondent has achieved a status of current compliance with regard to Grant Assurance 23, *Exclusive Rights,* by ceasing to take deliberative steps to further protect the incumbent FBO's position as the sole FBO on the airport offering services similarly proposed by the Complainant.

- The Respondent currently is in compliance with regard to Grant Assurance 24, *Fee and Rental Structure*. The Director cautions the Respondent to ensure its leasing practices, including the leasing of ramp space adjoining a tenant's leasehold, is consistent with its obligations.

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[38] The Director discussed concerns regarding the Respondent's actions to protect Gulf's exclusivity under Grant Assurances 22 and 23 earlier in this Determination.
[39] Even if such facts existed in the Record, the Director would be inclined to assess the Respondent's reasoning in greater depth before making a definitive finding.
[40] See Infra page 51, citing Drake, pages 11-12

Recommendation

The following is a recommendation by the Director; in no way should this be constructed as a finding of noncompliance or any violation of the grant assurances.

To ensure the Respondent continues to maintain the standing of current compliance, the Director encourages the Respondent to provide quarterly updates to the FAA Office of Airport Compliance Division (ACO-100) regarding the status of related airport development and Complainants' tenancy. These reports may be similar to those that have been provided by outside counsel, Mr. David Moran, as reflected in the Administrative Record to this proceeding and should continue for 12 months following the date of this Determination. The Complainant should be included on these communications, as Mr. Moran has done in the past. Furthermore, should the Complainant object to any statements in such correspondence purporting to be factual, the Director encourages the Complainant to make its objections known. Because the findings in this Determination are contingent on the Respondent's disposition at the time of the decision, the Director reminds the Respondent that a change in course may jeopardize the findings contained herein.

VII. ORDER

Accordingly, it is ordered that:

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

VII. RIGHT TO APPEAL OR REQUEST A HEARING

This Director's Determination, FAA Docket No. 16-10-02, is an initial Agency determination and does not constitute a final Agency decision and order subject to judicial review. [14 CFR, § 16.247(b)(2)]. A party to this proceeding adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR, § 16.33(b) within thirty (30) days after service of the Director's Determination.

Randall Fiertz
Director, Office of Airport Compliance
and Management Analysis

12-11-12
Date