

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Flightline Ground, Inc.

Complainant

v.

Louisiana Department Of Transportation And
Development, As Successor To The Louisiana
Division Of Administration And The Board Of
Commissioners For The Management Of The
Lakefront Airport; Non-Flood Protection Asset
Management Authority, As Successor To The
Board Of Commissioners Of The Orleans Parish
Levee District And Orleans Parish Levee District,
Division Of Non-Flood Assets.

Respondent



FAA Docket 16-11-01

DIRECTOR'S DETERMINATION

I. INTRODUCTION

Complainant, Flightline Ground Inc., d/b/a Flightline First (Flightline) is a fixed base operator (FBO) providing services to aircraft owners and operators on the New Orleans Lakefront Airport (Airport).

The Respondent is the Non-Flood Protection Asset Management Authority, successor to the Board of Commissioners of the Orleans Levee District and Division of Administration, State of Louisiana, and the governing authority of the Non-Flood assets of the Orleans Levee District (OLD), including the New Orleans Lakefront Airport ('OLD' or Respondent).¹ [FAA Exhibit 1, Item 4, page 1]

The Complainant alleges that the Respondent violated 49 U.S.C., § 47107(a) (5)

¹ On January 1, 2007, Management of the Lakefront Airport shifted from the Orleans Levee District (OLD) to the State of Louisiana Division of Administration (DOA); ownership of the Airport stayed with the OLD. On August 15, 2010, Management shifted again from DOA to the newly created Non-Flood Asset Protection Management Authority (Authority); the Authority was under Louisiana's Department of Transportation and Development (DOTD) but OLD still held ownership of the Airport. On January 1, 2012, The Authority became a stand-alone political subdivision removed from DOTD; ownership continues to be with OLD.

and airport Grant Assurance 22(c), which requires that each fixed based operator at the airport shall be subject to the same rates, fees, rentals and other charges as are uniformly applicable to all other fixed based operators making the same or similar uses of such airport and utilizing the same or similar facilities. The Complaint alleges that the Respondent has allowed AeroPremier to default on its lease payments, insurance payments and other financial obligations, placing AeroPremier at a competitive advantage over Complainant. [FAA Exhibit 1, Item 1, page 4]

Additionally, the Complainant alleges that because the Respondent granted AeroPremier the right to sublease certain areas of Building 101, and to have sole option to cancel the lease of the McDermott Facility the Respondent violated Grant Assurances 5, *Rights and Powers*; 24, *Fee and Rental Structure*; 25, *Airport Revenues*; and 29, *Airport Layout Plan*. [FAA Exhibit 1, Item 1, pages 6-7]

These issues are listed in Section IV below and fully discussed herein.

With respect to the allegations presented in this Complaint, under the specific circumstances at the Airport as discussed below and based on the evidence of record in this proceeding, the FAA finds the Airport is not in violation of its Federal obligations at this time. The FAA's decision in this matter is based on applicable Federal law and FAA policy, review of the pleadings and supporting documentation submitted by the parties, reviewed by the FAA, which comprises the Administrative Record reflected in the attached FAA Exhibit 1.

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

II. Parties

A. The airport and its Federal Obligations

The Lakefront Airport (KNEW) is a public-use airport located in New Orleans, Louisiana. The sponsor of the airport is the Non-Flood Protection Asset Management Authority, successor of the Board of Commissioners of the Orleans Levee District and Division of Administration, State of Louisiana. The development of the Airport has been financed, in part, with funds provided to the sponsor 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.* [FAA Exhibit 1, Item 10] As a result, the sponsor is obligated to comply with the FAA sponsor assurances and related Federal law, like 49 U.S.C., §47107. The Airport has 116 based aircraft and approximately 52,000 operations per year. Since 1982, the airport has accepted \$31,444,836 in AIP grants for investments at the Lakefront Airport. [FAA Exhibit 1, Item 10]

B. Complainant

The Complainant is Flightline Ground, Inc. (Complainant). Flightline Ground is a fixed base operator (FBO) providing services to aircraft owners and operators on the New Orleans

Lakefront Airport (KNEW) and to transient aircraft requiring fuel, hangar or other services at the New Orleans Lakefront Airport.

III. Background & Procedural History

A. Factual Background

In late August 2005, Hurricane Katrina struck southeast Louisiana, causing severe damage to areas including the Lakefront Airport (Airport) in Orleans Parish, Louisiana.

On July 31, 2007, Complainant Flightline entered into a lease with the Airport, and on April 8, 2008, a third party FBO, AeroPremier Jet Center, LLC (AeroPremier), entered into a lease with the Airport. Throughout this time period repairs to buildings damaged by Hurricane Katrina continued to be made by the Airport. [FAA Exhibit 1, Item 4, page 2]

On August 13, 2009, the Airport issued a formal notice of default to AeroPremier for failure to pay rent. [FAA Exhibit 1, Item 1, exhibit C-9, page 3] AeroPremier withheld these payments because the Airport had not completed repairs to office space leased by AeroPremier, which the parties had agreed would be repaired by the Airport within 14 months of the effective date of the lease. [FAA Exhibit 1, Item 4, pages 2-3] The Airport and AeroPremier agreed to “stay legal action pending discussions to resolve the issues between them” with regard to the unpaid rent. [FAA Exhibit 1, Item 1, exhibit C-9, page 2]

On August 17, 2009, AeroPremier and its investors, Advantage Partners VI, LP and Advantage Capital Partnership XI, LP (Advantage Capital), filed a Petition for Breach of Contract and for Damages (Civil Suit) against the OLD in Orleans Parish Civil District Court, alleging that the Airport had breached their lease by not remediating damaged office space that was leased to AeroPremier, which the parties had agreed would be repaired by the Airport within 14 months of the lease execution. [FAA Exhibit 1, Item 4, pages 2-3, *see also* Civil Suit, FAA Exhibit 1, Item 4, Exhibit R-5] As part of this litigation, both AeroPremier and the OLD commissioned reports calculating the losses sustained by AeroPremier due to the OLD’s breach of the lease. The report commissioned by the OLD, written by Holly Sharp of LaPorte, Sehart, Romig and Hand, concluded estimates based on two different scenarios: in one scenario, AeroPremier suffered \$199,613 in lost profits, and in the second scenario, AeroPremier suffered no lost profits. [FAA Exhibit 1, Item 4, exhibit R-3, page 8] In the report commissioned by AeroPremier, written by Harold Flanagan of Flanagan Partners, AeroPremier sustained lost profits totaling \$2,559,400. [FAA Exhibit 1, Item 4, exhibit R-4, page 5]

On November 24, 2009, Flightline filed an informal Part 13 complaint with the FAA’s Louisiana/New Mexico Airports District Office (ADO), alleging violations of Grant Assurances 22, 24, and 5 for the Airport sponsor’s failure to evict AeroPremier for nonpayment of rent. On March 25, 2010 the ADO issued preliminary findings on the informal complaint, stating that “*we find that the Lakefront Airport sponsor is taking adequate action and at this time is in compliance with their grant assurances.*” [FAA Exhibit 1, Item 1, exhibit C-28, page 2]

On May 14, 2010, the District Court judge hearing the civil suit issued a Judgment granted a Motion for Summary Judgment filed by AeroPremier, which resulted in OLD being found to be summarily in breach of the lease between itself and AeroPremier. [FAA Exhibit 1, Item 4, exhibit 1, page 2] Following the issuance of this Judgment, the parties to the civil suit entered into mediation of the litigation, and on October 12, 2010, signed a Mutual Receipt, Release, and Indemnification Agreement (Settlement Agreement), settling the case for a total of \$1,258,000. [FAA Exhibit 1, Item 4, pages 3-5, *see also* Settlement Agreement, FAA Exhibit 1, Item 4, Exhibit R-2] In this Settlement Agreement, the parties agreed in part that:

1. *The OLD shall provide a \$473,000 credit to AeroPremier, which may be applied to past or future rent or any other obligation of AeroPremier to OLD.*
2. *The OLD shall provide a \$500,000 transferable rent credit to AeroPremier or Advantage as they shall agree between the two of them, which credit may be applied to rent due at any time on Building 101 on or after August 1, 2011. The credit may be applied in the amount of up to \$100,000 per year until exhausted.*
3. *The OLD waives and releases AeroPremier from the obligation under the Lease to invest \$285,000 in improvements to real property at the Airport.*
4. *The OLD waives and releases AeroPremier from the obligation under the Lease to pay rent for Building 101, including the hangar, from August 1, 2010 until renovations of Building 101 (as a whole) are completed.*
5. *AeroPremier shall receive a rent credit for any leased space within Building 101, which is presently in use by AeroPremier, to the extent such space is unusable due to OLD's construction/renovation activities resulting from Lessor's Repair Obligation.*
6. *OLD shall be responsible for the repair of damage to Building 101 which occurred as a result of Hurricane Katrina. OLD shall be further responsible for the repair of damage to Building 101 which may occur as a result of the Lessor's Repair Obligation.*
7. *The office and customer service space within Building 101 shall [...] be commercially acceptable office space suitable for use as a FBO [...]*
8. *The OLD shall lease Building 103 to AeroPremier [...]*
9. *At any time before the expiration of 21 months after completion of the Lessor's Repair Obligation, as defined herein, AeroPremier shall have the right to either sub-lease the 2nd floor of Building 101 or to release the space to the OLD and thus exclude it from the Lease.*
10. *AeroPremier shall not pay for (i) parking or sod in publically accessible areas and outside of the Airport fence (ii) car parking spaces it does not need.*
11. *AeroPremier shall have access to terminal areas to the same extent as other FBOs, including without limitation, terminal ramp space for aircraft arrivals, departures and U.S. Customs.*
12. *AeroPremier shall have the right, at its sole option, to cancel the Lease of the McDermott facility [...] effective upon 60 days' notice to OLD.*

[FAA Exhibit 1, Item 27, Exhibit R-2, pages 2-3]

The Settlement Agreement also contained the condition that it was subject to FAA approval. [FAA Exhibit 1, Item 27, Exhibit R-2, page 4] The FAA does not approve or disapprove agreements between sponsors and third parties, but on November 18, 2010 the FAA's Louisiana/New Mexico ADO provided comments regarding "concerns [the FAA] may have that could result in potential violations of the sponsor's grant assurance obligations." [FAA Exhibit 1, Item 33, page 1] These concerns included:

- The disparity between the two commissioned reports estimating AeroPremier's losses due to the breach of contract, which "*may result in an improper use of airport revenue if the sponsor agrees to provide unfounded compensation, subsidies, and/or set an improper fee schedule benefitting AeroPremier in violation of Grant Assurance 22, Economic Non Discrimination; 24, Fee and Rental Structure; and 25, Airport Revenue.*" [FAA Exhibit 1, Item 33, page 1]
- The lack of documentation submitted by AeroPremier regarding its losses and profits, which "*may lead to more violations of Grant Assurances 22 (Economic Nondiscrimination) and 24 (Fee and Rental Structure).*" [FAA Exhibit 1, Item 33, page 2]
- Concerns that "*the sponsor may have or may be ceding its rights and powers to operate and administer the airport by executing a settlement agreement that may allow AeroPremier to make leasing decisions without the sponsor's approval or acknowledgment that such decisions are in accordance with the Airport Layout Plan and the sponsor's right to develop its airport. [...] Grant Assurance 5 (Preserving Rights and Powers) and Grant Assurance 29 (Airport Layout Plan) may be affected by this provision.*" [FAA Exhibit 1, Item 33, page 2]

On February 2, 2011, the Complainant, Flightline Ground, Inc. filed a formal Part 16 Complaint with the FAA, alleging that the Respondent, as sponsor of the Lakefront Airport has engaged in activity contrary to its Federal obligations. In its Complaint, Flightline alleges that the Respondent has systematically and continuously permitted a competing fixed-base operator (FBO), AeroPremier, to default on financial obligations to the Respondent, which has placed the Complainant at a competitive disadvantage. [FAA Exhibit 1, Item 1, page 4] Complainant specifically alleges that the Respondent has violated 49 U.S.C., § 47107(a) (5) and airport Grant Assurance 22(c), which requires that each fixed based operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed based operators making the same or similar uses of such airport and utilizing the same or similar facilities. The Complainant also alleges the Respondent has violated Grant Assurances 5, 24, 25, and 29. [FAA Exhibit 1, Item 1, pages 4-7]

B. Procedural History

On February 2, 2011, the Complainant, Flightline Ground, Inc. filed a formal Complaint. [FAA Exhibit 1, Item 1]

On February 22, 2011, FAA issued a docketing notice and assigned docket number 16-11-01 to the Complaint. [FAA Exhibit 1, Item 2]

On March 15, 2011, the Respondent filed a motion for an extension of time to file an Answer. [FAA Exhibit 1, Item 3]

On March 22, 2011, the Respondent provided its Answer to the Complaint. [FAA Exhibit 1, Item 4]

On March 17, 2011, the Complainant filed a motion to alter the briefing schedule. [FAA Exhibit 1, Item 5]

On March 17, 2011, the Complainant responded to the Respondent's motion for extension of time to file an Answer. [FAA Exhibit 1, Item 6]

On March 17, 2011, the Complainant filed a motion to amend the style of case. [FAA Exhibit 1, Item 7]

On March 21, 2011, the Complainant filed a motion to extend time to respond to the Respondent's Answer. [FAA Exhibit 1, Item 8]

On March 28, 2011, the Complainant filed a second motion to extend time to respond to the Answer of the Respondent. [FAA Exhibit 1, Item 9]

On April 6, 2011, the Airport Grant History for Lakefront Airport was added to the docket. [FAA Exhibit 1, Item 10]

On April 6, 2011, Complainant submitted its Reply to the Respondent's Answer. [FAA Exhibit 1, Item 11]

On April 5, 2011, Counsel for the Complainant submitted an Affidavit in support of the Complaint from Michael A. Hodges, ABS Aviation Consultancy, Inc., d/b/a Airport Business Solutions. [FAA Exhibit 1, Item 12]

On April 13, 2011, Respondent filed a First Motion to Extend the Time to Rebut the Complainant's Response to the Answer of the Management Authority. [FAA Exhibit 1, Item 13]

On April 15, 2011, Complainant filed Notice of the Intention to Move to Amend Complainant's Response to the Answer of the Management Authority Based upon Newly Discovered Evidence. This submission includes exhibit C-66, dated April 13, 2011. [FAA Exhibit 1, Item 14]

On April 21, 2011 the Complainant filed 3 additional pleadings:

- (1) Complainant's Notice of The Intention to Move to Amend Complainant's Response to the Answer of the Management Authority Based upon Newly Discovered Evidence, dated April 15, 2011. Includes exhibit C-66.

(2) Complainant's Motion to Amend Complainant's Response to the Answer of the Management Authority Filed April 6, 2011.

(3) Complainant's Amendment to Its Response to the Answer of the Management Authority Based upon Newly Discovered Evidence. [FAA Exhibit 1, Item 16]

On April 22, 2011, Complainant filed an Amended Complaint. [FAA Exhibit 1, Item 15]

On April 25, 2011, Complainant filed a Motion to Amend Complaint. Includes exhibits C-66 through C-71. [FAA Exhibit 1, Item 17]

On April 27, 2011, Respondent filed a Motion to Suspend Procedural Process And, In the Alternative, For an Extension of Time in Which to Respond. [FAA Exhibit 1, Item 18]

On April 29, 2011, the FAA issued a Notice of Extension of Time to Rebut the Complainant's Response to the Answer of the Management Authority, which extended the Rebuttal deadline to May 3, 2011. [FAA Exhibit 1, Item 19]

On May 5, 2011, the FAA issued a Second Notice of Extension of Time regarding Respondent's Motion to Suspend Procedural Process to allow Respondent until June 3, 2011 to file its Rebuttal. [FAA Exhibit 1, Item 20]

On March 15, 2011, The Louisiana Department of Transportation and Development answered and stated it is not a proper party to the Complaint as it does not have any legal authority over the Non-Flood Protection Asset Management Authority. Electronically signed and dated March 15, 2011. [FAA Exhibit 1, Item 21]

On April 29, 2011, the Complainant filed a Brief In Opposition of Flightline Ground, Inc. to Respondent's Motion to Suspend Procedural Process and in the Alternative, For an Extension of Time within Which to Respond. Includes Exhibit A. [FAA Exhibit 1, Item 22].

On May 2, 2011, Complainant filed a Brief In Opposition Of Flightline Ground, Inc. To The Prayer In The Motion Of The Louisiana Department Of Transportation And Development Requesting Dismissal, Dated May 2, 2011. [FAA Exhibit 1, Item 23]

On March 24, 2011, the Complainant filed an Amendment to Correct Errata to the Complaint. [FAA Exhibit 1, Item 24]

On June 2, 2011, the Respondent filed its Rebuttal to the Complainant's Response and Amended Response And Response to the Amended Complaint by the Management Authority, which includes Exhibit 1. [FAA Exhibit 1, Item 25]

On September 15, 2011, the FAA issued a Notice of Extension of Time to December 20, 2012. [FAA Exhibit 1, Item 34]

On December 6, 2011, The Director of the Office of Airport Compliance and Management Analysis issued a Request for Additional Information and Notice of Extension of Time. [FAA Exhibit 1, Item 26]

On January 5, 2012, the Respondent provided a Submission of Documents in Response to the Request for Additional Information. [FAA Exhibit 1, Item 27]

On January 13, 2012, the Complainant filed a Motion to Strike or in the Alternative File Affidavit of Brayton Matthews in Response to Respondent's Submission of Documents. [FAA Exhibit 1, Item 29]

On January 13, 2012, the Complainant also submitted an affidavit from Brayton Matthews, Manager and Secretary of Flightline Ground. [FAA Exhibit 1, Item 28].

On January 16, 2012, the Respondent filed an Opposition to Complainant's Motion to Strike or in the Alternative File Affidavit of Brayton Matthews in Response to Respondent's Submission of Documents. [FAA Exhibit 1, Item 30]

On February 21, 2012, the FAA issued an Order Denying Motion to Strike and Granting Motion to File Affidavit, and Notice of Extension of Time. [FAA Exhibit 1, Item 31]

On April 2, 2012, the FAA issued a Notice of Extension of Time to June 30, 2012. [FAA Exhibit 1, Item 32]

Letter dated November 18, 2010 to Mr. Robert Lupo and Mr. Louis Capo from Andy Velayos, Lead Program Manager for FAA's Louisiana/New Mexico ADO regarding proposed settlement agreement between OLD and AeroPremier. [FAA Exhibit 1, Item 33]

On June 20, 2012, the FAA issued a Notice of Extension of Time to August 31, 2012. [FAA Exhibit 1, Item 35]

On August 27, 2012, the FAA issued a Notice of Extension of Time to September 17, 2012. [FAA Exhibit 1, Item 36]

On September 18, 2012, the FAA issued a Notice of Extension of Time to October 12, 2012. [FAA Exhibit 1, Item 37]

IV. ISSUES

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

Issue 1 - Determine whether Respondent violated Grant Assurance 5, Rights and Powers and/or Grant Assurance 29, Airport Layout Plan, by (1) allowing AeroPremier the right to sublease the second floor of Building 101 without seeking prior permission

from the Respondent and (2) granting AeroPremier the right at its sole option to cancel the lease of the McDermott facility.

Issue 2 - Determine whether the Respondent is in violation of Grant Assurance 19, Operation and Maintenance by (1) failing to operate the airport suitably because they did not restore the National Guard Hangar within 14 months of the effective date of the Respondents lease with AeroPremier or (2) allowing the airport to deteriorate and to become a safety hazard because of open drainage area.

Issue 3 – Determine whether the Respondent violated Grant Assurance 22(c), Economic Nondiscrimination by (1) entering into a settlement for damages with AeroPremier and its Advantage Capital parents or (2) charging Complainant non-reduced insurance premiums which resulted in unjust economic discrimination.

Issue 4 - Determine whether the Respondent violated Grant Assurance 24, Fee and Rental Structure, by (1) making no effort to collect monies due from AeroPremier and (2) by intentionally subsidizing AeroPremier with revenues generated by the Airport.

V. APPLICABLE LAW AND POLICY

The following is a discussion pertaining to the (a) FAA's enforcement responsibilities; (b) the FAA compliance program; (c) statutes, sponsor assurances, and relevant policies; and (d) the complaint and appeal process.

A. FAA Enforcement Responsibilities

The Federal Aviation Act of 1958, as amended, 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 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 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 grant assurances.

B. 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 which airport sponsors operate in a manner consistent with their Federal obligations and the public's interest in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of valuable rights, which 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.

Order 5190.6B, *FAA Airport Compliance Manual* (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 for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for the grant of Federal funds or the conveyance of 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 interpretation of the assurances by FAA personnel.

The FAA Compliance program is designed to achieve voluntary compliance with Federal obligations accepted by owners and/or operators of public-use airports developed with FAA administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable Federal obligations. Consequently, "*the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligations to be grounds for dismissal of such allegations.*" [See Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, (August 30, 2001) (Final Decision and Order), page 5 (Wilson FAD).]

C. Statutes, Sponsor Assurances, and Relevant Policies

As a condition precedent to providing airport development assistance under the Airport and Airway Improvement Act of 1982 (AAIA), codified at title 49 U.S.C., § 47101, et seq., the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 U.S.C., § 47101, et seq., sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. These sponsorship requirements are included in every airport improvement program (AIP) grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal Government.

Six grant assurances are relevant to the Complainant's Complaint: Grant Assurance 5, *Preserving Rights and Powers*; Grant Assurance 19, *Operation and Maintenance*; Grant Assurance 22, *Economic Nondiscrimination*; Grant Assurance 24, *Fee and Rental Structure*; Grant Assurance 25, *Airport Revenues*; and Grant Assurance 29, *Airport Layout Plan*.

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

Grant Assurance 5, *Preserving Rights and Powers*², requires the airport owner or sponsor to retain all rights and powers necessary to ensure the continued operation of the airport consistent with its Federal obligations. This assurance implements provisions of the Airport and Airway Improvement Act of 1982 (AAIA) at 49 U.S.C., § 47107(a), et seq., and requires, in pertinent part, that the owner or sponsor of a federally obligated airport “[...]will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor.”

FAA Order 5190.6B, *Airport Compliance Manual*, describes the responsibilities under grant assurance 5 assumed by the owners or sponsors of public-use airports developed with Federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport. [See Order 5190.6B, section 7.8(c)]

2. Grant Assurance 19, *Operation and Maintenance*

Grant Assurance 19, *Operation and Maintenance*, requires, in pertinent part that

The airport and all facilities which are necessary to serve the aeronautical users of the airport, [...] shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. [Assurance 19]

3. Grant Assurance 22, *Economic Nondiscrimination*

Grant Assurance 22, *Economic Nondiscrimination*, requires the owner of any airport developed with Federal grant assistance 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 fair and reasonable terms, and without unjust discrimination. Grant Assurance 22 deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory

² 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.

conditions as a potential for limiting access. Grant Assurance 22 implements the provisions of 49 U.S.C., § 47107(a) (1) through (6), and requires, in pertinent part that

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

Each fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport and utilizing the same or similar facilities. [Assurance 22(c).]

[The airport owner or sponsor] may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.
[Assurance 22(h).]

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

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

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [See FAA Order 5190.6B, section 14.3.]

FAA Order 5190.6B describes the responsibilities under Grant 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 generally FAA Order 5190.6B, 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 activities on reasonable terms and without unjust discrimination. [See FAA Order 5190.6B, section 9.1(a)]

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

Grant Assurance 24, *Fee and Rental Structure*, implements the provisions of the AAIA, 49 U.S.C., § 47107(a) (13), and requires, in pertinent part, that the sponsor of a federally obligated airport assure that:

It 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. [Assurance 24]

Grant Assurance 24 addresses fees the owner or sponsor levies on airport users in exchange for the services the airport provides and 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.]

5. Grant Assurance 25, *Airport Revenues*

Grant Assurance 25, *Airport Revenues*, implements provisions of 49 U.S.C., § 47107(b) and § 47133, et seq., and requires, in pertinent part, that the sponsor of a federally obligated airport assure:

a. All revenues generated by the airport and any local taxes on aviation fuel established after December 30, 1987, will be expended by it for the capital or operating costs of the airport; the local airport system; or other local facilities which are owned or operated by the owner or operator of the airport and which are directly and substantially related to the actual air transportation of passengers or property; or for noise mitigation purposes on or off the airport. [...]

b. As part of the annual audit required under the Single Audit Act of 1984, the sponsor will direct that the audit will review, and the resulting audit report will provide an opinion concerning, the use of airport revenue and taxes in paragraph (a), and indicating whether funds paid or transferred to the owner or operator are paid or transferred in a manner consistent with Title 49, United States Code and any other applicable provision of law, including any regulation promulgated by the Secretary or Administrator.

c. Any civil penalties or other sanctions will be imposed for violation of this

assurance in accordance with the provisions of Section 47107 of Title 49, United States Code. [Assurance 25]

FAA's Policy and Procedures Concerning the Use of Airport Revenues (64 Fed. Reg. 7696, February 16, 1999) (Revenue Use Policy) provides, among other things, the FAA's policy on the use of airport revenue. It provides, in relevant part, that:

1. All fees, charges, rents, or other payments received by or accruing to the sponsor for any one of the following reasons are considered to be airport revenue:

b. Revenue from sponsor activities on the airport. Airport revenue generally includes all revenue received by the sponsor for activities conducted by the sponsor itself as airport owner and operator, including revenue received:

i. From any activity conducted by the sponsor on airport property acquired with federal assistance;

ii. From any aeronautical activity conducted by the sponsor which is directly connected to a sponsor's ownership of an airport subject to 49 U.S.C. § 47107(b) or 47133; or

iii. From any nonaeronautical activity conducted by the sponsor on airport property not acquired with federal assistance, but only to the extent of the fair rental value of the airport property. The fair rental value will be based on the fair market value.

[Revenue Use Policy at Section II.B.1.b., 64 Fed. Reg. 7696, 7716 (Feb. 16, 1999)]

6. Grant Assurance 29, Airport Layout Plan

Grant Assurance 29, *Airport Layout Plan*, implements provisions of 49 U.S.C., § 47107(a) (16), and requires that the sponsor of a federally obligated airport assure:

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

b. If a change or alteration in the airport or the facilities is made which

the Secretary determines adversely affects the safety, utility, or efficiency of any federally owned, leased, or funded property on or off the airport and which is not in conformity with the Airport Layout Plan as approved by the Secretary, the owner or operator will, if requested by the Secretary (1) eliminate such adverse effect in a manner approved by the Secretary; or (2) bear all costs of relocating such property (or replacement thereof) to a site acceptable to the Secretary and all costs of restoring such property (or replacement thereof) to the level of safety, utility, efficiency, and cost of operation existing before the unapproved change in the airport or its facilities.
[Assurance 29]

Specifically, Grant Assurance 29 requires the airport owner or sponsor to keep its Airport Layout Plan (ALP), which is a planning tool for depicting current and future airport use, up to date. Grant Assurance 29 prohibits the airport owner or sponsor from making or permitting any changes or alterations in the airport or any of its facilities that are not in conformity with its FAA-approved Airport Layout Plan.

D. The Complaint and Appeal Process

1. Right to File the Formal Complaint

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

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. “In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided [...]. Each party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance.” [14 CFR, Part 16, §16.29.]

“The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense.” [14 CFR, 16.229(b)-(c)] This standard burden of proof is consistent with the Administrative Procedure Act (APA) and Federal case law. The APA provision states, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C., §556(d). See also, Director, Office of Worker’s Compensation Programs, Department of Labor v. Greenwich Collieries, 512 US 267, 272 (1994); Air Canada et al. v. Department of Transportation, 148 F3d 1142, 1155-56 (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(b)(1) states that

“[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance.”

2. Right to Appeal the Director’s Determination

A party to this decision 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. If no appeal is filed within the time period specified, 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. [14 CFR, §16.33.]

14 CFR, Part 16 requires all relevant facts to be presented in the complaint documents. [14 CFR, §16.23(b)(3).] New allegations or issues should not be presented on appeal. Review by the Associate Administrator is limited to an examination of the Director’s Determination and the administrative record upon which such determination was based. Under Part 16, a complainant is required to provide with the complaint and reply all supporting documentation upon which it relied to substantiate its claims. Failure to raise all issues and allegations in the original complaint documents may be cause for such issues and allegations to be deemed waived and not reviewable upon appeal. This is consistent with the Supreme Court’s recognition that courts may require administrative issue exhaustion as a general rule because it is usually appropriate under an [administrative] agency’s practice for contestants in an adversarial proceeding before it to develop fully all issues there. The Court concluded that where parties are expected to develop the issues in an adversarial administrative proceeding, the rationale for requiring issue exhaustion is at its greatest. [See Sims v. Apfel, 530 US 103, 108-110 (2000) citing Hormel v. Helvering, 312 US 552 (1941) and US v. LA Tucker Truck Lines, 344 US 33, (1952).]

3. FAA’s Responsibility with Regard to an Appeal

Pursuant to 14 CFR, §16.33, the Associate Administrator will issue a final decision on appeal from the Director’s Determination, without a hearing, where the complaint is dismissed after investigation.

In such cases, *“it is the Associate Administrator’s responsibility to determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy.”* [Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, (December 30, 1999) (Final Decision and Order) page 9, *see also* 14 CFR, §16.227.]

VI. ANALYSIS AND DISCUSSION

Issue 1: Determine whether Respondent violated Grant Assurance 5, Rights and Powers and/or Grant Assurance 29, Airport Layout Plan, by (1) allowing AeroPremier the right to sublease the second floor of Building 101 without seeking prior permission from the

Respondent and (2) granting AeroPremier the right at its sole option to cancel the lease of the McDermott facility.

Grant Assurance 5 requires the airport owner or sponsor to retain all rights and powers necessary to ensure the continued operation of the airport consistent with its Federal obligations. Additionally, it requires that the owner or sponsor of a federally obligated airport

“[...] will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor.”
[Assurance 5]

Grant Assurance 29, Airport Layout Plan states in part that an airport sponsor

will keep up to date at all times an airport layout plan of the airport showing:

(1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto;

(2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), including all proposed extensions and reductions of existing airport facilities;

(3) the location of all existing and proposed non-aviation areas and of all existing improvements thereon.

[Assurance 29]

1. The Complainant alleges that the Respondent has violated Grant Assurance 5 and 29 by permitting AeroPremier the right to sublease the second floor of Building 101.

In the Mutual Receipt, Release and Indemnification Agreement, OLD and AeroPremier agreed that *“At any time before the expiration of 21 months after completion of the Lessor’s Repair Obligation, as defined herein, AeroPremier shall have the right to either sub-lease the 2nd floor of Building 101 or to release the space to the OLD and thus exclude it from the Lease.”* [FAA Exhibit 1, Item 27, exhibit R-2, page 3]

The Complainant argues that, by agreeing to this term, the Respondents

have violated and are violating Grant Assurance No. 5, because vesting this power and authority in AeroPremier ‘would operate to deprive (Respondents) of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in this grant agreement without the written approval of the Secretary...’

Further, these actions violate Grant Assurance 29, Airport Layout Plan.” [FAA Exhibit 1, Item 15, page 9]

In its Rebuttal, the Respondent argues that, contrary to the Complainant’s belief, allowing a lessee to sublease space is not a violation of the Grant Assurances, and that, “[i]f granting the right to sublease space is a violation of the statute, there are a number of airports around the country in violation.” [FAA Exhibit 1, Item 25, page 8]

Other than the Complainant’s statement that the Respondent is in violation of Grant Assurance 5 because AeroPremier was granted the right to sub-lease the 2nd floor of Building 101 without explicit concurrence from the Respondent, there is no evidence in the record that shows whether the potential subtenants would be aeronautical or nonaeronautical users. Indeed, there is no evidence to show that the space has actually been subleased at this time, as there were no subleases or other pertinent information submitted to the administrative record.

The FAA encourages an airport sponsor to maintain the right to approve in advance an assignment (sale of the lease) or sublease by the tenant. For example, the sponsor should maintain the right to intervene if an aeronautical tenant decides to lease aeronautical space to a nonaeronautical tenant. It is unclear in this Complaint what actions may or may not have been taken regarding the subleasing of the 2nd floor of Building 101 that causes the Complainant concern. There is no evidence presented that the space has been leased for a nonaeronautical purpose at this time.

The Director is unable to make a finding at this time on allegations that Grant Assurance 5 has been violated by the OLD. It is not uncommon for tenants to have rights to sublease part of their leased premises, but such agreements should be subject to sponsor concurrence. The FAA reviews current compliance [See Wilson FAD, page 5], and lacking evidence in the pleadings that a violation has occurred, the Director can only strongly caution the airport sponsor to be engaged and informed when or if a sublease is granted. In addition, the Director cautions the airport sponsor that any future sublease to a nonaeronautical tenant in Building 101 without FAA concurrence subjects the sponsor to a potential violation of Grant Assurance 5.

The Respondent is also strongly encouraged to place a “subordination clause” in all of its tenant leases and agreements that subordinates the terms of the lease or agreement to all current and future Federal grant assurances and surplus property obligations. A subordination clause may assist the sponsor in amending a tenant lease or agreement that otherwise deprives the sponsor of its rights and powers. A typical subordination clause states that if there is a conflict between the terms of a lease and the Federal grant assurances, the grant assurances will take precedence and govern.

2. The Complainant alleges that the Respondent has violated Grant Assurance 5 and 29 by permitting AeroPremier the right at its sole option to cancel the lease of the McDermott facility.

In the Mutual Receipt, Release and Indemnification Agreement, paragraph 12, OLD and AeroPremier agreed that “*AeroPremier shall have the right, at its sole option, to cancel the Lease of the McDermott facility [...] effective upon 60 days’ notice to OLD. Except as provided herein, the Lease as it relates to McDermott facility remains unchanged.*” [FAA Exhibit 1, Item 27, Exhibit R-2, page 3]

In the Complaint, the Complainant argues that this provision of the Settlement Agreement between the Respondent and AeroPremier is proof that the Respondent “*has violated and is violating Grant Assurance Numbers [...] 5 Preserving Rights and Powers, and 29 Airport Layout Plan.*” [FAA Exhibit 1, Item 15, page 10]

In its response to the Complaint, the Respondent did not specifically address the allegation that it violated Grant Assurance 5 or 29 by allowing AeroPremier the right to cancel its lease on the McDermott facility with 60 days’ notice. Rather, the Respondent seems to rely on a general denial of grant assurance violations and focuses its affirmative arguments on the need and validity of the Mutual Receipt, Release and Indemnification Agreement (Settlement Agreement) to spare the airport a more expensive end result.

The FAA’s Southwest Region Louisiana/New Mexico ADO reviewed the proposed settlement agreement between the New Orleans Lakefront Airport and AeroPremier Jet Center in a letter sent to Mr. Robert Lupo, Chairman of the Non-Flood Protection Asset Management Authority and Mr. Louis Capo, Director of Non-Flood Assets, Orleans Levee District on November 18, 2010. The letter noted that the FAA does not approve or disapprove agreements or contracts executed by sponsors with third parties, though it did provide general comments regarding concerns that could result in potential violations of the sponsor’s grant assurance obligations. The letter stated in part,

“[...] we also have concerns that the sponsor may have or may be ceding its rights and powers to operate and administer the airport by executing a settlement agreement that may allow AeroPremier to make leasing decisions without the sponsor’s approval or acknowledgment that such decisions are in accordance with the Airport Layout Plan and the sponsor’s right to develop its airport. The FAA reminds the sponsor that the language in the proposed settlement agreement allowing AeroPremier the right to sublease certain space should be subordinate to the grant assurances. For example, Grant Assurance 5 (Preserving Rights and Powers) and Grant Assurance 29 (Airport Layout Plan) may be affected by this provision.”

[FAA Exhibit 1, Item 33, page 2]

As discussed above in 1 and in the November 2010 letter from the FAA to Mr. Lupo and Mr. Capo, [FAA Exhibit 1, Item 33, page 2] FAA encourages an airport sponsor to maintain leases that are subordinate to the airport grant assurances and are beneficial to the airport. However, no evidence has been provided in these pleadings that the permission granted in the Settlement Agreement has caused the airport to breach its obligations under the grant assurances. Moreover, aside from the allegation in the Complaint, and the Respondent’s brief response, there is little discussion of this issue within the pleadings. As stated above, the FAA reviews current compliance, and no evidence appears in the record that AeroPremier has

actually cancelled its lease of the McDermott facility without OLD's oversight. [See Wilson FAD, page 5] Simply alleging that the ability to sublease or cancel a lease has caused a violation is not sufficient to find the Respondent in noncompliance. Again, the Respondent is encouraged to administer and enforce provisions in its lease agreements with its tenants, including advance written approval of tenant subleases and oversight of the accommodation of subleases to avoid violating the grant assurances.

Summary of Issue 1

Because the FAA reviews current compliance, the Director is not persuaded that granting permission to sublease the 2nd floor of Building 101 or allowing AeroPremier to have the sole option to cancel the lease on the McDermott hangar rises to a violation of either Grant Assurance 5 or 29 at this time. However, the Director cautions the OLD that if the permission to sublease the 2nd floor of the National Guard Hangar results in a sublease for a nonaeronautical purpose without agreement from the FAA, or if AeroPremier were to cancel its lease of the McDermott facility without OLD oversight, the OLD could be found in noncompliance under Grant Assurances 5 and 29.

Issue 2: Whether the Respondent is in violation of Grant Assurance 19, Operation and Maintenance by (1) failing to operate the airport suitably because Respondents did not restore the National Guard Hangar within 14 months of the effective date of the Respondents lease with AeroPremier and/or (2) allowing the airport to deteriorate and to become a safety hazard because of an open drainage area and changes to an on-airport maintenance schedule.

Grant Assurance 19, Operation and Maintenance states in pertinent part that:

The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith, with due regard to climatic and flood conditions.

[...]

Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.

[Assurance 19]

Grant Assurance 19, *Operation and Maintenance*, is the most encompassing Federal grant assurance related to airport maintenance. It requires the sponsor to operate and maintain the

airport's aeronautical facilities – including pavement – in a safe and serviceable condition in accordance with the standards set by applicable Federal, state, and local agencies. [FAA Order 5190.6B, 7.3 et. seq.]

1. The Complainant alleges that the Respondent has violated Grant Assurance 19 by failing to restore the National Guard Hangar within 14 months of the effective date of the Respondent's lease with AeroPremier.

In the Amended Complaint, Complainant alleges that the Respondent “*failed to maintain and operate the Airport suitably as required by 49 U.S.C. §47107(a)(7)*”³ because the Respondent

[...] did not restore the NG Hangar⁴ within fourteen (14) months of the effective date of the Respondent's lease with AeroPremier [...] as required by Section IV A and B of the AeroPremier Lease. [...] Respondents failed to exercise reasonable diligence by contractually obligating themselves to restore the initial eight thousand square feet of office space in the NG Hangar [...] without regard to whether FEMA⁵ funds required to restore the office space in the NG Hangar were actually available. A reasonable, prudent and competent Airport Sponsor would have conditioned or qualified its obligation to make improvements on the National Guard Hangar on the FEMA funds being available, but Respondents failed to do so.

[FAA Exhibit 1, Item 15, pages 4-5]

In its response, the Respondent stated:

On July 31, 2007, OLD entered into a lease with a new FBO, Flightline Ground, Inc., and on April 8, 2008 entered into another lease with a third FBO, AeroPremier Jet Center [...] These leases were entered into in an effort to enhance the Airport's revenues and to increase competition between and among the FBOs in an effort to make the Airport more self-sustainable. When these leases were entered into, certain hangars had been repaired. However, all three FBOs at the Airport operated their offices from trailers after Hurricane Katrina.

The lease with AeroPremier specifically recognized this deficient status of its office space by stating in Paragraph IV that the former National Guard Hangar (NG Hangar) 'may not be ready for use and occupancy' by the lease's effective date, June 1, 2008, and required the OLD to repair the office space within fourteen months of the effective date or by August 1, 2009. [...] OLD had and still has a number of challenges in its continuing efforts to bring the Airport to its pre-Katrina status. [...] As a result, funds were not available to repair the NG office space by August 1, 2009. [...] As a result of OLD's inability to meet this contractual obligation to AeroPremier, litigation ensued between OLD and AeroPremier and OLD was adjudged by a Louisiana State court judge to be liable for breach of the lease with AeroPremier.

³ 49 U.S.C., §47107(a)(7) states, “the airport and facilities on or connected with the airport will be operated and maintained suitably, with consideration given to climatic and flood conditions.”

⁴ NG Hangar means National Guard Hangar

⁵ Federal Emergency Management Agency

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

The Respondent goes on to state, as far as the Settlement Agreement is concerned, “*in essence, the OLD agreed to the mediated settlement to abate a certain amount of rent owned by AeroPremier over a certain period of time, instead of being faced with a state court settlement for damages which would require all of AeroPremier’s rent to be offset for an uncertain period of time.*” [FAA Exhibit 1, Item 4, page 4]

Additionally, the Respondent notes its belief that “[t]he issues raised by the Complainant’s entire complaint [are] an expression of dissatisfaction with OLD’s handling of the litigation with AeroPremier. [...] Complainant’s greatest dissatisfaction is that, in spite of the harm that was inflicted on AeroPremier as a result of the breach of its lease by the OLD, it continues to operate and compete with Complainant.” [FAA Exhibit 1, Item 4, page 4-5]

Other than the statements above, the Complainant has not articulated why this failure to timely repair the NG Hangar resulted in the Respondent’s failure to operate and maintain the airport in the manner required by Grant Assurance 19.

The Respondent has stated that expected funds from the Federal Emergency Management Agency (FEMA) were not made available in time to affect the promised repairs to AeroPremier’s leasehold. The damage to the NG Hangar and many other structures on the Airport were caused by Hurricane Katrina.

Grant Assurance 19 specifically states that “*nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.*” [Assurance 19]

In this case, it is evident that the Respondent was confronted with not only physical damage to the Airport, but also with the need to coordinate with Federal agencies to provide additional financial aid to allow repair and reconstruction.

Although an acceptable level of maintenance is difficult to express in measurable units, the FAA will consider a sponsor compliant with its Federal maintenance obligation when the sponsor:

- a. Fully understands that airport facilities must be kept in a safe and serviceable condition.
- b. Makes available the equipment, personnel, funds, and other resources, including contract arrangements, to implement an effective maintenance program.
- c. Adopts and implements a detailed program of cyclical preventive maintenance adequate to carry out this commitment. [FAA Order 5190.6B, ¶ 7.5]

Grant Assurance 19 does not replace a prospective tenant's obligation to conduct the proper due diligence before leasing property on the airport.

The Complainant has not shown that the Respondent failed to understand that the airport must be kept in a safe and serviceable condition, or failed to make resources available as those resources were made available to the Respondent. Nor has the Complainant alleged that the Respondent has failed to carry out a detailed preventative maintenance program.

It is understandable that repairs and reconstruction as a result of Hurricane Katrina may not necessarily have been completed as timely as desired. However, rather than a violation of Grant Assurance 19, this issue is instead a potential breach of lease between the contracted parties (in this case, AeroPremier and the OLD) and was more appropriately addressed in state court.

2. The Complainant alleges that the Respondent has violated Grant Assurance 19 by allowing the airport to deteriorate and to become a safety hazard because of an open drainage area and changes to an on-airport maintenance schedule.

In its Original Complaint, the Complainant stated the following:

In the recent past, a jet aircraft was being relocated on the airport ramp. Because the Orleans Levy [sic] District failed to maintain the drain plates and cover in a proper configuration and failed to have them properly secured, when the aircraft was moved by tug across the drain plate, the plate gave way and the aircraft was damaged. The airport sponsor (the Orleans Levy [sic] District) denies any liability or responsibility for this damage to the aircraft. The incident with this aircraft is merely one illustration of the manner in which the Orleans Levy [sic] District is allowing the Lakefront Airport to deteriorate. Further, if you will examine the Exhibit 18 attached to this letter you will note that the Orleans Levy [sic] District now desires to defer filter changes on the fuel filter system from an annual replacement cycle to every two years. While this may have a certain appeal economically, it may present a safety hazard.

[FAA Exhibit 1, Item 1, page 21]

The Complainant has submitted four images that depict a square, open area on the ramp with an adjacent cover – this appears to be a drain area and cover. [FAA Exhibit 1, Item 1, exhibit C-20, sub-exhibits 19-22] Additionally, the images show that cones have been placed around the area to warn and prevent others from getting close to it. There is no additional information on these images to indicate whether damage to an aircraft has occurred; there are no images of a damaged aircraft and no dates indicating when the images were taken. Other than Complainant's statements above, there was no additional information provided in the pleadings to substantiate these claims. The Respondent's Answer addresses this allegation only to say "the contents of Exhibit [C-]20 are in dispute." [FAA Exhibit 1, Item 4, page 14]

An airport owner should adopt and enforce adequate rules, regulations or ordinances as necessary to ensure safety and efficiency of flight operations and to protect the public using the airport. In fact, the prime requirement for local regulations is to control the use of the airport in a manner that will eliminate hazards to aircraft and to people on the ground. [FAA Order 5190.6B 7.8-7.9]

As stated above, the standard for compliance is that a sponsor understands its obligations, has a program in place to implement its obligations and demonstrates execution of that program. In order for the FAA to determine a violation involving ongoing maintenance failures by a sponsor a Complainant must present more substantial evidence of repeated failure.

In a formal Part 16 Complaint, *“the complainant has the burden of proof to establish the complaint’s allegations by a preponderance of substantial and reliable evidence.”* [BMI Salvage Corporation & Blueside Services, Inc. v. Miami-Dade County, Florida, FAA Docket No. 16-05-16, (July 25, 2006) (Director’s Determination), page 13.]

In this matter, lacking any reliable, probative and substantial evidence to conclude an open drain area existed on the ramp so as to create a hazard, or that this hazard, or the fuel filter system filter maintenance schedule changes proposed by the OLD were part of larger ongoing maintenance failures by the sponsor, the Director cannot make a finding on this issue in favor of the Complainant.

The Airport should continue to monitor any legitimate complaints of unsafe airport conditions made by Complainant or any other tenant, and should ensure reasonable steps are taken to allow unimpeded access to leaseholds and the public areas of the Airport.

Summary of Issue 2

The Director is not persuaded that the Respondent violated Grant Assurance 19, Operations and Maintenance, by failing to meet self-imposed deadlines to repair the NG Hangar. The Respondent’s repairs were dependent in part upon the receipt of FEMA funds; when those funds were not available as anticipated the delay in repairing the NG Hangar did not result in a violation of Grant Assurance 19. The Director also finds that the allegations and evidence presented by Complainant regarding an open drain area on the airport ramp and changes to an on-airport maintenance schedule are insufficient to conclude that the Respondent has so neglected the facilities at the Airport as to rise to a violation of Grant Assurance 19.

Issue 3: Determine whether the Respondent violated Grant Assurance 22(c), Economic Nondiscrimination, by agreeing to a settlement that benefited AeroPremier and its Advantage Capital parent and unjustly discriminated against Complainant.

Grant Assurance 22, Economic Nondiscrimination states in part,

“It 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. [...] Each fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and utilizing the same or similar facilities.” [Assurance 22]

In the Complaint, the Complainant cites from an affidavit submitted by Michael A. Hodges [FAA Exhibit 1, Item 12] and states that:

The economic concessions conferred by Respondents on AeroPremier and its Advantage Capital parent corporations were without a doubt discriminatory and unjustified since paragraph 4 of the Consent Order [FAA Exhibit 1, Item 1, exhibit C-38] gave AeroPremier a 75% reduction in rent even though the 8,000 square feet of office space represented only 15% of the leased space, and no rational person without discriminatory motives would have believed that the loss of 8,000 square feet of office space (when the hangar bay consisting of 30,000 square feet and fully rentable) would justify a seventy-five percent (75%) reduction in rent plus a fifty percent (50%) reduction in insurance, taxes and utilities on the NG Hangar and the absence of 8,000 square feet of office space had no negative impact on AeroPremier's ability to lease the hangar bay to aircraft owners.

[FAA Exhibit 1, Item 15, page 6]

Additionally, the Complainant states that, in settling with AeroPremier,

Respondents carelessly and without regard to the public trust relied upon economic data provided by AeroPremier including damage projections that were significantly overstated, i.e., (i) the gross profit and market share projections were excessive, (ii) the gross profit from the sale of fuel was unreasonable and unachievable, (iii) in light of the economic downturn following Hurricane Katrina and the economic climate nationally, the gross fuel margins were excessive, (iv) the projection that AeroPremier could achieve 33% market share in such a short period, given the incumbency and national presence of Odyssey Aviation as well as the facility quality and marketing efforts of Flightline, was not supportable based on market and historical data, and (v) the damage projections being based on 100% occupancy of the office space at \$25,000 per month was not realistic, since the assumption on[e] FBO can go from 0 to 100% occupancy in twelve months is unreasonable. As demonstrated more fully by the facts set forth herein below [...] the Respondents have violated and are violating 49 U.S.C. §47107 (a) (5) which requires 'Fixed based operators similarly using the airport will be subject to the same charges.'

[FAA Exhibit 1, Item 15, pages 6-7]

In its Rebuttal, the Respondent states, with regard to the affidavit of Michael Hodges, that the affidavit is "critically flawed," because "Mr. Hodges incorrectly assumes that of the 24,000 square feet of office contained in the NG Hangar, only 8,000 square feet was not improved. None of the 24,000 square feet of office space was improved pursuant to the requirements of the lease. All of the office space remains unimproved although it is anticipated that it will be complete as of the end of this year." [FAA Exhibit 1, Item 25, page 3]

In addition, the Respondent avers that Flightline never requested to be charged the same rates as AeroPremier, and that, citing *Aerodynamics of Reading, Inc. v. Reading Regional Airport Authority*, FAA Docket No. 16-00-03 (Reading DD),

'in order to establish a claim of unjust discrimination, a complainant must establish that it requested similar terms and conditions as other similarly situated airport users and was denied for unjust reasons.' [Reading DD, p. 19] *The initial rates assessed to Flightline and AeroPremier were exactly the same. When the Respondent failed to meet its contractual obligation to AeroPremier, that FBO sued the Respondent in state court for the material breach of failing to provide an essential part of any FBO operation, to wit, the offices from which to manage such a facility. That breach of lease was litigated in the State Court proceeding and ultimately settled through mediation after the OLD was adjudged to have breached the lease. Complainant chose not to intervene in that State Court proceeding, even though its allegations herein indicate that Complainant has/had issues with the resolution thereof.*

[FAA Exhibit 1, Item 25, pages 4-5]

Review of the Settlement Agreement and Louisiana Court Proceedings

AeroPremier and the Orleans Levee District, Division of Non-Flood Assets (OLD) engaged in litigation in the Civil District Court for the Parish of Orleans, State of Louisiana, in the case of AeroPremier Jet Center, LLC v. Board of Commissioners, et al, No. 09-8632. The central focus of this litigation was the claim asserted by AeroPremier that it lost profits because the OLD failed to timely complete renovations to the National Guard Hangar office space leased by AeroPremier. Attendant to that litigation, the OLD permitted AeroPremier to operate without paying the full rent due under an existing lease between AeroPremier and the OLD. [See FAA Exhibit 1, Item 1, exhibit 54, page 1]

In October 2010, AeroPremier, its partner Advantage Capital Partners, and OLD entered into a "Mutual Receipt, Release and Indemnification Agreement (Agreement). The Agreement stated, in part, that:

1. *The OLD shall provide a \$473,000 credit to AeroPremier, which may be applied to past or future rent or any other obligation of AeroPremier to OLD.*
2. *The OLD shall provide a \$500,000 transferable rent credit to AeroPremier or Advantage [...] which credit may be applied to rent due at any time on Building 101 on or after August 1, 2011. The credit may be applied in the amount of up to \$100,000 per year until exhausted.*
3. *The OLD waives and releases AeroPremier from the obligation under the Lease to invest \$285,000 in improvements to real property at the Airport*
4. *The OLD waives and releases AeroPremier from the obligation under the Lease to pay rent for Building 101, including the hangar, from August 1, 2010, until renovations of Building 1-1 (as a whole) are completed.*
5. *AeroPremier shall receive a rent credit for any leased space within Building 101 which is presently in use by AeroPremier to the extent such space is unusable due to OLD's construction/renovation activities resulting from Lessor's Repair Obligation*
6. *OLD shall be responsible for the repair of damage to Building 101 which occurred as a result of Hurricane Katrina. OLD shall further be responsible for the repair of damage to Building 101 which may occur as a result of the Lessor's Repair Obligations.*

7. *The office and customer service space within Building 101, shall, upon completion of the Lessor's Repair Obligation, be commercially acceptable office space suitable for use as a FBO and consistent with the agreed plans, specifications, drawings and floor plans.*
9. *[...] AeroPremier shall have the right to either sub-lease the 2nd floor of building 101 or to releases the space to OLD [...].*
17. *This Agreement is subject to the approval of the Federal Aviation Administration (FAA). If the FAA declines to approve the Agreement, the Parties agree to recommence mediation with Judge Ponder within thirty (30) days.*

[FAA Exhibit 1, Item 1, exhibit 54]

In the FAA's Southwest Region Louisiana/New Mexico ADO's letter of November 16, 2010 reviewing the proposed settlement agreement (discussed above in Issue 1, subsection 2), the FAA expressed concerns with the proposed agreement and suggested, in part, that:

the sponsor address its findings, specifically, the conclusions in the two scenarios reported by the CPA firm estimating AeroPremier's losses. In its statements to the sponsor, Aero Premier estimated its losses amount to nearly \$2.6M. However, the OLD report purports two vastly different results. In scenario #1, the report estimates losses amount to just under \$200,000, while in scenario #2, the report states there are no losses. We believe these significant differences between AeroPremier's estimations and the report's findings may result in an improper use of airport revenue if the sponsor agrees to provide unfounded compensation, subsidies, and/or set an improper fee schedule benefitting AeroPremier in violation of Grant Assurance 22, Economic Non Discrimination; 24, Fee and Rental Structure; and 25, Airport Revenue.⁶

[...]

Finally, we are concerned that the documentation, or lack thereof, submitted by AeroPremier to support its estimations and allegations regarding lost income and profits may lead to more violations of Grant Assurances 22 (Economic Nondiscrimination) and 24 (Fee and Rental Structure). For example, we recommend the sponsor engage in due diligence to quantify statements and estimations pertaining to AeroPremier's assertions it lost \$25,000 per month in leasing opportunities. [FAA Exhibit 1, Item 33, pages 1-2]

On March 1, 2010, Harold Flanagan of Flanagan Partners prepared a damages calculation report commissioned by AeroPremier. This report considered damages other than lost fuel sales. The report reviewed OLD's failure to timely meet contractual deadlines, improper material benefits to AeroPremier's competition including subsidized parking area, ramp space and hangar space and operational infringement. The report also considered lost fuel sales,

⁶ The OLD commissioned a report from Holly Sharp of LaPorte, Sehr, Romig and Hand to review records and documents and render an opinion regarding the losses, if any, sustained by AeroPremier as a result of the failure of the OLD to refurbish the former Louisiana National Guard Hangar by August 1, 2009 for use as office space, customer service area and other commercial uses. This report focused exclusively on lost fuel sales and provided estimates based on two scenarios. In scenario one (1), lost profit to AeroPremier was \$199,613. In scenario two (2), there was no profit lost. [FAA Exhibit 1, Item 27, exhibit R-3]

'but for' circumstances and lost net income on leasing space at a rate of \$25,000 per month. [FAA Exhibit 1, Item 27, exhibit R-4, pages 2-4]

The report also considered future loss assumptions including a 1.5 percent monthly increase until AeroPremier captured 33 percent of the market share of Lakefront Airport. The report concluded that "[b]ased on the above and as summarized [...] AeroPremier has sustained lost profits totaling \$2,559,400." [FAA Exhibit 1, Item 27, exhibit R-4, page 5]

The OLD then commissioned a second report from 'The Aviation Group' (TAG), which reviewed the terms and conditions of the settlement agreement between the OLD and AeroPremier. In June 2011, TAG issued a report that concluded that the settlement agreement was fair to all parties. Specifically, the report stated:

The Settlement Agreement gave rent credits to AeroPremier and Advantage Capital as well as relief from some obligations. A rent credit for past rental payments of \$473,000 was granted to AeroPremier as well as rent credits for some future rental payments until such time as repairs are completed. Both parties, OLD and AeroPremier presented their projections of current and future losses that ranged from a low of less than \$200,000 from OLD to a high of over \$2,000,000 from AeroPremier. The OLD report^{7]} was narrow in scope as it only considered fuel sales and not all the other non-fuel revenue potential. The time period for future losses extended only to 2012.

[...]

In addition to aeronautical services, AeroPremier is unable to provide office space to potential customers. [...] AeroPremier is unable to assure customers of when and what space will be available. This loss of rent continues to negatively impact their revenue stream. Snapshot projections of financial performance that both parties presented during the settlement hearing are difficult and obviously open to much criticism. However, as time has passed since these projections were made, the continued effects of the lack of the expected renovated National Guard facility reinforce that the amount of the settlement was appropriate.

The Settlement Agreement also provided a \$500,000 transferable rent credit to AeroPremier or Advantage Capital. [...] This rent credit applied over a 5 year period is appropriate for Advantage to use in order to try to recapture the lost value in their investment.

AeroPremier was also released from the obligation to invest \$285,000 in improvements in the National Guard hangar. This obligation was in the original lease in 2008. It will now be 3 or more years before AeroPremier will be able to make improvements to the facility as projected. [...] Since AeroPremier intends to spend a significant amount to improve the facility, the relief of the specific amount of the obligation appears appropriate." [FAA Exhibit 1, Item 27, exhibit R-7, The Aviation Group Report, page 7-8]

⁷ First report commissioned by OLD and prepared by Holly Sharp of LaPorte, Sehart, Romig and Hand.

Justification for the Settlement Agreement

In support of the Settlement Agreement, the Respondent states:

“For the FAA to understand the motivation of the OLD to settle the state court litigation initiated by AeroPremier, it is important to understand the factual and procedural antecedents that led to the mediated settlement.

Under the Transportation Statute and the relevant FAA policies, Airport Sponsors are entitled to use their best judgment to settle lawsuits using airport revenue in concert with those statutory and regulatory obligations. As explained below, because (1) the OLD had been found liable for breach of the lease with AeroPremier, (2) the OLD faced a substantial risk of a large adverse judgment in the state lawsuit, (3) the OLD recognized that its expert report covered only one element of the damages claimed by AeroPremier, lost fuel sales, and (4) a settlement meant that the OLD would not have to pay a monetary judgment, which would have allowed AeroPremier to offset 100% of all amounts due OLD until the judgment was paid, the OLD decided that it was reasonable to settle the state lawsuit immediately for rent credits. When monetized, these credits were much less than the amount AeroPremier could have recovered in its lawsuit. [...]

AeroPremier presented a very strong case during the state court litigation. [...] During the early stages of the litigation, AeroPremier obtained a partial summary judgment for breach of lease based on the OLD’s failure to repair the facility on a timely basis [...] AeroPremier’s expert witness, an accountant named Harold Asher, opined that AeroPremier lost between \$2 million and \$3.5 million as a result of the OLD’s contract breaches. He further opined that had AeroPremier failed as a result of OLD’s actions, the losses would have exceeded \$5 million. Pursuant to Louisiana Civil Code Article 1997: ‘An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.’ As the law permits, the expert’s calculation included more than just lost customers that could be identified by name, and also took into account lost market share and other identifiable losses.” [FAA Exhibit 1, Item 27, pages 2-4]

The Respondent also states that, with regard to the FAA’s reference to the OLD report in its request for further information, while this report shows a loss of only \$200,000, the report analysis did not include a number of items, including “[t]he loss of other revenue streams generated along with the loss of fuel revenue; in addition to providing fuel, an FBO also earns substantial revenue through the provision of maintenance, office rent, hangar fees, detailing, catering, rental cars, travel service fee, ground support and tie down fees. The OLD expert report did not include these other revenue sources.” [FAA Exhibit 1, Item 27, page 4-5]

While the Complainant may disagree with the financial business decisions of the Respondent regarding the settlement agreement with AeroPremier, the Respondent retains the right to make such decisions. FAA will not substitute its judgment for that of the court or the OLD in

determining what terms and conditions were included in crafting the settlement agreement. Having said that, the Director is not persuaded that the terms of the settlement are so beneficial to AeroPremier, over and above the damages it sustained, that it rises to a situation where Flightline or other FBOs on the airport have incurred unjust economic discrimination as a result.

Although the Complainant contends that AeroPremier has received an unfair advantage in the form of rent reductions and other concessions, the Complainant has not demonstrated that it was adversely affected by the Respondents' decision to mediate an agreement with AeroPremier for its breach of lease, nor has it provided examples of how the settlement with AeroPremier has materially affected its ability to do business. Rather the Complainant has alleged that the settlement has unfairly provided AeroPremier a benefit that it did not receive. Conversely, the Complainant may have enjoyed an economic benefit when it was not required to compete against AeroPremier as a fully functioning FBO.

For a finding of unjust economic discrimination to be made, evidence must be presented that the Respondent failed to charge each fixed base operator the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed based operators making the same of similar use of airport land and utilizing the same or similar facilities (i.e. are similarly situated). In this Complaint, it is apparent that AeroPremier, although originally charged similar rates to the Complainant, was disadvantaged by circumstance—that is, the failure of the OLD to meet lease terms that required improvements to its leasehold. The Respondent has resolved its breach of lease, and, primarily through the application of rent credits to AeroPremier, has 'leveled the playing field' with the other fixed base operators, thereby allowing competition between the businesses.

The FAA does not ordinarily arbitrate or mediate settlement negotiations through the formal Part 16 complaint process. Nor does the FAA enforce lease terms between parties to an agreement. Rather, the FAA enforces contracts between an airport sponsor and the Federal Government. [See AmAv v. Maryland Aviation Administration, FAA Docket No. 16-05-12, (March 20, 2006) (Director's Determination), page 23.]

Insurance Rates Charged to Complainant

The Complainant also argues that although it had also occupied space that was not fully remediated from damages incurred by Hurricane Katrina, it was obligated to pay its insurance premiums in full, stating:

“While granting economic concessions to AeroPremier for insurance obligations on the theory it has been damaged by premises not fully remediated and by charging full insurance to Complainant operating in similar circumstances, Respondents are diverting revenues generated by the Airport (insurance paid by Complainant) to AeroPremier.” [FAA Exhibit 1, Item 15, page 9]

The Complainant goes on to allege that this disparity in insurance premium payments is unjust discrimination because

While premises rented to AeroPremier are larger and more valuable than premises rented to complainant, the Respondents have arbitrarily and capriciously placed a value for purposes of assessing contributions to a common fund of insurance that require Complainant to contribute more than its fair share to the fund and effectively subsidized AeroPremier (i.e., Complainant's hangar has a hangar bay consisting of 19,500 sq. ft. and office space consisting of 6,000 sq. ft. which is taxed, with no appraisal, at a value of \$3,500,000.00 while AeroPremier's National Guard Hangar has a 30,000 sq. ft. bay and 24,000 sq. ft. of office space but is assessed at only \$1,400,000.00).

[FAA Exhibit 1, Item 1, page 8]

The Respondent denied the Complainant's allegations, [FAA Exhibit 1, Item 4, page 7, ¶15] arguing that AeroPremier and the Complainant were originally charged the same rates, and that Complainant was not forced or coerced to accept the Respondent's rates. Respondent cites the FAA's Final Agency Decision (FAD) in Aerodynamics of Reading, Inc. v Reading Regional Airport Authority, FAA Docket No. 16-00-03 (Reading FAD), for the proposition that "[...] *the FAA will not entertain a complaint about reasonableness of a fee set by agreement when the complaint is filed by one of the parties setting the disputed fee.*" [FAA Exhibit 1, Item 25, page 4; Reading FAD p. 15] The Respondent also states that the Complainant never requested to be charged the same discounted rate that AeroPremier received as a result of the settlement. [FAA Exhibit 1, Item 25, page 4]

The Complainant has provided relatively little information regarding its allegation that it was forced to pay full insurance premiums for its leased space even though that space was not fully renovated or usable. Other than the allegation that AeroPremier benefitted from a reduced insurance premium because of unusable space, the Complainant has not provided details of how its space was unusable or even whether it had contacted the OLD to discuss a reduced rate until the facility was fully functional.

It appears, from this lack of evidence in the record to the contrary, that the Complainant agreed to its lease and insurance terms at lease signing. The Director can only construe that Complainant agreed to these lease terms, agreed to pay certain insurance premiums, and only complained after AeroPremier received a reduction in its insurance because of the settlement agreement.

The Complainant has a responsibility and an obligation to perform the necessary due diligence to determine the financial viability of the FBO operation. The time to do this is before the lease is signed, not after discovering that another entity was receiving a benefit due to a breach of lease settlement. Moreover, if the Complainant believes that it has been disadvantaged because of excessive insurance payments, it should raise this issue with the Respondent and seek redress. Simply alleging that because one FBO received a reduction in its insurance fees because of breach of lease Complainant should receive a reduction as well is not reasonable. *"With regard to an allegation of unjust economic discrimination under Grant Assurance 22, an allegation should contain a description of the alleged preferential treatment of another party, how the other party is similarly-situated, and that the complainant*

requested similar treatment and was denied.” [BMI Salvage Corporation & Blueside Services, Inc. v. Miami-Dade County, Florida, FAA Docket No. 16-05-16, (July 25, 2006) (Director’s Determination), page 12.]

If the Complainant believes that it has been charged excessive insurance rates under its lease with the OLD, this is a contract issue or dispute. The Director assumes that the requirement to pay insurance on its leased premises was in Complainant’s lease, as it was with AeroPremier. The Complainant cannot now go back and claim unjust discrimination. If the Complainant believes the contract has been breached it can also seek a remedy under state contract law.

Summary of Issue 3

The Director is not persuaded that the Respondent violated Grant Assurance 22, Economic Nondiscrimination, by agreeing to a settlement agreement that offered rent credits and other concessions to AeroPremier. The FAA will not substitute its judgment for that of the court or the OLD in determining the level of damages appropriate to resolve OLD’s adjudged breach of lease with AeroPremier. The Director is not persuaded by the evidence presented that the Complainant has been economically disadvantaged by the OLD’s settlement agreement with AeroPremier.

The Director is not able to make a finding on the evidence presented as to whether the Complainant has been charged excessive insurance rates to ‘make up’ for a reduction in insurance fees paid by AeroPremier. The Complainant is advised to contact the Respondent to resolve this issue.

Issue 4: Determine whether the Respondent violated Grant Assurance 24, Fee and Rental Structure, by (1) making no effort to collect monies due from AeroPremier and (2) by intentionally subsidizing AeroPremier with revenues generated by the Airport.

Grant Assurance 24 states in part that an airport sponsor “*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.*”[Assurance 24]

In the Complaint, Flightline alleges that the Respondent entered into an agreement with AeroPremier not to collect payments on which AeroPremier had defaulted:

As early as July 1, 2008, only three months after the execution of the AeroPremier lease, AeroPremier defaulted in its payment obligations to Respondents [...] With AeroPremier in arrears for \$390,729.25 in rent, \$122,154.28 in insurance premiums and \$4,200.00 in sewage charges, the Respondents make no effort to collect monies due from AeroPremier, a violation of Grant Assurance No. 24 [...] but rather entered into a secret ‘forbearance agreement’ with AeroPremier, which the Respondents never disclosed.”

[FAA Exhibit 1, Item 15, pages 4-5]

The Complainant states that this inaction of the Respondent was a violation of the airport sponsor's duty to make the airport as self-sustaining as possible under 49 USC §47101(a)(13)(A) [FAA Exhibit 1, Item 11, page 10], and that Respondent, "*rather than confronting the issues publicly, entered into a 'deal' to benefit AeroPremier and its Advantage Capital parents, a deal that was arbitrary, capricious and discriminating in favor of AeroPremier and against Flightline, and was not predicated upon any supportable market data or justifiable analysis of damages or financial impacts.*" [FAA Exhibit 1, Item 15, page 6]

On December 11, 2009, Andrew Velayos, Lead Program Manager for Louisiana/New Mexico ADO sent a letter to Louis Capo, Director of Non-Flood Assets for OLD, in response to an Part 13 informal complaint filed by Flightline. This letter stated that the primary assertion of Flightline's informal complaint

is that AeroPremier has NOT paid rent for the past three months, to which you have not denied. Therefore, we ask that you take action to negotiate a modified rental structure with AeroPremier based on the state of its lesser facilities, recognizing the condition of the premises due to the sponsor's asserted default. Keep in mind that the modified rental structure must be in accordance with Grant Assurance 22c. [FAA Exhibit 1, Item 1, exhibit C-8]

On December 14, 2009, Gerard G. Metzger, counsel for the OLD, responded to the December 11 letter and stated:

The District is in active negotiation with AeroPremier Jet Center, LLC regarding the alleged breach by the District for failure to complete improvements at the former National Guard Hanger (Building 101). On this lease, we do not intend to modify the 'rental structure,' except to the extent necessary to provide the tenant with a rent abatement for damages (if proven) caused by any breach by the District.

Accordingly, there will not be a rent reduction negotiated with the tenant over this dispute, but only a settlement of the amount of the damages suffered by the tenant and a rent abatement to offset any alleged losses, i.e., loss business, etc. [...]

You will find enclosed the default notice that was issued to the tenant on behalf of the District. Again, please be advised that after this default notice was issued, that the parties agreed to stay legal action pending discussions to resolve the issues between them. The District further agreed to a rent abatement pending the outcome of these negotiations in a good faith expression of the District's intent to settle these matters without litigation. In that regard the District has not released the tenant from its obligation to pay the rent due under its lease with the District, and has only agreed to a deferment or abatement pending an amicable settlement of the issues between the parties. It was anticipated that a settlement would be reached within a relatively short

period of time, however, the issues involved entailed much more than was initially anticipated.

[FAA Exhibit 1, Item 1, exhibit C-9]

In its Answer, the Respondent addressed the Complainant's accusations of a forbearance agreement, stating:

There was no written 'forbearance agreement' between the parties in the Underlying Litigation; there was an oral agreement that Respondent would not move to evict AeroPremier from the leased premises while settlement discussions were ongoing. Complainant either does not understand or is being misleading concerning the sums not paid by AeroPremier pursuant to the Lease Agreement. The entirety of the past due sums pursuant to the Lease Agreement as of August 1, 2010, was \$473,000.00. That amount was provided as a credit to AeroPremier pursuant to the Settlement Agreement. The Settlement Agreement further provided a \$500,000.00 transferable rent credit to AeroPremier or Advantage, as they shall agree between the two of them, which credit could be applied to rent due at any time on the NG Hangar or after August 1, 2011. This rent credit could be applied in the amount up to \$100,000 per year until exhausted. [...] Finally, the Settlement Agreement released AeroPremier from the obligation under the Lease Agreement to pay rent on Building 101 (NG) Hangar until renovations to that building are completed. In addition, the Settlement Agreement requires AeroPremier to pay 50% of the utilities and insurance for the hangar portion of Building 101 until renovations [...] are completed. It should be noted that AeroPremier has and continues to pay the full amount due under the Lease Agreement for the MT Hangar as well as all fuel flowage fees.

[FAA Exhibit 1, Item 4, pages 18-19]

The Respondent also argues, in its Rebuttal, that “[t]he FAA must take judicial notice that the Respondent’s inability to forecast the incredible havoc wreaked on the airport was consistent with the level of preparation of the mayors, governors and relevant federal officials of the entire regions. Given those facts, the Complainant’s allegations fail to rise to a violation of §47108(a)(13).”⁸ [FAA Exhibit 1, Item 25, page 7]

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. This requirement recognizes that individual airports differ in their ability to be fully self-sustaining, given the differences in conditions at different airports. The purpose of the self-sustaining rule is to maintain the utility of the Federal investment in the airport. In some circumstances, a sponsor’s decision to charge rates that are below those needed to achieve self-sustainability in order to assure that services are provided to the public is not inherently inconsistent with the Federal obligation to make the airport as self-sustaining as possible given its particular circumstances. [See FAA Order 5190.6B 17.5–17.6]

⁸ §47107(a) (13) states in part: “The airport owner or operator will maintain a schedule of charges for use of facilities and services at the airport [...]”

It appears from the record in this Complaint that Flightline was aware that AeroPremier was not paying full rent and utilities on Building 101 and, because the OLD was not moving as quickly to take action as Flightline believed was appropriate, construed that the OLD was in violation of Grant Assurance 24 for failing to be as self-sustaining as possible. However, the Complainant may not have been initially aware of the OLD's culpability in failing to renovate Building 101 in a timely fashion.

Because the OLD failed to begin renovations as soon as initially promised, AeroPremier did not pay rent on Building 101. Litigation and negotiation followed the actions by AeroPremier and ultimately resulted in the OLD being adjudged to be in breach of the lease with AeroPremier. The Settlement Agreement resolved the outstanding back rent issue by recognizing that the OLD had breached the lease agreement and offered rent credits as a way to resolve the conflict.

In this case, the fact that the Lakefront Airport was so severely affected by Hurricane Katrina also played a part in the resolution of this matter between AeroPremier and the OLD. Absent damage to Building 101 from Hurricane Katrina, this issue would likely not be the subject of a formal complaint. Allegations of the OLD failing to be self-sustaining seem to arise from the perception that AeroPremier, in spite of the lack of renovation to Building 101, received a reduction in rent for its use that caused the airport to be in violation of Grant Assurance 24.

To find the OLD in violation of Grant Assurance 24 for failing to pursue overdue rent on Building 101 when the OLD has been found by a civil court to be in breach of its lease agreement for failing to renovate the facility would be unreasonable. The parties to that dispute, the OLD and AeroPremier, litigated and negotiated a resolution that sought to make AeroPremier whole from damages incurred as a result of OLD's admitted failure to make timely improvements to Building 101.

Determine whether the Respondent violated Grant Assurance 24, Fee and Rental Structure, by (2) by intentionally subsidizing AeroPremier with revenues generated by the Airport.

In its Amended Complaint, the Complainant alleges that the OLD is in violation of Grant Assurance 25, *Airport Revenues*, because it intentionally allowed AeroPremier to pay less than its contractually-obligated lease payments, insurance payments and other obligations. The Complainant alleges that this constitutes a subsidy to AeroPremier using airport revenue and this violates Grant Assurance 25. [FAA Exhibit 1, Item 15, page 8]

In its Rebuttal, the Respondent dismisses the assertion that it had engaged or is engaging in prohibited revenue diversion and responds by citing FAA's Revenue Use Policy, as well as the FAA's Airport Compliance Handbook, 5190.6B. [FAA Exhibit 1, Item 25, pages 4-5, 7] The Respondent also argues that the statutory language cited by Complainant to support their argument is "*totally inapposite to the allegation of diversion;*" stating instead that "*the cited subsection addressed the obligation of an airport to attempt to be self-sustaining,*" not revenue diversion. [FAA Exhibit 1, Item 25, page 6] The Respondent also states that "[t]he

revenue diversion language of the Act⁹ was enacted to prohibit airports from siphoning revenues created on airports to local governments,” while “[t]he issue in the instant proceeding is payments being made by the tenant to the Airport. The Director should dismiss this element of the Complainant’s prayer. [FAA Exhibit 1, Item 25, pages 6-7]

The Respondent is correct that although the Complainant is alleging a violation of Grant Assurance 25, it cites the statutory language from Grant Assurance 24, *Self-Sustainability*.¹⁰

The Director is persuaded that the allegations identified by the Complainant—allowing AeroPremier to pay less than its contractually-obligated lease payments, insurance payments and other obligations—are more appropriately examined under Grant Assurance 24.

The Complainant, in its Amended Complaint, alleges that the OLD is diverting revenue, and that

Respondents by systemically and intentionally allowing AeroPremier to pay less than its contractually-obligated lease payments, insurance payments and other obligations to Respondents are effectively subsidizing AeroPremier’s operation with revenues generated by the Airport, including money obtained from Complainant.” Respondent, by agreeing in a private mediation session to confer \$1,258,000.00 in additional economic benefits in AeroPremier [...] is diverting and/or intends to divert Airport revenues to and for the benefit of AeroPremier.

Respondents, by arbitrarily and capriciously assessing AeroPremier’s leased premises at a grossly reduced value with no appraisal [are] diverting revenues generated by the Airport [...] to AeroPremier and subsidizing AeroPremier’s operations. While granting economic concessions to AeroPremier for insurance obligations on the theory it has been damaged by premises not fully remediated and by charging full insurance to Complainant operating in similar circumstances, Respondents are diverting revenues generated by the Airport [...] to AeroPremier. [FAA Exhibit 1, Item 15, pages 8-9]

In this instant Complaint, the fact that the OLD agreed to rent credits for AeroPremier to settle the damages incurred by OLD’s failure to timely meet lease terms is consistent with the self-sustaining assurance and thereby allowable as part of a self-sustaining rate structure under Grant Assurance 24. Revenue generated by the airport for the aeronautical and nonaeronautical use of the airport includes, but is not limited to, the fees, charges, rents, or other payments received by or accruing to the sponsor from air carriers, tenants, concessionaires, lessees, purchasers of airport properties, airport permit holders making use of

⁹ Refers to the 1994 Authorization Act. In the FAA Act of 1994, (Public Law No. 103-305) Congress strengthened the revenue use requirement by adding a new assurance requiring airport owners or operators to submit an annual report listing all amounts paid by the airport to other units of government, and required the FAA to issue a policy on the use of airport revenue.

¹⁰ Complainant cites 49 U.S.C. §47107(a)(13), “The airport owner will maintain a schedule of charges for use of the facilities and services at the airport –(A) that will make the airport as self-sustaining as possible under the circumstances existing at the airport, including volume of traffic and economy of collection; and (B) without including in the rate base used for the charges the Government’s share of costs for any project for which a grant is made under this subchapter....” [FAA Exhibit 1, Item 15, page 9]

the airport property and services, etc. In the case of the Settlement Agreement, the Airport is agreeing not to receive revenues that it would normally receive from AeroPremier (rent and insurance payments as originally agreed to in the lease between the entities) in order to settle damages incurred by AeroPremier by OLD's breach of lease. An airport sponsor can use airport revenue (or agree to the non-receipt of revenue) to pay court costs that pertain to the capital or operating costs of the airport [See 49 U.S.C., § 47107(b)(1)]. In this case, the OLD was obligated under a lease to commit revenue for the improvement of Building 101. When that renovation was untimely delayed, the OLD offered rent credits to address the damages suffered by AeroPremier. Had the OLD offered cash payments rather than rent credits in the Settlement Agreement, the Director would provide an analysis under Grant Assurance 25, but the outcome would be the same.

The Settlement Agreement between the OLD and AeroPremier states that the OLD provided material and unjustified advantages to other FBOs at the Airport, which placed AeroPremier at a competitive disadvantage and led to lost revenue and other losses. The Settlement Agreement provided a \$473,000 credit to be applied to past or future rent or any other obligations of AeroPremier to the OLD. Additionally, the Settlement provided a \$500,000 rent credit to AeroPremier or Advantage, as they shall agree between them. The credit can be applied in the amount of up to \$100,000 per year until exhausted. The OLD also waived AeroPremier's obligation to invest \$285,000 in improvements to real property at the Airport. In total, the OLD is allowing \$973,000 in rent credits and an additional \$285,000 in temporarily lost investment in Building 101.¹¹ The Settlement Agreement also allows AeroPremier to pay only 50 percent of the utilities and insurance for the hangar portion of Building 101 until renovations of Building 101 are completed. [FAA Exhibit 1, Item 4, Exhibit 2, page 2]

Because the OLD was adjudged to be in breach of its lease with AeroPremier, it opened the OLD up to liability of an unknown amount. By agreeing to rent credits and temporarily waiving investment in Building 101, the OLD was able to control the amount of settlement to AeroPremier and also avoid paying damages in cash, thereby preserving airport assets. However, even if the OLD were directed by court order to pay damages to AeroPremier, the settlement could have been paid from airport revenue. Airport revenue can be used to pay court costs that pertain to the capital or operating costs of the airport.

The FAA is satisfied that additional scrutiny was applied to the settlement amount. The TAG report considered factors not previously analyzed in the report originally commissioned by the OLD. The FAA's concerns, expressed in the November 16, 2011 letter to the OLD, were addressed and satisfied by the TAG report.

The Director is not persuaded by the arguments or evidence presented that the award of rent credits and other concessions to AeroPremier via the Settlement Agreement were wildly inflated and therefore an unallowable use of airport revenue or a violation of the obligation for the OLD to be as self-sustaining as possible under these unique circumstances. Rather, the

¹¹ As noted in the TAG report, "[i]t will now be 3 or more years [from June 2011, the date of the TAG report] before AeroPremier will be able to make improvements to the facility as projected. AeroPremier plans to make investments in the facility after the OLD repairs are completed." [FAA Exhibit 1, Item 25, page 8]

Director is persuaded that the settlement agreement was a reasonable solution to this matter and perhaps served to hold down the ultimate cost of the settlement.

Summary of Issue 4 (1) and (2)

The Director is not persuaded that the OLD's agreement to a reduction in rent while renovations were ongoing to Building 101 is not in compliance with Grant Assurance 24. Rather, the Director is persuaded that the OLD recognized its liability in failing to meet the terms of its lease with AeroPremier and negotiated a resolution that was accepted by AeroPremier. This resolution does not rise to a violation of Grant Assurance 24 in that the rent credits granted to AeroPremier do not negatively impact the ability of the airport to be as self-sustaining as possible under these unique circumstances.

The Director is also not persuaded that the OLD is in violation of Grant Assurance 24 for agreeing to rent credits and a temporary reduction in insurance payments to settle its breach of lease with AeroPremier. Court costs and settlement expenses as a result of a lawsuit are an acceptable use of airport revenue.

The FAA makes conclusions of fact and law regarding the Complainant's allegations. Underlying these conclusions is the basic requirement of Part 16 that the Complainant provide sufficient evidence that the airport owner or sponsor is violating its commitments to the Federal Government to serve the interests of the public by failing to adhere to its grant assurances. [See 14 CFR, 16.23 and 16.29] The burden of proof rests with the Complainants. Complainants have not met this burden with respect to these allegations.

VII. FINDINGS AND CONCLUSIONS

Upon consideration of the submissions of the parties, and the entire record herein, and the applicable law and policy and for the reasons stated above, the Director of Airport Compliance and Management Analysis, finds and concludes:

- The Respondent has not violated Grant Assurance 5, Rights and Powers and/or Grant Assurance 29, Airport Layout Plan, by (1) allowing AeroPremier the right to sublease the second floor of Building 101 without seeking prior permission from the Respondent or (2) granting AeroPremier the right at its sole option to cancel the lease of the McDermott facility.
- The Respondent has not violated Grant Assurance 19, Operation and Maintenance by not restoring the National Guard Hangar within 14 months of the effective date of the Respondents lease with AeroPremier. Evidence presented on an open drainage area is inadequate to make a finding on whether the OLD is allowing the airport to deteriorate and to become a safety hazard because of the open drainage area and changes to an on-airport maintenance schedule.

- The Respondent has not violated Grant Assurance 22(c), Economic Nondiscrimination by entering into a settlement for damages with AeroPremier and its Advantage Capital parents. The evidence presented on whether the OLD is unjustly discriminating against Complainant by charging Complainant non-reduced insurance premiums is inadequate to make a finding.
- The Respondent has not violated Grant Assurance 24, Fee and Rental Structure, by failing to collect past monies due from AeroPremier or by offering rent credits and a temporary reduction in insurance payments to settle its breach of lease with AeroPremier.

ORDER

ACCORDINGLY, the Director finds that the Non-Flood Protection Asset Management Authority, as sponsor of the New Orleans Lakefront Airport is not violation of Federal law and the Federal grant obligations. The Complaint is dismissed.

All Motions not expressly granted in this Determination are denied.

RIGHT OF APPEAL

This Director's Determination is an initial Agency determination and does not constitute final Agency action and order subject to judicial review. [14 CFR, 16.247(b)(2)] A party to this Complaint adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports, pursuant to 14 CFR, 16.33(b) within thirty (30) days after service of the Director's Determination.



Randall Fiertz
Director, Office of Airport Compliance
and Management Analysis

Oct. 24, 2012
Date