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April 22, 2016

Office of the Chief Counsel
Attention: FAA Part 16 Airport Proceedings Docket
AGC-610
Federal Aviation Administration
800 Independence Ave. S.W.
Washington D.C. 20591

Re: Answer to Respondent's Motion to Dismiss (Docket No. FAA-16-16-02)

Mark Smith, Kim Davidson Aviation, Inc., Bill's Air Center, Inc., Justice Aviation, Inc., National Business Aviation Association, Inc. and Aircraft Owners and Pilots Association, Inc. v. City of Santa Monica, California

Dear Sir or Madam:

Pursuant to 14 C.F.R. § 16.26(b)(3) and 14 C.F.R. § 16.17(c), Mark Smith, Kim Davidson Aviation, Inc., Bill's Air Center, Inc., Justice Aviation, Inc., National Business Aviation Association, Inc. and Aircraft Owners and Pilots Association, Inc. (collectively "Complainants") respectfully submit this Answer to the Motion to Dismiss and supporting Memorandum ("Motion") filed in this docket on April 11, 2016 by the City of Santa Monica, California (the "City" or "Respondent").

Preface

The City's Motion seeks to dismiss one of the four claims of the underlying complaint ("Complaint"). Section IV of the Complaint alleges that the City has failed to make leases available to SMO tenants in compliance with its federal obligations, as set forth both in the Airport's 1948 surplus property deed (which on its face remain effective in perpetuity) and in Airport Improvement Program ("AIP") grant agreements (which the FAA has ruled remain effective through 2023). See Complaint ¶¶ 137-153. The City argues that the adoption of a leasing policy (the "Policy") by the City Council on March 22, 2016 moots

this claim. It also argues that any facial challenge to the Policy cannot be considered by the Federal Aviation Administration ("FAA") in this proceeding because Complainants cannot show that the Policy is invalid "in all its applications." Both arguments are wrong. For the reasons set forth in the following sections of this Answer, the Motion fails to meet the requirements of 14 C.F.R. § 16.26(b)(1)(ii) and accordingly should be denied by the FAA.[1]

The City does not seek the dismissal of the balance of the Complaint, and indeed appears to concede that, as alleged by Complainants, it has collected excessive interest on loans to the Airport (Complaint ¶¶ 57-65) and has failed to collect fair market rent from Santa Monica College for the college's non-aeronautical lease of Airport property (Complaint ¶¶ 127-136), suggesting that the City will evaluate some corrective measures. Conversely, it claims that its new landing fees (Complaint ¶¶ 69-126) "completely conform with all applicable federal requirements." See Motion, at 7 n.3. While various legal and factual questions with respect to these issues remain to be resolved, Complainants are obliged to note that:

- The revenue diversions alleged in the Complaint occurred over many years in the case of improper loans, and over several decades in the case of Santa Monica College rents, and both involve City and Airport books and records that are internally inconsistent and of questionable provenance and accuracy. See, e.g., Complaint ¶ 47 (backdated purported loan agreements); ¶ 48 (backdated and conflicting loan agreements); ¶¶ 66-68 (misallocation and diversion of new revenues).

- The landing fees are directly and substantially impacted by this revenue diversion, which necessarily resulted in reduced Airport net revenues over a period of many years, and from which the City's landing fee computation cannot be segregated. Moreover, as alleged in ¶¶ 87-111 of the Complaint, the books and records on which the landing fee calculations were based are not only internally inconsistent, but are in some instances missing entirely and frequently involve attributions (such as for indirect and legal expenses) that are clearly improper.

[1] In the Background section of its Motion, the City purports to summarize the foundations of the City's obligations as well as the pending disputes before both the FAA and the Ninth Circuit Court of Appeals regarding those obligations. Unfortunately, many of the City's representations are inaccurate. For example, the City asserts that not until 2008 did it become aware that the FAA understood the Airport's surplus property deed to obligate Santa Monica to operate SMO as an airport in perpetuity, upon condition of reversion. See Motion at 3-4. In addition to the finding to the contrary of the District Court (City of Santa Monica v. United States, 2014 WL 1348499, *9-10 (February 13, 2014)), a former City Assistant Attorney (and former Acting City Attorney) has specifically testified under oath that the City was aware of (although it disagreed with) the FAA's position as early as 1981. See Exhibit 78, at 10-12 (attached).

It was for these reasons that Complainants requested that any order directing corrective action include the requirement of an independent audit of all relevant City and Airport books and records. Given the City's tangled, multi-year and ongoing manipulation of Airport revenues and expenses, Airport finances cannot now be entrusted to the City to "correct" and "adjust." Both Complainants and the FAA (as well as the residents of the City) are entitled to an objective and trustworthy review of the City's dealings with the Airport.[2]

I. The City's Promulgation Of A Leasing Policy Does Not Moot Section IV Of The Complaint

Section IV of the Complaint alleges that the City was not in compliance with its federal obligations because: the leases of Airport tenants had expired *en masse* on July 1, 2015; the City repeatedly had deferred negotiations with aeronautical Airport tenants for anything beyond insecure month-to-month tenancies;[3] and that to the extent a leasing policy had been proposed (but its adoption repeatedly delayed), the proposal included numerous impermissible terms that would flatly violate the City's federal obligations if adopted. See id. ¶¶ 137-153.

The City now asserts that its adoption of the Policy (officially denominated as the "Airport Licensing and Leasing Policy") on March 22, 2016 effectively moots section IV of the Complaint, because it brings the City into current compliance with its obligations. See Motion, at 8. But that is simply not the case. As an initial matter – as anticipated – the Policy includes numerous provisions directly at odds with the City's federal obligations. Far from a "cure" for the violations alleged, it greatly exacerbates them, imposing a set of ambiguous, often indecipherable and mainly illegal requirements on Airport tenants. For example:

- The Policy's stated goals include "an airport tenant mix" that "[i]s harmonious with the nearby built environment by protecting the health and safety of Airport neighbors" and "[f]osters uses and practices that are sensitive to the environment and protect the health of Airport neighbors and users and protect the City from future environmental damage exposure." See id. at 1.

[2] City officials continue to inform the public that the Airport is indebted to the City in the amount of either $13 million (see Exhibit 79, at 1-2 (attached)) or $16 million (see Exhibit 12), both of which the City knows to be untrue.

[3] In contrast, various non-aeronautical tenants of SMO recently have been offered or granted long-term leases. See, e.g., Complaint ¶ 144(g).

- The Policy provides that: "no lease shall have a term that goes beyond June 30, 2018." See id. at 2 (§ B(1)).[4]

- The Policy provides that all leases "shall be reviewed to assess potential negative consequences on the environment." See id. at 2 (§ B(2)).

- The Policy provides that: "[a]ll lessees shall use the airport and any airport property in a manner that is compatible with City policies and with the adjacent residential uses; to encourage activities that complement adjacent residential and commercial uses; and to establish practices that are sensitive to the environment and protect the City from future environmental exposure."[5] See id. at 4 (§ C(1)).

- The Policy provides that: "The City will request hangar owners to avoid from [sic] performing pattern operations at Santa Monica airport during weekends, holidays, and evening hours." See id. at 5 (§ C(5)(b)).

These and other provisions in the Policy clearly are intended to enable the City to condition leases to aeronautical tenants on terms that are inconsistent with the City's federal obligations, and as a result, the adoption of the Policy in no way moots section IV of the Complaint.

For example, the FAA previously has established that only environmental restrictions which are rationally related to environmental problems that actually exist at an airport are permissible. See, e.g., Centennial Express Airlines v. Arapahoe County Public Airport Authority, docket no. 16-98-05, Director's Determination, at 20 (August 21, 1998). But the Policy would enable the City to condition tenant leases on nebulous concepts of "harmony" and "compatibility" – with reference to the interests of off-airport entities, not the airport itself. The FAA has established – such as through its interpretation of grant assurance no. 21 – that an airport sponsor is obligated to ensure that land uses near an airport are compatible with the airport, *not the other way around*. See, e.g., FAA Order 5190.6B, Chapter 20. An obligated airport must prioritize the interests of aviation. See, e.g., Sun Valley Aviation, Inc. v. Valley International Airport, City of Harlingen, Texas, docket no. 16-10-02, Director's Determination, at 64 (December 11, 2012) ("the sponsor has put forth no value or priority in pursuit of the public's interest in civil aviation"); United States Construction Corporation v. City of Pompano Beach, Florida, docket no. 16-00-14, Final

[4] Section E(1) of the Policy states that leases for terms of occupancy beyond June 30, 2018 require City Council approval, but appears to be meaningless in light of the specific prohibition on such leases set forth in § B(1). See id. at 6-7.

[5] Notably, the City's policies include "the closure of the Santa Monica Municipal Airport as soon as possible." See Complaint ¶ 19.

Agency Decision, at 21 (July 10, 2002) ("[o]perating the airport for aeronautical use is not a secondary obligation; it is the 'prime obligation'").

The Policy's "harmony" and "compatibility" language is also impermissibly vague. As discussed *infra*, even the Policy's author was unable to explain the meaning of its basic terms beyond circular references to those very same terms. See also Cedarhurst Air Charter, Inc. v. County of Waukesha, docket no. 16-99-14, Final Decision and Order, at 12 (August 7, 2000) (holding that vague airport policy amounted to a violation of the grant assurances).

Likewise, the Policy suggests that hangar leases will be denied unless prospective occupants agree to the City's "request" that they limit their pattern operations, a transparent effort at an end-run of the obligations of grants assurance no. 22 (and the parallel deed obligations) by "voluntary" measures that in practice are likely to be mandatory.[6] See, e.g., Jim De Vries v. City of St. Clair, Missouri, docket No. 16-12-07, Director's Determination, at 26-27 (May 20, 2014) (leasing practices used as "a means to dissuade, intimidate, or otherwise turn away potential tenants" are impermissible); Maxim United, LLC v. Board of County Commissioners of Jefferson County, Colorado, docket no. 16-01-10, Director's Determination, at 18 (April 2, 2002) ("[t]he Respondent cannot avoid its Federal obligation by securing an agreement to the contrary from the tenant").

Finally, the longest-term lease available under the Policy to a tenant will be no more than 27 months (to an end date of July 1, 2018, a date which is seemingly arbitrary) despite an airport sponsor's general obligation to make long-term leases available. See, e.g., Santa Monica Airport Association v. City of Santa Monica, California, docket no. 16-99-21, Director's Determination, at 22 (November 22, 2000) (noting that Santa Monica was obligated to offer leases consistent with the duration of the federal obligations at issue in that proceeding; see also footnote 12); Skydance Helicopters, Inc. v. Sedona Oak-Creek Airport Authority, docket no. 16-02-02, Director's Determination, at 32 (March 7, 2003) (airport authority concluded to be non-compliant because it had not offered lease terms

[6] Not only do these veiled threats conflict with Santa Monica's deed- and grant-based obligations, but they also would effectively dictate how SMO-based aircraft can operate in navigable airspace – a matter within the exclusive jurisdiction of the FAA. See, e.g., FAA Order 5190.6B § 13.2(a)(1); In the Matter of Compliance with Federal Obligations by the City of Santa Monica, California, docket no. 16-02-08, Director's Determination, at 1 (May 27, 2008) ("Federal aviation law preempts local ordinances such as the City's designed to control flight operations and impede safe and efficient airspace management"). Under limited circumstances, an airport may *with FAA approval* limit an entire class of operations for airspace safety or efficiency reasons. But Santa Monica did not even request (much less obtain) approval for its lease terms – and because the pattern restrictions would be implemented on a tenant-by-tenant basis and would not affect non-tenant flights, the lease terms further impermissibly would burden individual operators. See, e.g., FAA Order 5190.6B § 14.4(a).

commensurate with the remaining term of its lease – and potentially longer, even if there was possibility that lease would not be renewed).[7]

Indeed, so flawed is the Policy that it has attracted criticism from the Santa Monica Airport Commission – a panel stacked with opponents of operations at SMO that ordinarily will favor any proposal intended to restrict operations (see Complaint ¶ 30). On March 15, 2016, Nelson Hernandez, Senior Advisor to the City Manager for Airport Affairs, appeared before the Commission to explain the Policy, which he had drafted, and members of the Airport Commission were obviously frustrated by his vague and circular explanations of the Policy's terms:

> **Commissioner Stephen Mark:** Can you expand on what you mean by "compatible" and "standards" when you are talking about compatible with the surrounding area, and by environmental standards what standards exactly and who is setting the standards? And actually for that matter, who is going to do the environmental reviews?
>
> **Mr. Hernandez:** Well the standards are compatibility with the local community in terms of noise, pollution, and other operational matters like that.
>
> **Commissioner Mark:** The FAA at the moment argues that they are compatible with noise and pollution, so I'm wondering who is going to decide that, and what are they going to use as their index?
>
> **Mr. Hernandez:** They will use this leasing policy and the decision will be made by the City Manager. If it is approved by the City Council, it is delegated to him.
>
> **Commissioner Mark:** So the City's staff is going to have people who can do environmental reports? And environmental impact reports?
>
> **Mr. Hernandez:** Well the City does environmental impact reports all the time.
>
> **Commissioner Mark:** And so can you give me an example of, well for example, how would you, what do you think would be the result of some of the airport meetings …

[7] The City previously represented to the FAA that "the City Council has previously voted to offer three (3) year lease extensions which would run through June 30, 2018 that and is in the process of considering proposed leasing guidelines." See the City's motion to dismiss in docket no. 16-14-04, at 3 (August 14, 2014). The City for unspecified reasons has maintained June 30, 2018 as an arbitrary expiration date for any new leases, and thus has diminished the maximum term to considerably less than three years despite the 18+ month delay in actually adopting the Policy and offering lease extensions (the latter of which, in fact, has yet to occur, and thus the maximum term may be even shorter).

neighborhood compatibility noise and pollution standards? Do you think that the airport does now?

Mr. Hernandez: Well I'm not going to answer hypothetical questions. When we get a real application we'll give you a real answer. But it's not really … when we have real applications we can do a real test.

Commissioner Mark: But they're going to be based on some specified … I mean if you're a company and you want to lease here and you want to decide "does my company pollute or not according to the city" do they have to go through the whole study first? How is anyone going to know?

Mr. Hernandez: I think that's a case-by-case basis. They may have to; they may not. I think we're going to have to see with the specific application that's in front of us.

Commissioner Mark: But if you are applying for a lease, what do you look to, to know, if it makes sense that you're going to fall afoul of the standard or not? It just seems it's vague to me what the standard….

Mr. Hernandez: We have applications from some of the former Gunnell subtenants, and there's a section in there in which they describe their operation, so we'll take a look at what they said they're going to do.

Commissioner Mark: So you are not going to publish any type of standard for people to use as a basis for deciding whether it makes sense for them to apply?

Mr. Hernandez: The standard is compatibility with the surrounding community.

Commissioner Mark: Uh. Okay.[8]

To put it mildly, that the City official who drafted the Policy is unable to provide a coherent explanation of its standards should deeply trouble the FAA – especially given the City's long history of defiance and non-compliance. Under those circumstances, there is certainly no

[8] An audio recording of the Santa Monica Airport Commission's March 16, 2016 meeting is available at http://santamonica.granicus.com/viewpublisher.php?view_id=6. The quoted exchange occurs at 21:10 - 24:20 – only one of many in which Hernandez refused to provide specifics (e.g., the Commission also inquired why the Policy doesn't actually mention aeronautical uses and "on its face is precluding leasing to aviation tenants"; Hernandez responded that aeronautical uses – which, as the FAA is aware, should be the priority at an airport – are adequately accounted for by an "other uses required by law" provision, presumably meaning section A(1)). An unofficial transcript of Hernandez's presentation and the Airport Commission's responses is attached as Exhibit 79.

basis to argue that the adoption of the Policy moots the concerns raised in this docket by Complainants.

Moreover, even if the Policy were not fundamentally flawed, its mere adoption by the City Council would not moot section IV of the Complaint. DOT precedent establishes that a Part 16 complaint can be dismissed when and only when an airport achieves *current compliance* with its federal obligations. That requires more than the adoption of a policy that *possibly* could be compliant if and when implemented.

In fact, the City always has had the power to grant compliant leases, even before the adoption of the Policy. But with or without the Policy, it still has not done so, and nothing in the Policy compels it to do so; the Policy equally allows the Airport to deny every lease request and to evict every aeronautical tenant. As the FAA previously has established, only after "the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations" will the FAA consider dismissal of the allegations. See Desert Wings Jet Center, LLC v. City of Redmond, docket no. 16-09-07, Director's Determination, at 14 (November 10, 2010).[9] The cases cited by Respondent actually reaffirm this principle – i.e., corrective action must be under way if not already completed. See Thermco Aviation, Inc. v. City of Los Angeles, docket no. 16-06-07, Final Agency Decision, at 25 (December 17, 2007). And, if anything, the City's current action in seeking to evict an aeronautical tenant *without cause* (as specifically attested by the City Manager in a deposition on February 22, 2016)[10] demonstrates that whatever the words that the City has committed to paper, its actual deeds have not only failed to resolve the problems asserted by section IV of the Complaint but also further demonstrate active non-compliance. See 41 North 73 West Inc. d/b/a Avitat Westchester v. Westchester County, New York, Director's Determination, no. 16-07-13, at 31 (June 12, 2008), aff'd Final Agency Decision (September 18, 2009) ("the FAA considers an airport sponsor's actions, not the verbiage of leases or rules").

[9] See also 14 C.F.R. § 16.109(f) ("when the Director determines that the respondent has corrected the areas of noncompliance, the Director will terminate the proceeding"); Air Transport Association of America, Inc. v. City of Los Angeles, docket no. 13-95-05, Final Decision and Order, at 53 (June 1, 2009) (noting that hearing provisions of Part 13 and Part 16 are inapplicable if an airport sponsor has submitted "a corrective action plan that is *acceptable to the FAA*") (emphasis added).

[10] In its Motion, the City cryptically (and misleadingly) refers to "[e]fforts … to resolve the claims" of Justice Aviation, Inc. ("Justice"; see id. at 7 n.4), one of Complainants. The City in fact has sought to evict Justice from its leasehold – and is doing so without specific cause, according both to Hernandez and the sworn deposition testimony of the City Manager, Rick Cole (and despite the City's federal obligations). The eviction is set for trial on May 10, 2016 (Los Angeles Superior Court no. 16R00754). Justice has also filed its own 14 C.F.R. Part 16 complaint (docket no. 16-16-07) which further documents this matter (including excerpts from Cole's deposition), as well as a federal complaint (C.D.Cal. no. 16-CV-2043).

II. The "Facial Attack" Standard Cited By Respondents Is Inapplicable; Complainants Need Not Show That The Policy Is Invalid In All Applications

Respondents additionally argue that to the extent that the FAA in this docket entertains a challenge to the Policy (which it most certainly can), that challenge should be denied because Complainants cannot show that no set of circumstances exist under which the Policy would be valid. See Motion, at 10-11. But the case law cited by Respondent concerns the predicates for facial challenges to the constitutionality of statutes in an Article III tribunal. This is not a facial challenge to the City's obligations – as stated in the Complaint, its non-compliance already affects Complainants (see Complaint ¶ 154) and indeed destabilizes the entire Airport by discouraging tenant investment and encouraging them to relocate elsewhere (presumably the City's intended endgame).

Further, no authority is cited by the City to show that a "facial attack" standard is applicable to a challenge pursuant to 14 C.F.R. Part 16 of an airport sponsor's compliance with its deed/contract-based federal obligations. So far as Complainants are aware, there is no such authority. Cf. National Treasury Employees Union v. OPM, 76 M.S.P.R. 244, 251 (1997) (denying a similar argument against the review of a regulation, explaining that "the rule that courts should not strike down a statute on its face unless it is invalid in every application is based upon the proper role of the judiciary in the constitutional scheme" and "is not relevant to a determination of the Board's authority"); NAACP v. FCC, 46 F.3d 1154, 1161 (D.C.Cir. 1995) ("unlike the case or controversy requirement for a federal court … an agency may issue a declaratory order to terminate a controversy or remove uncertainty").

In fact, the FAA itself repeatedly has established that in Part 16 proceedings it may address current practices that are likely to result in future violations – which should include the vague and impermissible terms of Santa Monica's Policy, even if the FAA should deem that the City has not yet violated its federal obligations in that regard. See, e.g., JetAway Aviation LLC v. Board of Commissioners, Montrose County, Colorado, docket no. 16-06-01, Director's Determination, at 34 (November 6, 2006) (warning respondent that UNICOM frequency must be reclaimed by the airport from the existing FBO to which it had been assigned when a second FBO contract was awarded); Town of Fairview, Texas v. City of McKinney, Texas, docket no. 16-99-04, Director's Determination, at 17 (July 26, 2000) (FAA specified that it could hear a complaint which alleged that an airport's current noncompliance with wildlife mitigation requirements would lead to future hazards, so long as the complainant "demonstrate[d] a realistic danger of sustaining direct injury"); National Business Aviation Association v. City of Santa Monica, California, docket no. 16-14-04, Director's Determination, at 9 (December 4, 2015) (noting "high likelihood of a future violation" by Santa Monica).

Additionally, although the City disputes that its delay in promulgating the Policy itself amounted to a denial of reasonable access, see Motion at 15, the FAA has made clear that undue or indefinite delay is not permissible. See, e.g., United States Construction Corporation v. City of Pompano Beach, Florida, docket no. 16-00-14, Director's Determination, at 18 n.63 (August 16, 2001). Nor, based on the chronology set forth in the Complaint (see ¶ 144), can Respondent credibly claim that the delay was caused by "the City Council deliberat[ing] extensively on alternatives." Long periods elapsed without any action by the City – and without any "legal developments" that would justify further delay; the City has introduced no evidence or even any suggestion of other relevant work during that timeframe. Simply put, for purposes of the motion to dismiss, it is uncontradicted that the City dragged its feet in adopting (and still has yet to actually implement) the Policy.

III. The City's Purported "Reasonable Balance" Is Neither Reasonable Nor Legal

The City devotes the rest of its Motion to the argument that the Policy as adopted is a "reasonable balance" between the City's position that it is no longer subject to any federal obligations and the FAA's position that its grant-based obligations extend through 2023 and its deed-based obligations are perpetual, and asserts that as a further reason that section IV should be dismissed. See Motion, at 12-15. This argument is equally unavailing; it is really no more than an assertion that airport sponsors are free to adopt and implement their own interpretations of their federal obligations – and the reasonableness of them – without FAA oversight, simply because they interpret the law differently from how the FAA or the courts interpret it. That is not the law.

As an initial matter, although Complainants do not contest that the term "reasonable" – as used in grant assurance no. 22 and the equivalent surplus property deed obligation – does not mean that airport tenants are entitled to lease terms of their choosing (see Motion, at 12), it also does not mean that an airport sponsor may – as Santa Monica has – nakedly refuse to enter into long-term leases with *any* current or prospective airport tenant. See, e.g., Atlantic Helicopters, Inc. v. Monroe County, Florida, docket no. 16-07-12, Director's Determination, at 31 (September 11, 2008) ("[s]ponsors must provide aeronautical businesses that meet minimum standards with the opportunity for occupancy with certainty of associated rights to conduct business for appropriate lengths of time, depending on investment requirements and associated costs"); Skydance Helicopters. Inc. v. Sedona Oak-Creek Airport Authority, docket no. 16-02-02, Director's Determination, at 29 (March 7, 2003) (concluding that two-year lease term was insufficient, and explaining that "[p]rivate investment … supports the operation of the nation's airports. When an airport owner imposes unreasonable barriers to private investors, it excludes this essential

ingredient in developing a viable airport").[11] No specific reasons have been cited as to why any – much less all – SMO tenants have been and continue to be month-to-month tenants and denied even the theoretical opportunity for a long-term lease (e.g., more than 27 months) and on that basis the ability to have a secure future at SMO for investment and other purposes. Thus, the Policy is facially not "reasonable."

The City proceeds to assert that it was "reasonable" for it to deny long-term leases to tenants because of the pendency of litigation regarding the duration of its obligations. The City cites no authority for this use of the word "reasonable" – which is not surprising, because there is none.[12] The City attempts to distinguish Jim De Vries v. City of St. Clair, Missouri, docket No. 16-12-07 (Director's Determination), at 26 (May 20, 2014) (in which the FAA warned that an airport could not use "its intent and desire to close the airport" to evade its grant responsibilities) on the basis that it has asserted a legal entitlement to close the airport, which St. Clair did not. See Motion, at 14.[13] This is a distinction without a difference; one which invokes an imaginary standard in which the filing of a legal action to close an airport would free a sponsor to act as it chooses. Moreover, the City does not explain how this novel principle should operate once a court has dismissed the action, as is the case here, or where the trial and appellate process drags on over multiple years. If the mere filing of a complaint can free an obligated sponsor to re-evaluate and "balance" its obligations, the whole notion of compliance is rendered essentially meaningless.

Simply put, although the City is free to appeal the FAA's conclusion that it remains obligated, the City is not free in the interim to ignore its federal obligations – and the FAA is both entitled and compelled to enforce those obligations.[14] The City cannot comply with

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[11] See also McDonough Properties, LLC, et al., v. City of Wetumpka, Alabama, docket no. 16-12-11, Final Agency Decision and Order, at 21 (January 15, 2015) (ten-year lease offered to tenants after sponsor's plan to relocate airport – *consistent with FAA requirements* – had been abandoned).

[12] In its Motion, at 14 (and elsewhere therein), the City looks to the FAA's statement in Santa Monica Airport Association v. City of Santa Monica, docket no. 16-99-21, Director's Determination, at 19 (November 22, 2000), aff'd Final Agency Action (February 4, 2003), that it could be "unreasonable" for the FAA to require the City to enter into a lease beyond July 1, 2015, premised on the notion that the City's obligation to operate SMO expired on that date. But as a factual matter, that decision predated the 2003 modification of the City's AIP grants – which in turn extended the City's obligations through 2023, as the FAA has ruled – and in its text addressed only grant-based obligations and not the obligations of the surplus property deed. So despite the frequent out-of-context citation of this passage by the City, it simply is inapposite and not relevant. See City of Santa Monica v. United States, 2014 WL 1348499, *5 (February 13, 2014).

[13] The City also misleadingly suggests that if Pompano Beach, Florida had asserted a legal right to close its airport, for that reason alone it would have been entitled to offer only short-term leases to its aeronautical tenants. That is not an accurate representation of the FAA's holding in docket no. 16-00-14.

[14] Additionally, as the FAA is aware, the City's obligation to operate SMO without granting exclusive rights (including the constructive exclusive rights that would be the product of unjust discrimination) remains in effect so long as SMO is operated as an airport, pursuant to 49 U.S.C. § 40103(e), and thus requires that the Policy be compliant irrespective of any pending litigation.

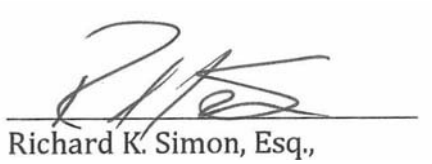
the obligations at issue in this case by doing only what it deems "reasonable"; it must comply with its obligations by complying with them, full stop. The City's self-created and self-interested "compromise" is no basis for a motion to dismiss. See Skydive Monroe, Inc. v. City of Monroe, Georgia, no. 16-06-02, Director's Determination, at 16 (March 30, 2007) ("pending litigation does not give an airport the right to deny access to a viable aeronautical operator"); United States v. City of Santa Monica, 330 Fed. App. 124 (9th Cir. May 8, 2009) (upholding FAA order requiring Santa Monica to comply with agency's interpretation of grant assurances while Part 16 proceeding regarding those obligations was in progress).

Conclusion

The Complaint in this matter begins with a lengthy review of the history of the City's efforts to close or restrict SMO. Although dismissed by the City as irrelevant (see Motion, at 6), the City's conduct and undisputed intentions, extending unaltered over nearly four decades, could not in fact be more relevant to the FAA's assessment of the City's actions with respect to Airport finances; with respect to its lack of compliance with its federal obligations; with its purported "balancing" of those obligations against its own assessment of their existence; and, most importantly, with the likelihood that the City will comply in the future with obligations it deems unenforceable or malleable.

For the reasons set forth above, Respondent's motion to dismiss should be denied; Respondent should be required to file an answer to the Complaint; and the FAA should proceed to adjudicate this case promptly, given the significant consequences of the issues for Airport tenants and users – and nationwide consequences of the City continuing to "thumb its nose" at its federal obligations, which can only serve to break down the safety and efficiency of the national transportation infrastructure and may potentially encourage other airport sponsors to engage in similar misconduct.

Respectfully submitted,



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Certificate of Service

I hereby certify that I have this day caused the foregoing complaint to be served on the following persons by first-class mail with a courtesy copy by electronic mail:

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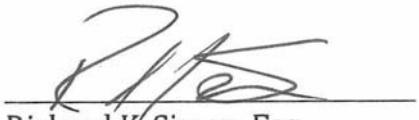
Dated this 22nd day of April, 2016.



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