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July 19, 2005

ET Doc. No. 05-247

VIA FEDERAL EXPRESS

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Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

DOCKET FILE COPY ORIGINAL JUL 27 2005

Federal Communications Commission
Office of the Secretary

Re: Supplement to Petition of Continental Airlines, Inc. for a Declaratory Ruling

Dear Secretary Dortch:

Enclosed are the original and four copies of Continental Airlines, Inc.'s Supplement to Petition for Declaratory Ruling for filing and consideration by the Commission.

Thank you.

Very truly yours,

Donna J. Katos

Enclosures

cc w/ encls: Gregory S. Zanni (via FedEx)
Deborah Lau Kee, Esq. (via FedEx)

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

.....
PETITION FOR A DECLARATORY
RULING PURSUANT TO 47 CFR § 1.2
.....

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Federal Communications Commission
Office of the Secretary

SUPPLEMENT TO PETITION OF
CONTINENTAL AIRLINES, INC.
FOR A DECLARATORY RULING

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July 19, 2005

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

PETITION FOR A DECLARATORY
RULING PURSUANT TO 47 CFR § 1.2

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: Undocketed

ET Doc. 05-247

**SUPPLEMENT TO PETITION OF
CONTINENTAL AIRLINES, INC.
FOR A DECLARATORY RULING**

Continental Airlines, Inc. ("Continental") files this Supplement to its Petition for a Declaratory Ruling dated July 7, 2005, which was filed pursuant to 47 CFR § 1.2, as authorized by 47 CFR § 1.4000 (e), to allow Continental to continue to maintain and use its antenna for the reception and transmission of fixed wireless signals in its frequent flyer lounge ("Presidents Club") at Boston-Logan International Airport ("Logan") despite the demand of the Massachusetts Port Authority ("Massport") to remove such services. By this Supplement to its Petition, Continental respectfully asks the FCC also to consider the following information in support of its request, in addition to its previously filed Petition, Affidavit and Exhibits:

1. While the wireless service in our Presidents Club is primarily a service offered free of charge to our frequent flyer customers who are members of the Club, it is also routinely used by our employees who are members of

the Presidents Club or otherwise allowed access and are traveling on or conducting company business. Revenue and non-revenue customers are not separately tracked such that Continental would be able to differentiate between its users of the wireless system, but it is estimated that employees' use is not incidental, but could equal the use by Continental's customers in conjunction with their business travel. This estimate is based on the observations made by Continental's General Manager at Logan, Jeff Willis, who oversees the operations at Logan. Primarily, employees traveling on business use this system to keep up with their business communications..

2. There are four provisions in Lease L-7936 (the "Lease") on which Massport relies in support of its demand to Continental to remove its wireless antenna. In addition, Massport argues that Continental did not seek prior approval from the Authority to install the antenna under the Tenant Alteration Application Process (section 9.8) described in the Lease. These provisions are cited in Massport's prior correspondence with Continental, and are as follows:

- (a) Section 7.2 generally sets forth certain prohibited uses of the Premises. The portion cited by Massport in a footnote to its letter dated June 10, 2005 (Exhibit A to Petition) states that the "Tenant shall not use the Premises for any use not specifically granted herein without the prior written approval of the Authority, which approval may be withheld based on any factor which the Authority, in its sole determination, determines has or may have an impact upon the Authority, the Airport or its efficient or productive operations, provided that any approval of any additional use may be conditioned upon a reasonable increase in the Rent reflective of

Tenant's additional use and inclusion of additional provisions in this Lease." In addition, Section 7.2 (h) prohibits the "[i]nstalling or operating or causing to be installed or operated any coin-operated, credit card operated, or other user-paid machine(s) or device(s), including, but not limited to any communications device or any device using telecommunications transmissions of any nature, except for ATMs or similar devices for sale of Tenant's and Tenant's Affiliated Carriers tickets located on the Premises or to serve Tenant's own internal communications, provided such communications are non-revenue generating and are approved through the [Tenant Alteration Application] process." (emphasis added)

- (b) Section 9.4 states that "[t]he Tenant shall not place or construct any improvements, structures, alterations, modifications, signs, communications equipment, wiring or additions in, to, or upon the Premises without the prior written approval of the Authority which may be withheld in its sole and absolute discretion. Any such...communications equipment, [or] wiring...are hereinafter referred to as the "Tenant Improvements". In addition, the Tenant shall obtain the Authority's prior written approval of any of the Tenant's Improvements in accordance with the TAA Process described in Section 9.8 hereof, as such process may be amended from time to time. In the event Tenant fails to obtain the Authority's prior written approval, the Authority may, without limiting other remedies available to it, direct in writing that Tenant...remove any work done without the approval of the Authority."
- (c) Section 9.8, which refers to the Tenant Alteration Application Process requires that "[p]rior to undertaking the construction or renovation of any proposed improvement, structure, alteration, modification, sign or addition, the Tenant shall submit a complete Tenant Alteration Application ("TAA") in form satisfactory to the Authority, and include with any request for the Authority's approval of the TAA preliminary engineering, architectural plans or other information, in accordance with the requirements of the Authority's TAA process in effect from time to time during the Term (the "TAA Process"). ...The Authority's approval of any TAA may be withheld, granted or conditioned upon factors which it determines in its sole discretion has or may have an impact upon the Authority, the Airport, its efficient or productive operation, including but not limited to, the removal of any Tenant improvement upon

termination of the Tenant's occupancy of the Premises or expiration of the Term.

*

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*

If the Tenant does not obtain the prior written approval of the Authority or, if such approval is obtained, it is not complied with, or Tenant does not submit as-built plans, the Authority may, upon reasonable prior notice, enter the Premises and restore the condition of the Premises, complete the proposed improvement, structure, alteration, modification, sign or addition as described in the approved TAA and/or have as-built plans prepared, as the Authority deems appropriate."

- (d) Section 10.3 states that the "Tenant shall not do or knowingly permit to be done anything which may interfere with the effectiveness or accessibility of any drainage and sewerage system, water system, ventilation, air-conditioning and heating systems, communications system, key card access systems, elevators and escalators, electrical system, fire-protection system, sprinkler system, alarm system, fire hydrants and hoses and other utility and other systems, if any, installed or located on, under, in or adjacent to the Premises now or in the future." Please note that this is the *only* section upon which Massport relies in its correspondence of July 5, 2005 (Exhibit C to Petition) in which it raises for the first time an undefined and "potential threat to public safety."
- (e) Section 18.1 refers to specific Events of Default, none of which is specifically cited by Massport in its prior correspondence to Continental.

3. Continental contends that not only are the above provisions/restrictions of the Lease as they relate to the wireless antenna at issue preempted by the OTARD regulations, but also they are inapplicable to the free wireless services Continental offers within the exclusive area of its Presidents Club. Moreover, the TAA Process is really applicable to "construction" done to the Premises that alters them in any way, not to the mere use of the fixed wireless antenna, which is a mobile device less than 1 meter in size that sits on a shelf and was placed in the Premises in July 2004.

4. In addition, notwithstanding the filing of its Petition under the provisions of OTARD, Continental reserves its rights under the Lease and believes that it had the right to install and use its free wireless communication services for its customers and employees who use the Presidents Club.

This is supported by the following provisions:

- (a) Section 7.1(iv), specifically permits "the conduct of operations, communications, reservations and administrative office functions and activities in connection with air transportation performed by Tenant" . . .
- (b) Section 7.1(xi) permits "the installation, operation, and maintenance of telecommunications equipment customarily used in air transportation operations, subject to approval under the TAA Process." Clearly, the lease of the Presidents Club and its use by Continental's customers and employees is directly related to the provision of Continental's air transportation operations. Although the TAA Process approval may not have been obtained, (assuming it is even applicable to the placement of the fixed wireless antenna at issue, which Continental contends it is not), the Authority should not be permitted to use the TAA Process to refuse arbitrarily its permission to do an act it otherwise expressly permits under the Lease and which is a protected act under the OTARD regulations.
- (c) Sections 7.2 (b) and (c) can and should be read as supporting the view that such service can indeed be offered free of charge to Continental's customers and employees within its frequent flyer club, because the only prohibition in those sections is if Tenant *sells goods* of any kind, "including any other items which fall within the rights provisions of the Authority's contracts with concessionaires" or food or beverages in its Presidents Club, which Continental does not do.
- (d) Under Section 10.1 (d) of the Lease, the Authority has "no obligation to provide telephone or data communication services to the Premises." Thus, the Authority should not be permitted to disclaim any obligation to provide services that are usually and customarily provided in our President's Club, but at the same time contend that the Authority would not give its consent to Continental's doing so.

(e) Section 19.2 also provides that "Tenant shall peacefully have and enjoy the Premises and the rights and privileges granted by this Lease."

5. Finally, as to the speculative threat of a safety risk raised for the first time in Massport's letter of July 5, 2005, Section 10.3 of the Lease does not support Massport's contention because there is no showing that Continental's wireless system in any way interferes with any installed "communications system", "fire protection system", "alarm system" or any other system at Logan. Thus, there is no genuine safety exemption available to Massport under the OTARD regulations. Rather, these regulations require a showing that a restriction be "necessary to accomplish a clearly defined, legitimate safety objective that is either stated in the text, preamble, or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size and weight and pose a similar or greater safety risk as these antennas and to which local regulation would normally apply."
6. Continental does not believe that Massport has met even the threshold requirement of stating "a clearly defined, legitimate safety objective" in order to avail itself of any protection under the OTARD regulations.
(Please see Exhibit C to Petition and Affidavit in Support of Petition.) The

Federal Aviation Administration ("FAA"), which regulates aviation safety, has not found the installation or operation of Continental's wireless system at Logan (or at any other airport) to be unsafe. Moreover, Continental's first concern as an airline is for the safety of its passengers, employees and the public, so Continental strongly objects to the implication with respect to its operations at Massport such that the Authority would be entitled to a legitimate safety exception under the OTARD regulations. And, although Continental is without knowledge or information as to whether the same safety restrictions have been applied in a non-discriminatory manner to Massport's third party vendor, AWG (which Massport now contends Continental should have to pay to use AWG's antenna), these are issues which Continental believes the FCC should fully explore in making its declaratory ruling.

7. Continental also states that it has exclusive use of its Presidents Club, which is part of the defined Premises under section 4.1 for which it pays Rent under the Lease. There are portions of the Airport under section 4.4 of the Lease where Continental has only appurtenant rights to use and access areas in common with other tenants (such as Common Areas) and Airport Facilities (such as landing fields) and the shared use of outbound and inbound baggage space. There are also areas in which Continental has the appurtenant right to preferential or priority use of gate or ramp areas. However, in marked contrast, the lease of the Presidents Club

Premises is solely to Continental under the Lease and no other person or entity under the Lease has the right to use such premises.

8. For these reasons and the reasons set forth in its Petition, Exhibits and Affidavit, all of which are incorporated by reference in this Supplement to Petition, Continental respectfully requests the FCC to issue its declaratory ruling as requested.

Respectfully submitted,
Continental Airlines, Inc.

CERTIFICATION

I, Donna J. Katos, say under penalty of perjury, that the following is true and correct:

1. I am the Managing Attorney-Litigation and Department Administration in the Legal Department of Continental Airlines, Inc.
2. I have read the foregoing Supplement to Petition for Declaratory Ruling.
2. Except for those matters of which the FCC may take official notice, all of the information contained therein is true and correct to the best of my knowledge, information and belief.

July 19, 2005



Donna J. Katos

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing Supplement to Petition on the following interested persons in accordance with 47 CFR §1.4000 (f):

Massachusetts Port Authority, One Harborside Drive, Suite 200S, East Boston, MA 02128-2909, to the attention of: Gregory S. Zanni and Deborah Lau Kee.

July 19, 2005



Donna J. Katos