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January 28, 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: Part 16 Complaint
National Business Aviation Association, Krueger Aviation, Inc., Harrison Ford, Justice Aviation, Kim Davidson Aviation, Inc., Aero Film, Youri Bujko, James Ross, Wonderful Citrus, LLC, and Aircraft Owners and Pilots Association v. City of Santa Monica, California
Docket Nos. 16-14-04/FAA-2014-0592

Reply of the Complainants to Respondent's Appeal from the Director's Determination and to Respondent's Petition to Supplement the Record on Appeal

The Complainants respectfully submit this Reply, pursuant to 14 C.F.R. § 16.33(d), to the appeal and accompanying petition filed in this docket by the City of Santa Monica ("City," "Santa Monica," or "Respondent") on January 8, 2016.

At its core, the City's appeal asserts that Santa Monica, uniquely, should not be subject to the obligations that apply to every airport that accepts federal Airport Improvement Program ("AIP") grants, and that the City's professed ignorance of what it was agreeing to when it accepted additional federal funds in 2003 should further excuse it from those obligations. As the FAA is aware, the City has for decades been seeking, unsuccessfully, to find a means by which to impose restrictions on operations at Santa Monica Municipal Airport ("SMO" or "Airport"), or to close the Airport altogether, a position specifically restated in its Appeal (see p. 22). This proceeding was triggered by the City's latest maneuver – the public and definitive denial of its Grant Assurance obligations after June 29, 2014 – and that strategy should be no more successful than its prior efforts. As established by the Director's Determination in this proceeding, the City is obligated by the

Grant Assurances through August 27, 2023 and that finding now should be affirmed by the Associate Administrator.

I. The City's Petition to Supplement the Record Should Be Denied.

As an initial matter, the City has filed a petition to supplement the record pursuant to 14 C.F.R. § 16.33(f) to include two declarations to the effect that City officials did not understand the consequences of the 2003 grant modification that is at issue in this docket. The City has failed to show any good cause for the submission of these declarations at this late date, and the City's request should be denied.[1]

The very crux of the Complaint in this docket is the consequence of the acceptance of grant funds. Thus, the City has been on notice since at least the filing of the Complaint on July 2, 2014 that its contemporaneous understanding of the significance of the 2003 grant modification was at least arguably relevant. In fact, the City raised the subject of its understanding in its answer dated October 20, 2014 (see pp. 20-21) – so there is no question that the City not only should have been, but actually was, aware of the issue. Yet the City has offered no explanation as to why it did not submit the proposed evidence until now. See, e.g., Langa Air, Inc. v. St. Louis Regional Airport Authority, Docket No. 16-00-07, Final Agency Decision, p. 15 (December 13, 2001) ("it is well established that in an internal agency appeal process new evidence need not be admitted unless the new evidence was not available and could not have been discovered or presented at the prior proceeding").

In any case, the new evidence proffered by the City is irrelevant because the City's contemporaneous – or even earlier[2] – understandings of the significance of its actions in 2003 are beside the point. As previously explained by Complainants – without substantive response from the City – the City's prior misunderstanding of its obligations provides no basis to argue that the FAA's interpretation of those commitments was out of step with the underlying statutory program. See, e.g., Morris v. Redwood Empire Bancorp, 27 Cal. Rptr.3d 797, 809 (Cal. App. 2005) ("it is reasonable to expect even an unsophisticated businessman to carefully read, understand, and consider all the terms of an agreement affecting . . . a vital aspect of his business"); In re Doble, 2011 WL 1465559, *3 (Bankr.S.D.Cal. No. 10-11296 April 14, 2011) ("legally sophisticated parties are held to understand the consequences of their actions"); Hangzhou Silk Import and Export

[1] Complainants do not oppose the City's request for leave to submit one of those declarations late, due to circumstances beyond the control of the City and the signatory to the declaration, but that request is moot for the reasons discussed in this section.

[2] The Matthieu Declaration seeks to introduce a 1994 City report as evidence of the City's understanding of the consequences of the 2003 grant modification (see ¶ 5).

Corporation v. P.C.B. International Industries, Inc., 2002 WL 2031591, *6 (S.D.N.Y. No. 00-CV-6344 September 5, 2002) ("[e]specially with regard to sophisticated business people, capable of resort to counsel for advice, as is the situation here, the law presumes that parties to a contract will only sign it if they fully understand its terms and conditions").[3]

Moreover, the City has a long record of alleged misunderstandings of its Grant Assurance and contractual obligations, which has necessitated repeated administrative and court proceedings – at significant cost and burden to the FAA and third parties – to ensure the City's compliance. See, e.g., City of Santa Monica v. FAA, 631 F.3d 550 (D.C. Cir. 2011); Bombardier Aerospace Corp. v. City of Santa Monica, Docket No. 16-03-11, Director's Determination (January 3, 2005). This pattern appears yet again in the proffered McCarthy declaration, which gratuitously repeats the City's alleged belief that the 1984 Agreement "represented the definite end of the City's legal obligation to operate the Airport" (see ¶ 4; see also Appeal, p. 5), a claim which has been shown to be demonstrably false.[4]

The City's ongoing record of legal and factual amnesia, even if charitably construed to be negligent rather than deliberate, should provide a framework and context for the FAA's review of the City's request to supplement the record with documentation and information that it has actually known for quite some time – and which should not affect the outcome of the appeal in any event, given the overwhelming support for the Director's findings vis-à-vis the 2023 date, as further set forth below.

II. The Director's Determination that the 2003 Grant Amendment Extended the City's Obligations Until 2023 Was Proper and Should Be Affirmed.

The principal issue on appeal is the Director's conclusion that by accepting additional AIP funds from the FAA in 2003, the City extended through 2023 the "not to exceed" period during which it is obligated to comply with the Grant Assurances. The City does not dispute that the project funded in 2003 (a blast wall at SMO) will have a useful life that will extend at least through 2023. Rather, the City argues that the new batch of funds

[3] Moreover, the assertion in the declarations that the City would not assume an Airport-related contractual obligation extending beyond July 1, 2015 (see McCarthy, ¶ 5; Matthieu, ¶ 7) is at odds with the fact that the City, from at least January through June 2015, was negotiating with the FAA for a new, multi-year lease for the federal navaids and tower at SMO.

[4] See the amicus brief filed by NBAA and AOPA in the City's appeal of its Surplus Property Act challenge, 2015 WL 416879, *13-*18 (9th Cir. No. 14-55583 January 22, 2015)) and the decisions rejecting this contention by both the underlying U.S. District Court (2014 WL 1348499, *12 (C.D.Cal. No. 13-CV-8046, February 13, 2014)) and the Director in a prior Part 16 proceeding (In the Matter of Compliance Obligations by the City of Santa Monica, California, Docket No. 16-02-08, Director's Determination, p. 60 (May 27, 2008)).

that it accepted in 2003 should not be understood to have restarted the clock on its obligations, and that they instead expired 20 years after the date of the initial grant – i.e., in 2014. Complainants respectfully disagree with the City's reasoning, and for the reasons stated in the Director's Determination, the Complaint and other prior filings, and this Reply, urge the Associate Administrator to affirm the Director's conclusion that 2023 is the correct date.

a) The City inaccurately describes the language of the 2003 grant modification.

The City's opening argument is that clear and unambiguous language in the 1994 grant agreement and the 2003 grant modification require a 2014 expiration date for its obligations. See Appeal, pp. 10-13. But the City does not dispute that the duration of the obligation period is not explicitly addressed by the 2003 grant modification, nor did any language in the 1994 grant agreement establish 2014 as an unalterable expiration date.[5] For example, the City cites language in the 2003 modification which states that "[a]ll other terms and conditions of the Grant Agreement remain in full force and effect." But that does not facially mean that the 20-year duration period in effect since 1994 was unchanged – only that the incorporated assurances continued in effect (and were also applicable to the modification), without any clarification of their post-modification term. Cf. Olympia Properties, LLC v. U.S., 54 Fed Cl. 147, 153-55 (2002) (holding that portions of contract termination clause that did not explicitly expire during original contract period continued in indefinite effect post-modification, based on clause which provided that "all other terms and conditions remain the same").

In short, the City's language-based argument for the interpretation of the 2003 grant modification is not compatible with the factual record or the law. Instead, the FAA must determine how language in the modification should be interpreted – a matter discussed in the subsequent sections of this Reply.

b) The language in the 2003 grant modification must be construed in favor of the FAA.

The City next argues that even if the language of the 2003 grant modification is not unambiguous, it should be construed against the FAA. See Appeal, pp. 17-21. But this

[5] The City also premises its argument on language in the 1984 Agreement, but that agreement provided that "federal funding of program improvements intended to further this Agreement, executed prior to July 1, 1995" shall not extend the City's obligation to operate the Airport. Indisputably, the 2003 grant modification was executed after July 1, 1995. See Director's Determination, p. 18. Nor has the City shown that the 2003 grant modification was designed to implement a program or improvement covered by the 1984 Agreement.

contention already was fairly considered and properly rejected by the Director, in reliance on the Supreme Court's holding in Bennett v. Kentucky Department of Education, 470 U.S. 656, 669 (1985), distinguishing U.S. v. Seckinger, 397 U.S. 203, 210 (1970). That is to say, for grants that originate in and are governed by federal statutes, the standards of construction governing statutory interpretation, not the rule of *contra proferentem*, are to be applied.[6]

The City acknowledges this general principle, but asserts that it is inapplicable in this case because the obligation period at issue is not an explicit statutory directive. See Appeal, p. 20. But the City cites no authority for this proposed distinction. On the other hand, in Westlands Water District v. Patterson, 864 F.Supp. 1536 (E.D.Cal. 1994) – a case previously cited by the City as authoritative (in its answer dated October 20, 2014, pp. 15-16) – the court explained, without qualification, that:

> "[G]overnmental contracts should be interpreted against the backdrop of the legislative scheme that authorized them, and [the] interpretation of ambiguous terms or implied covenants can only be made in light of the policies underlying the controlling legislation."

Id., p. 1542, quoting Peterson v. Department of the Interior, 899 F.2d 799, 807 (9th Cir. 1990). Likewise, in City and County of San Francisco v. FAA, 942 F.2d 1391 (9th Cir. 1991), the Court adopted a deferential standard of review toward an FAA ruling pursuant to its statutory authority which found that an airport had violated Grant Assurance-based obligations, irrespective of whether those obligations appeared in the literal text of the statute. The Ninth Circuit explained that:

> The conditions Congress imposed on the grant to local airport proprietors of money from the Airport and Airway Trust Fund are designed in part to insure the maintenance of conditions essential to an efficient national air transport system. . . . Pursuant to this statutory scheme, San Francisco received grant offers. . . . A grant agreement based on such an offer is not an ordinary contract, but part of a procedure mandated by Congress to assure federal funds are disbursed in accordance with Congress' will. . . . While we review questions of statutory interpretation de novo, we accord substantial

[6] The City also seeks support for its position in language in Air Transportation Association of America v. City of Los Angeles, California, Docket No. 13-95-05, Final Decision and Order, 2009 WL 1578613, *28 (June 1, 2009). But that case concerned a change in the FAA's interpretation of an airport's substantive AIP obligations that also contradicted prior advice to that airport, not first-impression guidance on the duration of an airport's AIP obligations.

> deference to the interpretation adopted by the agency charged with administering the statute.

Id., pp. 1395-96 (emphasis added). Cf. Flightline Ground, Inc. v. Louisiana Department of Transportation, Docket No. 16-11-01, Final Agency Decision, p. 30 (January 15, 2015) (requirements need not be statutory to have weight and effect; "[s]ponsors are not free to ignore non-statutory grant assurances or terms").

In contrast, the principal case cited by the City, Clay Tower Apartments v. Kemp, 978 F.2d 478, 480 (9th Cir. 1992), is an outlier that Complainants previously established to have been implicitly overruled. See Complainants' reply dated October 30, 2014, p. 7, n.5. Subsequent Ninth Circuit decisions have confirmed that Peterson is the authority to be followed. See, e.g., Student Loan Fund of Idaho, Inc. v. Department of Education, 272 F.3d 1155, 1162 (9th Cir. 2001). See also Imperial Credit Industries, Inc. v. FDIC, 527 F.3d 959, 969 (9th Cir. 2008) (distinguishing Clay Tower when agreement "included intrinsically regulatory terms of a type that the agency frequently employs its expertise in reviewing") (quotation marks and citation omitted). Cf. Nat'l Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563, 1570 (D.C.Cir. 1987) ("[a]s this court stated even before Chevron, there is room, in review of administrative agencies, for some deference to their views even on matters of law like the meaning of contracts, as on the meaning of statutes, where the understanding of the documents involved is enhanced by technical knowledge of industry conditions and practices") (quotation marks and citation omitted). The City simply has not shown why Clay Tower is relevant – or even that it is valid law.

In the same vein is the City's suggestion that even if the FAA is entitled to deference, the 2003 grant modification nevertheless must be construed against the FAA. See Appeal, p. 21. But the cases cited by the City do not stand for that proposition. Indeed, one of those cases – Barnes v. Gorman, 536 U.S. 181, 186 (2002) – specified that the scenario at issue therein was one in "which funding recipients may be held liable for money damages" – not a scenario applicable to AIP grant recipients generally, or to this proceeding in particular. Likewise, this proceeding does not involve the "commandeering" of state and local officials, as implied by the City's citations of decisions such as National Federation of Independent Businesses v. Sebelius, 132 S.Ct. 2566, 2602 (2012).

Santa Monica voluntarily chose to participate in a statutory program administered by the FAA in accepting several AIP grants. It did so with the undisputed knowledge that the FAA would be fiscally responsible in requiring the City to use those funds in a manner that ensured a proper benefit in return to the public. Santa Monica must thus accept the consequences of the FAA's reasonable exercise of its statutory authority to find that the City's obligations – after the 2003 receipt of additional monies for an additional project – extended until 2023.

c) The City's proposed interpretation of the language in the 2003 grant modification is not reasonable.

The City asserts that its interpretation of the 2003 grant modification is reasonable. See Appeal, pp. 21-23. Even assuming that would be relevant if true – given the deference that should be given to the FAA's interpretation of the 2003 grant modification – the City's interpretation is most certainly not reasonable, because the consequences of its reasoning would not be in the general interest, either at SMO or more broadly. As noted by the Director, Congress intended that the FAA and the public receive a benefit in return for the federal investment of AIP funds, which the grant assurances have defined to be a term of 20 years (with exceptions not here relevant).[7] In contrast, under the City's approach, the grant assurances applicable to the blast wall would have expired after only 12 years of use, depriving the FAA and the public of 40% of their intended benefit. See Director's Determination, p. 19.

As Complainants previously have observed, the AIP grant scheme is designed to ensure that the FAA retained ongoing supervisory authority over airports that had accepted public largesse. See, e.g., FAA Order 5190.6B, § 1.5 ("[g]rants and property conveyances are made in exchange for binding commitments (federal obligations) designed to ensure that the public interest in civil aviation will be served") (emphasis added).[8] The City's position potentially would allow recipients of AIP funds to be subject to federal commitments for only a brief period of time, far less than the useful life of a funded project, if a modification was entered into at a date well after the initial grant date. That reasoning would be a predicate for as-bad or even-worse funding arrangements at other airports. Accordingly, it is entirely reasonable for the FAA to have concluded that the City's position is incompatible with the FAA's underlying statutory dictates and the protection of the public purse (both in regard to SMO and other airports), and to instead look to its own reasonable conclusion that the grant modification at issue restarted the clock for the City's 20-year obligation period.

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[7] As explained in Airport Compliance Manual, FAA Order 5190.6B, § 4.4 (September 30, 2009): "Generally improvements are presumed to last at least 20 years because they are built to FAA standards." The baseline for FAA-funded improvements has been 20 years for decades, predating the AIP itself. See, e.g., 14 C.F.R. Part 152, Appx. D, No. 17 (duration of obligations for grants made under Airport and Airway Development Act of 1970).

[8] See also Airport Compliance Requirements, FAA Order 5190.6A, § 1-1 (October 2, 1989) (AIP "is a program to administer valuable rights obtained for the people of the United States at a substantial cost in direct grants of funds and in donations of Federal property. Such grants and donations are made in exchange for binding commitments designed to assure that the public interest would be served. The FAA bears the important responsibility of seeing that these commitments are met") (emphasis added).

d) The Director was correct to conclude that the 2003 grant modification required consideration – and that to the extent it did, the 2023 date was the consideration.

Although not necessary to its interpretation of the 2003 grant modification, the Director concluded that further support for its interpretation can be found in that the modification required consideration, and that the only consideration that the City could and did provide was the extension of its federal obligations through 2023. See Director's Determination, p. 16. The City disputes the Director's reasoning, asserting both that no consideration was required for the modification and that even if it were needed, that consideration could have taken a different form. See Appeal, pp. 14-17. The City is in error.

As an initial matter, the City suggests that no consideration was necessary because the absence of consideration would have meant only that the City could not enforce the modification – a moot point, because the City actually received an additional $240,000 from the FAA. But if there had been no consideration, that would also mean that the FAA would have given nearly a quarter million dollars to Santa Monica with no ability to enforce accompanying terms – an implausible notion: (i) in a vacuum; (ii) more so given the statutory directives applicable to the FAA for AIP grants generally; and (iii) most especially given the long-standing tensions between the City and the FAA. It is simply not credible to suggest that the FAA – even if it had the ability to do so (which it did not, as discussed below) – would have chosen to make an "unenforceable grant" to Santa Monica.

Santa Monica next suggests that no consideration was required because the City and the FAA in 2003 merely entered into a modification of an existing contract. See Appeal, p 14 n.1. But the general authority cited by the City – Uniform Commercial Code § 2-209 – is only concerned with contracts for the sale of goods, which the 1994 grant agreement unquestionably was not.[9] Further, the City elsewhere acknowledges that the interpretation of the 2003 grant modification is governed by federal law (see, e.g., Appeal, p. 11), and it is well-established that federal "government officers lack authority to enter into contracts," including modifications, "under which the government receives nothing." Aviation Contractor Employees, Inc. v. U.S., 945 F.2d 1568, 1573 (Fed. Cir. 1991); see also Carter v. U.S., 102 Fed. Cl. 61, 66 (2011). But even if one were to look to state law for additional guidance, one would find that the City has not been forthright because whatever the

[9] As a general matter, the UCC does not even apply to agreements with the federal government. See, e.g., Technical Assistance International, Inc. v. U.S., 150 F.3d 1369, 1372 (Fed.Cir.1998); GAF Corporation v. U.S., 932 F.2d 947, 951 (Fed. Cir. 1991).

situation may be in other jurisdictions,[10] in California it remains mandatory that contract modifications be accompanied by consideration. See, e.g., Post v. Palpar, Inc., 7 Cal. Rptr. 823, 826 (Dist. Ct. App. 1960); Porkert v. Chevron Corp., 461 Fed. Appx. 245, 250 (4th Cir. 2012) (under California law, "[t]he valid modification of a written contract must satisfy the same criteria essential to the formation of the original contract, including . . . adequate consideration").[11]

The City also claims that the Director erred to the extent that he conceptually relied on certain U.S. Supreme Court authority in concluding that federal grants are in the nature of a contract to the extent that in return for those monies the recipient agrees to comply with federally-imposed conditions. See Appeal, pp. 15-16. But the cases cited are explicit; there is no room to dispute that Jackson v. Birmingham Board of Education, 544 U.S. 167, 182 (2005) and Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981) stand for the asserted proposition. See also American Hospital Association v. Schweiker, 721 F.2d 170, 184 (7th Cir. 1983) (Pennhurst principles for grants are that "in consideration of the federal financial assistance, the recipients agreed to a substantial amount of federal regulation"); Thermalon Industries, Ltd. v. U.S., 34 Fed. Cl. 411, 415 (1995) ("[a]s to consideration, the terms of the offer and acceptance, which are contained in the solicitation, the 'Grant General Conditions,' and the other terms and conditions specified by NSF in the award, provide for the passage of consideration between the parties").

Further, to the extent that the Jackson and Pennhurst cases also state that grant recipients should be put on notice of applicable conditions, the City has misrepresented the significance and scope of those statements. Jackson noted that Bennett, in interpreting Pennhurst, found that there was sufficient notice of grant conditions "where a statute made clear that some conditions were placed on the receipt of federal funds . . . Congress need

[10] The only other authority relied upon by Santa Monica – Angel v. Murray, 322 A.2d 630 (R.I. 1974) – is out-of-jurisdiction and was explicitly concerned with contract modifications due to "unexpected or unanticipated difficulties." But in the Appeal, p. 12, the City asserts that the 2003 grant modification actually "had been contemplated in the 1994 Grant Agreement itself . . . in recognition of the possibility of cost overruns." Obviously, the City cannot have it both ways.

[11] Additionally, as noted by the Director, the 1994 grant was understood by the FAA to have been closed prior to the 2003 grant modification. See Director's Determination, p. 15; see also p. 17. The FAA subsequently did agree to reopen the grant – an "extraordinary" circumstance. See Airport Improvement Program Handbook, FAA Order 5100.38D, § 5-65. (Indeed, normally a grant should not be left open for more than four years, and a "final" grant payment is made at closeout. See id. § 5-57 – as also similarly stated in the version of the order contemporaneously in effect with the 2003 grant modification, FAA Order 5100.38B, § 1031(b)(5) and § 1314(a) (May 31, 2002).) For these further reasons, the circumstances at issue in this case also were very different from those under which consideration may have been deemed unnecessary for the modification of open contracts.

not 'specifically identif[y] and proscribe[]' [*sic*] each condition." 544 U.S. at 183, quoting 470 U.S. at 666. As the Supreme Court sagely understood, "the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications." 470 U.S. at 669. So, in practice, "prior notice of the general principle to be regulated in a cooperative scheme between the federal government and the states does not need to be all encompassing." Massachusetts ex rel. Executive Office of Health and Human Services v. Sebelius, 701 F.Supp.2d 182, 196 (D.Mass. 2010). In this case, there is no dispute that Santa Monica was on notice that AIP grants carried conditions; and it has no one to blame but itself for failing to be proactive in confirming the details of the grants.

Finally, the City suggests that even if consideration was required, it could have taken the form of expenditures on airport maintenance. See Appeal, pp. 16-17. But the uncertain language of the Airport Manager's May 7, 2003 "imploring" request for new federal money (asserting that it would enable Airport funds instead to be used for "much needed and differed [*sic*] airfield maintenance projects," see FAA Item No. 11) certainly does not rise to the level of consideration: there is no evidence that the City could have, would have, or actually did engage in airport maintenance in return for the modification. See, e.g., City of Los Angeles v. Anchor Casualty Co., 22 Cal. Rptr. 278, 282 (Dist. Ct. App. 1962) (a promise must be definite and substantial to comprise consideration); Piano v. Premier Distributing Co., 107 P.3d 11, 14 (N.M. 2005) ("a promise that puts no constraints on what a party may do in the future – in other words, when a promise, in reality, promises nothing – [] is illusory, and it is not consideration") (quotation marks and citation omitted). Nor is there any evidence that such expenses were what was referred to by the reference to "benefits to accrue to the parties" in the 2003 grant modification. The City has offered nothing to show that, to the extent consideration is relevant, it could have been or actually was comprised of anything other than an extension of its obligation period.

e) The City's objection to the Director's use of the term "akin to a new grant" is much ado about nothing.

The City asserts that the Director's description of the 2003 grant modification as being "akin to a new grant" is improper in that the Director has thus created an FAA funding category that did not previously exist; one which is incompatible with existing regulations to the extent that those regulations draw a distinction between the requirements for new grants and modifications to existing grants. See Appeal, pp. 23-26. But this ultimately is much ado about nothing. The Director used the phrase "akin to a new grant" only once, in a header in the Director's Determination.[12] The apparent purpose was

[12] Cf. VICI Racing, LLC v. T-Mobile USA, Inc., 921 F. Supp.2d 317, 328 (D.Del. 2013), affirmed 763 F.3d 273 (3rd Cir. 2014) ("the word telematics is used only one time . . . with no indication that this provision was the bedrock of the deal for T–Mobile. . . . The court will not rely upon the meaning inferred from such an obscure *(continued…)*

to make the point that because of the circumstances of the 2003 grant modification, it was appropriate to find that the clock for the duration of Santa Monica's federal obligations had restarted. It was presumably not the Director's intent to suggest the existence of or create a new FAA funding category – nor did he actually do so – or to suggest that a grant modification triggering a new 20-year obligation period must undergo the same process as an altogether new grant. The character of a decision is to be determined from its substance, not from a caption. See, e.g., Wilson v. Freeland, 773 So.2d 305, 308 (Miss. 2000).[13]

The City also challenges the FAA's citation of two GAO opinions on the basis that in those cases, the Comptroller General only decided that certain grant modifications were chargeable to the current fiscal years. See Appeal, pp. 25-26. But this criticism misses the point, because the City ignores the theoretical underpinnings of those GAO opinions – which were specifically flagged by the Director. See Director's Determination, p. 17 n.10. The Comptroller General explained that if the U.S. government is not obligated to modify a grant, then it not only should but must require the underlying project to be completed without additional federal contributions – at least, absent consideration for new monies. See 41 Comp. Gen 134, 137 (1961). "And such new grant would be subject to any statutory limitations as though it were not in any way connected with the grant sought to be amended." 39 Comp. Gen. 296, 298 (1959). This principle remains good law. See, e.g., 72 Comp. Gen. 175, 177 (1993) ("the enlargement of the grant beyond its original scope creates an additional obligation that must be regarded as a new grant"). And as discussed above in footnote 11, in this case the City's underlying grant had been closed prior to the 2003 grant modification, and its subsequent reopening by the FAA was extraordinary. Thus the Comptroller General opinions are relevant to how the 2003 grant modification should be understood, and show that it was correct for the Director to determine that, so far as the duration of the City's obligations was concerned, it was akin to a new grant.[14]

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provision to illuminate the contract's overall scheme or plan"); Duramed Pharmaceuticals, Inc. v. Paddock Laboratories, Inc., 715 F.Supp.2d 552, 562 n.10 (S.D.N.Y. 2010) (plaintiff "place[d] undue weight" on a phrase that appeared only once in cited opinion),

[13] The City further mentions that the 2003 grant modification was not specifically identified as a new grant in a certain FY 2003 report and a certain FY 2003 spreadsheet – see Appeal pp. 24-25 – but does not explain how/why these high-level summaries are determinative of the obligations that accompanied the modification.

[14] The City also suggests that Congress intended to strictly distinguish new grants and modifications by its adoption of 49 U.S.C. § 47111(e). See Appeal, p. 25. But that is not an accurate statement of the statute's purpose. See, e.g., H.Rpt. 103-677, p. 67 (August 5, 1994) (legislative intent of Pub. L. 103-305, § 112 is that: "If an airport violates the assurances against revenue diversion and refuses to take corrective action . . . the Secretary shall not approve new AIP applications"). Likewise, the City cites a statutory provision that allows for additional funding, 49 U.S.C. § 47108(b)(3)(A), but that provision is understood to apply only before a grant is closed. See FAA Order 5100.38D, § 5-55, Table 5-27(a)(5); FAA Order 5100.38B, § 1142(a).

f) The Director's interpretation of the 2003 grant modification was a proper exercise of the FAA's Part 16 authority and did not require notice-and-comment rulemaking.

Finally, the City argues that the FAA's conclusion that the City's obligations extend through 2023 is procedurally improper because it amounts to policy guidance regarding the Grant Assurances that only could have been adopted through notice-and-comment rulemaking. See Appeal, pp. 26-29. But the specific statute invoked, 49 U.S.C. § 47107(h), clearly is inapplicable, because it sets forth the requirements for the addition of new Grant Assurances, and not the clarification of existing obligations (such as their duration).[15] And in any case, as the Supreme Court recently held in Perez v. Mortgage Bankers Association, 135 S.Ct. 1199, 1204 (2015), a new agency interpretation generally does not require notice-and-comment rulemaking.

Moreover, what is on appeal in this proceeding is an agency adjudication. That is not only a further reason that section 47107(h) is inapplicable, but also is consistent with long-established Supreme Court guidance that administrative agencies generally may choose to announce new principles in adjudicative proceedings and that an agency's decision to proceed in such a manner "is entitled to great weight." See NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). That high court guidance has been specifically invoked for past FAA adjudications. See, e.g., Union Flights, Inc. v. FAA, 957 F.2d 685, 688 (9th Cir. 1992); Capitol Technical Services, Inc. v. FAA, 791 F.2d 964, 971 n.46 (D.C.Cir. 1986).[16]

Indeed, the City cites no further authority for its procedural assertion, but instead segues into a different argument, namely that the reasoning utilized in this case may have consequences that require further clarification. See Appeal, pp. 27-28. But the same could be said of any Part 16 decision involving an issue of first impression, and of jurisprudence generally. That is no reason for the FAA to fail to address a matter. As the FAA previously has explained, that a matter "is a case of first impression does not preclude us from adopting a standard . . . based on an interpretation of existing law, policy and the City's existing grant obligations." In the Matter of Revenue Diversion by the City of Los Angeles,

[15] To the extent that the City again seeks support in Air Transportation Association of America v. City of Los Angeles, California, for the same reason discussed in footnote 6, it involved different and inapplicable circumstances.

[16] The FAA also has previously recognized in Part 16 proceedings that guidance on airport compliance obligations promulgated through administrative decisions comprise interpretive rules that are not subject to notice-and-comment rulemaking. See, e.g., Jet 1 Center, Inc. v. Naples Airport Authority, Docket No. 16-04-03, Final Agency Decision, pp. 14-16 (July 15, 2005).

Docket No. 16-96-01, Record of Determination, p. 17 (March 17, 1997).[17] Moreover, given that the vast majority of airport sponsors accept AIP grants on a continuing basis – few have sought to "run out the clock" on their obligations, as has Santa Monica – any ambiguity left in the wake of a final decision in this proceeding is likely to have limited import and could easily be resolved by the FAA on a case-by-case basis.

III. The Director's Determination that this Proceeding Was Proper as a Matter of Procedure Was Correct and Should Be Affirmed.

In the final sections of its appeal brief, the City asserts various jurisdictional errors in the Director's Determination, but presents little or no new argument – just mere disagreement with the conclusions of the Director's Determination, and the authorities cited by the FAA and Complainants. As a result, these allegations by the City merit little attention, since no basis has been provided for the Associate Administrator to reason differently than the Director. But in the interest of a complete record, Complainants briefly respond as follows:

- **Complainants Are Directly and Substantially Affected.** As recognized by the Director's Determination (pp. 9-10), Complainants are directly and substantially affected by the uncertainty created by the City's defiant and unique position that it simply is no longer obligated to comply with No. (B)(1), or any other of the Grant Assurances. They cannot plan for the future – as they are entitled to do – without the certainty that the City will comply with fundamental ground rules. See, e.g., Atlantic Helicopters, Inc. v. Monroe County, Florida, Docket No. 16-07-12, Director's Determination, at 31 (September 11, 2008). And the City for decades and currently has made clear its intent to close the Airport at first opportunity. See, e.g., Director's Determination, pp. 9-10. In its Appeal (p. 30), the City largely responds with irrelevant authority that already has been fully discredited: i.e., a Part 16 decision regarding the City's obligations that was issued before the 2003 grant modification, and a Part 16 decision which states only the unremarkable proposition that aeronautical tenants are not entitled to a long-term lease at the location of their choosing, but provides no support for the City's position that it may refuse to

[17] The FAA routinely provides guidance to airports and other interested parties as to how grant assurance-based requirements are to be applied in practice. For example, the FAA previously has provided extensive guidance regarding what incentives airports may offer to air carriers – see Air Carrier Incentive Program Guidebook (September 2010) – and regularly issues Program Guidance Letters regarding AIP requirements.

negotiate for long-term leases at all.[18] See also Complainants' answer dated August 28, 2014, p. 6 n.3, pp. 7-8; Complainants' reply dated October 30, 2014, pp. 2-3, 5.[19]

- **Complainants Have Stated A Claim Under Part 16.** Both in connection with the issue above and separately, the City has asserted that Complainants lack standing and have not submitted a "live" dispute for the FAA's consideration because the City has not yet actually violated or stated an intent to violate the Grant Assurances (see Appeal at pp. 29, 31-32). This is another argument that has been recycled despite already having been fully discredited. See Director's Determination, pp. 8-11. To reiterate, this is not an Article III tribunal and thus there is no general prohibition on advisory opinions, even if there were not a "live" controversy (although there is, as described above). Nor is the FAA specifically prohibited by the underlying regulations from resolving the dispute at issue until a violation is imminent or has actually occurred. Part 16 allows the FAA to address current practices that are likely to result in future violations – of which the City's asserted lack of obligations under any of the Grant Assurances, coupled with its well-established intent to restrict operations at SMO or to close the Airport altogether, is a prime example. See, e.g., JetAway Aviation LLC v. Board of Commissioners, Montrose County, Colorado, Docket No. 16-06-01, Director's Determination, p. 34 (November 6, 2006). See also Complainants' answer dated August 28, 2014, pp. 4-9; Complainants' reply dated October 30, 2014, pp. 4-5.

- **Complainants Engaged in Good Faith Resolution Efforts.** As recognized by the Director's Determination (p. 11): "The City's position on the expiration date is clear

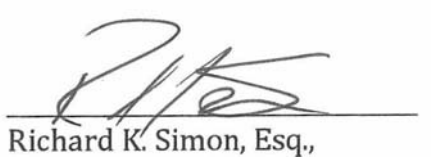
[18] Complainants note that the City represented to the Director that "the City Council has previously voted to offer three (3) year lease extensions which would run through June 30, 2018 and is in the process of considering proposed leasing guidelines." See, e.g., the City's August 14, 2014 motion to dismiss, p. 3. But nearly 18 months have passed since that representation, and in fact no lease extensions of any duration have been offered to aeronautical tenants (which since July 1, 2015 have been on month-to-month terms), even though lease extensions have been offered to non-aeronautical tenants. Complainants suggest that the FAA may take notice of these developments (or the lack thereof) pursuant to 14 C.F.R. § 16.29, to the extent necessary. Respondent's failure to self-disclose to the FAA that its representation, if ever accurate, does not reflect present realities is additionally troublesome.

[19] The one new authority cited by Respondent is Restatement (Second) of Contracts § 250 – but it is unavailing because it specifically implicates the circumstances under which a party to a contract may bring a claim in court for the breach thereof, and does not govern the jurisdiction of the FAA under Part 16. That said, Comment C to § 250 observes that a party to a contract is entitled to demand assurances in response to acts that fall short of a repudiation as defined by the Restatement, a concept which is consistent with the FAA's exercise of jurisdiction over the instant Complaint, given the City's asserted lack of Grant Assurance obligations subsequent to June 29, 2014 and, in its own words, "long-expressed policy to seek closure of the airport." See Appeal, p. 22. See also Highbridge Development BR, LLC v. Diamond Development, LLC, 888 N.Y.S.2d 654, 656 (App. Div. 2009) (finding cause of action for anticipatory repudiation where party "declared the contract to be void and stated its intention to begin entertaining offers from other buyers").

and unlikely to be voluntarily reversed." The City in its Appeal suggests that if Complainants engaged in further resolution efforts, the City somehow might have provided "assurances that might have obviated the need for these proceedings . . . however 'fixed' the City's 'position on the expiration date" might have been." See p. 33. But the City provides no explanation of what those "assurances" would be or how anything other than an acknowledgement by the City that its federal obligations do extend until 2023 would have resolved the instant dispute. As previously made clear by the FAA, complainants are not obligated to continue to engage in futile communications with an airport sponsor that has "for all practical purposes" signaled that it will not comply with Grant Assurances. See Bombardier Aerospace Corp. v. City of Santa Monica, California, Docket No. 16-03-11, Director's Determination, p. 23 (January 3, 2005). See also Complainants' answer dated August 28, 2014, pp. 9-10; Complainants' reply dated October 30, 2014, pp. 5-6.

Conclusion

For the reasons stated above, the City's appeal and accompanying petition should be denied and the Director's Determination should be affirmed, including the finding therein that the City is obligated by the Grant Assurances through August 27, 2023.



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Certificate of Service

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

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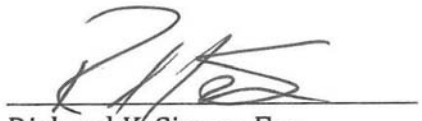

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