

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

|                                      |                      |
|--------------------------------------|----------------------|
| _____ )                              |                      |
| In the Matter of )                   |                      |
| )                                    |                      |
| Petition for Declaratory Ruling of ) | ET Docket No. 05-247 |
| Continental Airlines, Inc. )         |                      |
| _____ )                              |                      |

To: The Office of Engineering and Technology

**REPLY COMMENTS OF  
THE AIRPORTS COUNCIL INTERNATIONAL-NORTH AMERICA**

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October 13, 2005

## SUMMARY

The Airports Council International – North America (“ACI-NA”) again urges the Office of Engineering and Technology (“OET”) to deny the Petition for Declaratory Ruling of Continental Airlines (the “Petition”). The record demonstrates that the actions of the Massachusetts Port Authority (“Massport”) fall within the scope of the central antenna exception and the safety exception to the Over-the-Air-Reception Devices (“OTARD”) Rule. Furthermore, it is essential to the public interest that airports continue to have broad latitude to manage their physical infrastructure.

The comments of parties opposed to Massport’s actions do not make the case for preemption. In fact, the comments of T-Mobile USA, Inc. and the Air Transport Association of America, Inc., illustrate that airports across the country are permitting deployment of Wi-Fi facilities on their premises. Airports need flexibility, on a local basis, to make the best decisions in their particular circumstances, but claims that they are routinely blocking deployment are belied by the information supplied by the commenters themselves.

Claims that airports, including Massport, are motivated merely by the desire to establish “monopolies,” or to gain revenue, are also belied by the record. The truth is that airports have adopted a broad range of business models, based on local conditions, and are always driven by their mission of serving the needs of the traveling public. For instance, many airports offer Wi-Fi service at no charge. We urge OET to bear in mind that the airport is the only institution charged with meeting the needs of the entire airport community. Allowing the Balkanization of an airport in the name of protecting a handful of commercial tenants is not in the public interest.

Finally, airports are unique institutions, and OET can safely preserve the critical independence of airport management without affecting other Commission policies. Analogies to other institutions, such as hospitals, fail to recognize critical differences. Airports cannot

function without permitting a wide range of independent businesses to operate on their premises. Dulles International Airport, for example, is served by 41 airlines, 65 concessions, 7 rental car companies, and many other tenants, all of whom may wish to operate their own wireless facilities, for a wide variety of purposes. This does not even include the needs of the public, law enforcement agencies, or the airport itself. The tension among free public access, ensuring the flow of commerce, and security and safety concerns creates an extremely unusual environment.

In short, Massport's efforts to advance the public interest by exercising its authority to manage public property entrusted to its care should be upheld.

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THE AIRPORTS COUNCIL INTERNATIONAL-NORTH AMERICA**

**INTRODUCTION**

The Airports Council International – North America (“ACI-NA”) respectfully submits these Reply Comments in the above-captioned proceeding. The record demonstrates that airports are actively engaged in promoting the deployment of Wi-Fi and have no interest in hindering it. In fact, airports are far more likely to promote the public interest and the development of competition than individual service providers or airport tenants. The Office of Engineering and Technology (“OET”) has ample basis upon which to find that Massport’s actions fall within the scope of the central antenna exception and the safety exception to the Over-the-Air-Reception Devices (“OTARD”) Rule,<sup>1</sup> and ACI-NA urges OET to do so.

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<sup>1</sup> 47 C.F.R. § 1.4000.

**I. THE RECORD DEMONSTRATES THAT AIRPORTS AROUND THE COUNTRY ARE PROMOTING, NOT HINDERING, THE DEPLOYMENT OF WI-FI.**

**A. Even Commenters Opposed to Massport Acknowledge that Wi-Fi Is Commonplace in America’s Airports.**

In our opening comments, we stated that airports around the country were in various stages of introducing Wi-Fi service, and were actively promoting the technology as a means of meeting passenger demand. Commenters opposed to Massport – principally T-Mobile USA, Inc. (“T-Mobile”) and the Air Transport Association of America, Inc. (“ATA”) – have introduced information supporting ACI-NA on this point.

For example, T-Mobile states that it “provides Wi-Fi service in the entirety of eight domestic airports . . . .”<sup>2</sup> Three of these airports, Austin-Bergstrom International, Dallas-Fort Worth International, and San Francisco International, are in the top 50 airports in the country in terms of annual passenger boardings.<sup>3</sup> All told, the eight airports account for over 56 million passenger boardings, or about 8% of the annual national total.<sup>4</sup> In addition, T-Mobile states that it offers exclusive service in a total of 110 club lounges operated by American, Delta, United and US Airways.<sup>5</sup> Finally, T-Mobile suggests that its service is available in some fashion in other

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<sup>2</sup> T-Mobile Comments at 5.

<sup>3</sup> Federal Aviation Administration, Preliminary Calendar Year 2004 Boardings at Commercial Service Airports (“2004 Boardings”), available at [http://www.faa.gov/arp/planning/stats/2004/prelim\\_cy04\\_cs\\_board.xls](http://www.faa.gov/arp/planning/stats/2004/prelim_cy04_cs_board.xls).

<sup>4</sup> The FAA figures show a total of 702,997,034 passenger boardings nationwide in 2004, and the following figures for the eight airports served by T-Mobile: Dallas-Fort Worth – 28,063,035; San Francisco – 15,605,375; Austin – 3,446,564; Dallas Love Field – 2,945,774; Providence-T.F. Green – 2,732,001; Burbank – 2,445,574; Knoxville – 782,135; and Sioux Falls – 329,070. *See* 2004 Boardings.

<sup>5</sup> T-Mobile Comments at 5.

airports as well.<sup>6</sup> T-Mobile could not have deployed all of these facilities if airports in general were discouraging deployment of Wi-Fi.

ATA also demonstrates the extent to which airports are both promoting and accommodating the growth of Wi-Fi. Appendix A to ATA's comments is a "Partial List of U.S. Airports where ATA's Members Operate or Provide Wi-Fi Hotspot or Other Unlicensed Wireless Systems." There are 54 airports on the list, including 34 of the top 40.<sup>7</sup> ATA also notes that its members use Wi-Fi and other wireless technologies for a variety of different uses, including self-serve ticket kiosks, security screening, baggage check-in, baggage tracking, and others.<sup>8</sup> ATA fails to note, however, that for many of these applications to work effectively, ATA's members frequently must install wireless devices in common areas, which are unprotected by the OTARD Rule. In other words, airports are willing to accommodate the reasonable needs of the airlines, even when they have no legal obligation to do so.

**B. ATA Fails To Support Its Claim that "Many" Airports Are Restricting the Deployment of Wi-Fi.**

ATA attempts to frighten OET with repeated claims that limitations by airports on the deployment of Wi-Fi are widespread.<sup>9</sup> ATA does not, however, specifically name any of these other airports, nor does ATA attempt to quantify the scope of the alleged problem.<sup>10</sup> Such vague

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<sup>6</sup> *Id.*

<sup>7</sup> The top 40 airports enplane approximately 77% of all passengers each year. *See* 2004 Boardings.

<sup>8</sup> ATA Comments at 4-5.

<sup>9</sup> *See, e.g.,* ATA Comments at i-ii; 8; 14; 17; 19; 20.

<sup>10</sup> Of course, if ATA were actually to identify any of these airports, it would be required by the Commission's rules to serve each such airport with a copy of these comments, thus giving the airports the opportunity to respond. 47 C.F.R. § 1.1206(a), Note 1.

and unsubstantiated assertions do not constitute facts and cannot form the basis for policy-making by OET.

In addition, ATA fails to distinguish actions involving antennas in exclusive use areas and antennas in common areas. ATA's claims are thus doubly dubious, because ATA's comments do not allow the reader to distinguish between the two types of cases. ATA's members clearly have no rights – nor any legitimate basis for complaint -- regarding the installation of wireless facilities in common areas. Restrictions regarding baggage tracking, curbside check-in, and tracking of cargo on common ramp areas, very likely involve restrictions on installations in common areas. Although there might conceivably be cases in which restrictions affect exclusively leased areas, ATA has made no effort to demonstrate that point. Consequently, all of ATA's references to alleged problems at other airports should be rejected.

**II. AN AIRPORT'S PRIMARY MOTIVATION IS NOT TO INCREASE REVENUE BUT TO MANAGE COMPETING INTERESTS FOR THE PUBLIC BENEFIT.**

Several commenters assert that Massport and airports in general are motivated by only a desire for revenue or the prospect of establishing a “monopoly” on the airport.<sup>11</sup> This is simply false. As we stated in our opening comments, airports have many varied and valid concerns, and any claim that airports are motivated merely by the prospect of making money is not only simplistic but betrays a fundamental ignorance of how airports are organized and operated. We cannot deny that in some cases the opportunity to develop a revenue stream in exchange for the use of airport property is a factor. But reality is far more complicated than the suggestion that airport authorities are somehow blinded by greed.

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<sup>11</sup> See, e.g., T-Mobile Comments at 15; ATA Comments at 19.

First, as we showed in our opening comments, airports are adopting a range of business models, depending on their particular circumstances. Many airports offer Wi-Fi service at no charge. Others may charge, but do not restrict airlines or other tenants from operating their own facilities. Neutral host systems like Massport's are capable of offering access to multiple providers, and thus fairly balance the airport's need to control its physical infrastructure and the overall environment on its premises, with the airport's need to respond to the demands of the public.

In addition, as the comments of both ACI-NA and Massport show, the primary mission of an airport is to address the needs of the traveling public. We understand why private sector companies and many individuals may leap to the conclusion that "it's all about money." After all, the fundamental purpose of most organizations in our economy is to make money, and most decisions in the private sector hinge on the need to make a profit. But unlike T-Mobile, or Continental and ATA's other members, airports are not for-profit entities. They do not pay dividends and they cannot reward their employees and stockholders through higher stock prices. They do benefit from higher revenues – but under FAA policies governing use of airport revenues, those revenues can only be used to improve conditions at the airport.<sup>12</sup> This means that an airport's incentives are fundamentally different from those of profit-making entities. While they are charged with making the best use of the property entrusted to their care, they are not charged with making a profit and they have many other considerations to balance besides the possibility of generating revenue from any particular source.

As we stated in our opening comments, the overriding concern in many cases is the desire to extend service throughout the airport, so that all passengers and tenants can have access, rather

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<sup>12</sup> See, e.g., 49 U.S.C. § 47107.

than a favored few. ATA claims that passengers are angry about Massport's actions at Logan Airport. But passengers are just as likely to be frustrated and angry if they can only get service in limited areas of an airport. Consider the example of an airport that has concluded that it is not cost-effective to install a Wi-Fi system in its concourse because a few tenants, claiming protection under the OTARD Rule, have installed access points and effectively divided up the portions of the concourse adjacent to their clubs or restaurants among themselves, leaving large areas unserved. One can easily imagine passengers complaining loudly, perhaps in letters to the Commission, in the belief that "the airport is getting a cut" from those tenants, and therefore deliberately preventing Wi-Fi deployment elsewhere in the terminal.

A system that provides ubiquitous service will, by definition, be more useful to passengers and tenants than a system that is available only in limited areas of an airport. We simply do not understand why OET or the Commission should or would support a result that favors a handful of users over the common interest. Neutral host systems, in particular, offer a means of allowing an airport to control its infrastructure while opening itself up to ubiquitous service from a variety of providers.

In fact, the comments demonstrate the importance of central management in the airport setting. ATA, for instance, discusses current and planned uses of Wi-Fi that extend far beyond exclusive use areas.<sup>13</sup> It is difficult to imagine all of those uses becoming widespread without the active cooperation of airport management, however. If every airline were to introduce its

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<sup>13</sup> ATA Comments at 5 ("Additional examples of existing or planned use of Wi-Fi and other unlicensed wireless technologies include curbside check-in and baggage check, communications with cockpit crew, mobile gate equipment communications, flight crew "ready room" flight preparation, cargo parcel and U.S. mail tracking, cargo loading tracking and assistance (by establishment of an Automated Scale Interface), and support services such as wheelchair dispatch, unaccompanied minor service, medically required oxygen distribution, and cable service warehouse management").

own baggage handling system using access points in common areas, for instance, airports would need a role in the design and installation of those facilities, or conflicts would be inevitable. And of course, if conflicts could not be resolved, the airport would have every right to remove the facilities from the common areas. The need for coordinating the placement of facilities in exclusive use areas within the narrow confines of an airport is no different, especially because Wi-Fi installations in exclusive use areas will often affect activities in adjacent common use areas.

Finally, to the extent that revenue may indeed be a factor in some cases, we are aware of no statute or Commission rule that bars an airport from obtaining revenue for the use of its property. Nor is there anything wrong with an airport considering revenue generation as a factor in formulating policy. The federal government, acting through the Commission, has generated billions of dollars through the licensing of scarce wireless spectrum, including spectrum used by T-Mobile, among others. Even today airports earn revenue from the operation of payphones on their premises, just as do many other property owners. Neither Congress nor the Commission has ever barred that activity, nor should they.<sup>14</sup> Preventing airports from earning revenue from the use of their property to provide wireless services – or allowing the fact that they may do so in some cases to influence the formulation of Commission policy – will merely transfer wealth from the publicly-owned and operated airport to the private sector, and distort economic incentives by subsidizing wireless providers. It certainly makes no sense to prevent airports from earning revenue while at the same time insisting that T-Mobile, Continental, and other service providers or airlines must be allowed to make money from their use of airport property.

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<sup>14</sup> In fact, the Commission has expressly upheld the right of a local government to restrict the placement of payphones and to exercise “its contracting authority as a location provider . . . .” *In re California Payphone Ass’n*, 12 FCC Rcd 14,191 at ¶ 38 (1997).

Local airport managers are keenly aware of the many interests they have to balance in ensuring they meet the needs of the traveling public, and on the whole they do an excellent job. Management of Wi-Fi facilities is a matter best left to the judgment of local airport managers.

**III. MASSPORT'S ACTIONS FALL WITHIN THE SCOPE OF THE CENTRAL ANTENNA EXCEPTION AND THE SAFETY EXCEPTION.**

For the reasons discussed in our opening comments, both the central antenna option and the safety exception apply in this case. Massport has demonstrated in its comments that its system allows individuals to receive the service they desire, offers signal quality as good as or better than that provided by individual antennas, does not impose greater costs than the use of individual antennas, and does not unreasonably delay the ability to receive service.<sup>15</sup> Massport has also shown that there are strong security considerations, including use of its system by the Massachusetts State Police and the Transportation Security Administration, that justify application of the safety exception.<sup>16</sup> Continental's comments do nothing to alter this conclusion. Furthermore, as we discussed in our opening comments, a broad range of public policy considerations demand that airports have the flexibility to deal with local conditions. It simply does not make sense to apply the OTARD Rule in the context of an airport in the same way the rule has been applied in the context of residential buildings.

**IV. A RULING FOR MASSPORT WOULD SET ONLY LIMITED PRECEDENT BECAUSE OF THE UNIQUENESS OF THE AIRPORT SETTING, AND WOULD NOT VIOLATE ANY COMMISSION RULES OR POLICIES.**

The comments of Massport and ACI-NA amply demonstrate that airports are unique institutions. We are unaware of any other comparable class of entities: The range of activities

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<sup>15</sup> Massport Comments at 27-39.

<sup>16</sup> *Id.* at 39-55.

that take place on an airport, the number of different types of actors, and the geographic scope of an airport, all make airports unique. OET can easily take note of all of these factors and give airports the latitude they need to operate in the public interest.

In its comments, Partners Healthcare System, Inc., asserts that airports are not more complex than hospitals, and that hospitals have extensive experience in operating a variety of wireless systems simultaneously. The latter may be true, but the former statement is not. Airports are not like hospitals because of the large number of independent businesses that operate on airports; as we stated in our opening comments, for example, Dulles International Airport is served by 41 airlines, 65 concessions (*e.g.*, retail food establishments), and 10 other tenants in the terminal area; 7 rental car companies; and numerous other tenants.<sup>17</sup> While we do not claim to be familiar with the hospital environment, we suspect that most hospitals do not allow anything close to such a range of independent actors on their premises, and that the vast majority, if not all, of RF transmissions are produced by equipment controlled by the hospital. In fact, we strongly suspect that the hospital environment, properly examined, will illustrate the need for central control. Regardless of the number of types of equipment that may operate in a hospital, we very much doubt that hospital managers are prepared to allow any person who enters their premises to operate any type of device they choose to, under any circumstances.<sup>18</sup> In fact, although some may now be relaxing the ban, many hospitals have prohibited the use of cell phone by patients and visitors within hospital confines, citing potential interference with critical medical devices.

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<sup>17</sup> ACI-NA Comments at 5.

<sup>18</sup> Indeed, it seems likely that Partners Healthcare is more concerned with protecting its right to operate wireless equipment on property that it leases from others, than with issues related to property that it owns and controls.

ATA suggests that the “practical effect of Massport’s rules is to create an exclusive license for use of public airways that the Commission has expressly allocated for unlicensed use.”<sup>19</sup> This is a creative argument, but it ignores the limited range of Wi-Fi transmissions, the defined limits of any piece of private property, and the inherent rights of property ownership. Neither Massport nor any other airport can create any such “exclusive license for use of public airways,” because they cannot control activities that take place off of their premises. They can only control activities on their premises, which means that Wi-Fi users elsewhere, even across the street, remain free to use the public airwaves. Furthermore, Massport’s restrictions are tied to the right to occupy specific property, and property owners in our society have always had broad power to control the use of their property. Property rights may create all kinds of alleged “practical effects” simply because we live in a world with three physical dimensions. But that is not a sufficient reason to override rights protected by the Constitution. It is, on the other hand, a very good reason for allowing interested parties to reach voluntary agreements among themselves.

The actions of Massport in this case, or of airports generally, do not contradict the FCC’s August 2005 Policy Statement, cited by Continental, ATA, and others. That statement calls for, among other things, competition and consumer choice.<sup>20</sup> A neutral host system, for example, promotes competition and offers the public a choice, because multiple providers can obtain access to the system. Indeed, airports have a greater interest in offering passengers and tenants a choice of service providers than either the airlines or the service providers themselves. Thus, OET should ignore such parties when they present themselves as guardians of the public interest,

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<sup>19</sup> ATA Comments at 11.

<sup>20</sup> See “New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet,” News Release, FCC 05-151 (rel. Aug 5, 2005).

competition, and the consumer. In fact, systems that provide access to multiple Internet service providers promote competition by creating an environment in which small providers can compete and build market share. The Commission recognized the strength of this rationale in deciding not to prohibit exclusive contracts for the provision of video service in apartment buildings and other multiple tenant environments.<sup>21</sup>

The Commission's rule prohibiting exclusive contracts in commercial settings, cited by ATA, does not apply in this case for at least three reasons. First, the rule applies only to common carriers,<sup>22</sup> and Wi-Fi has not been classified as a common carrier service. Second, the rule only applies to telecommunications providers, and not to property owners. And third, neutral host systems like Massport's allow for access by multiple providers – they are not exclusive.

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<sup>21</sup> *Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1364-1370 (2003).

<sup>22</sup> 47 C.F.R. § 64.2500.

## CONCLUSION

Airports should be allowed to control the placement and use of Wi-Fi facilities on their premises. The record to date shows that airports welcome the technology and are helping to deploy it. ACI-NA respectfully urges OET to deny the Petition.

Respectfully submitted,



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October 13, 2005

Certificate of Service

I hereby certify that I have caused to be mailed this 13th day of October, 2005, copies of the foregoing Comments of the Airports Council International-North America, by first-class mail, postage prepaid, to the following persons:

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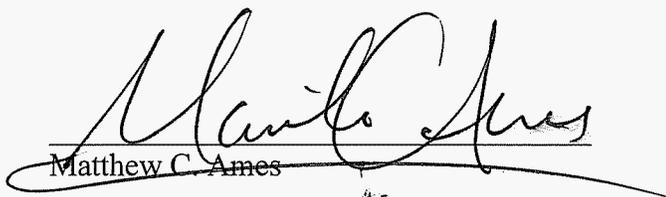
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