

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)
)
Continental Airlines of Houston, Texas) **ET Docket No. 05-247**
)
Petition for Declaratory Ruling Regarding)
Whether Certain Restrictions on Antenna)
Installation Are Permissible Under the)
Commission's Over-the-Air Reception Devices)
(OTARD) Rules)

To: The Office of Engineering and Technology

**REPLY COMMENTS OF
THE MASSACHUSETTS PORT AUTHORITY**

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EXECUTIVE SUMMARY

Massport submits these Reply Comments to clarify the record regarding the right of Continental Airlines, Inc., T-Mobile USA, Inc., and other entities to install and use individual Wi-Fi antennas at Logan.

There is no question that the OTARD rule authorizes Massport to restrict the installation and use of individual Wi-Fi antennas at Logan. This is because Massport has made available a neutral-host/common-use central Wi-Fi antenna system that allows Continental to access its desired service and service provider, provides identical or superior signal quality to Continental's individual Wi-Fi antenna, is less expensive than Continental's Wi-Fi antenna, and imposes no delay on the receipt of service. Although Continental attempted to rebut these facts, its comments merely confirm that the central Wi-Fi antenna system meets all of these conditions. No other tenant at Logan has suggested that the central Wi-Fi antenna system fails to meet these conditions.

In addition, Massport has demonstrated that the restrictions on the installation and use of individual Wi-Fi antennas at Logan are necessary to achieve legitimate safety objectives. Although some commenters claim that Massport raised the safety objectives at the last minute, these objectives were clear from the text of the individual lease agreements, readily available private documents governing the use of the terminal, the pervasive regulation of airport security, and numerous conversations and letters between Massport and its tenants.

The OTARD rule would not apply to the prior, actual, and proposed Wi-Fi antennas mentioned by the commenters. These antennas fail to meet the basic requirements of the OTARD rule, such as the use of the antenna primarily for the tenant's communications, the transmission of a commercial signal, the use of the antenna for wireless communications with a

commercial provider outside of the exclusive use area, and the placement of the antenna on property within the exclusive use and control of the tenant. Not only do commenters request approval of installations not covered by the OTARD rule, but T-Mobile and American Airlines also unabashedly complain that Massport objected to their repeated violations of the lease agreement and other activities which contravene Massport's established policies for any commercial operations at Logan.

The FCC should not preempt Massport's lease agreements with tenants. Although commenters suggest that Massport has attempted to regulate interference through its lease agreements, the FCC has expressly authorized restrictions on the installation and use of individual Wi-Fi antennas at Logan.

If the FCC were to interpret the OTARD rule to permit Continental, T-Mobile, or any other entity to install and use a Wi-Fi antenna at Logan, this would not only create an unmanageable situation at Logan, but it would also violate the Takings Clause of the Fifth Amendment and exceed the acknowledged limits on the FCC's statutory authority.

Massport's central Wi-Fi antenna system advances the policies set forth in the Communications Act. Although many commenters rely on policy arguments to overcome the patent limitations of the OTARD rule, the central Wi-Fi antenna system actually enables the FCC to comply with its statutory responsibilities of promoting the safety of life and property and promoting the deployment of competitive services, new technologies, and an open and interconnected Internet. Other policies clearly would not apply to the information services offered over the central Wi-Fi antenna system.

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REPLY COMMENTS OF THE MASSACHUSETTS PORT AUTHORITY

The Massachusetts Port Authority ("Massport"), through its undersigned counsel, respectfully submits these Reply Comments in response to the *Public Notice* in the above-captioned matter,¹ pursuant to Section 1.415 of the Federal Communications Commission's ("FCC") rules.² This proceeding addresses the authority of Massport to enforce the terms of its Lease Agreement with Continental Airlines, Inc. ("Continental") in connection with Continental's provision of public communications service in its "Presidents Club" at Boston-Logan International Airport ("Logan").

¹ OET Seeks Comment on Petition from Continental Airlines for Declaratory Ruling Regarding Whether Certain Restrictions on Antenna Installation Are Permissible under the Commission's Over-the-Air Reception Devices (OTARD) Rules, ET Docket No. 05-247, *Public Notice*, 20 FCC Rcd 13322 (2005). The Office of Engineering and Technology subsequently extended the deadline for filing reply comments to October 13, 2005. OET Seeks Comment on Petition from Continental Airlines for Declaratory Ruling Regarding Whether Certain Restrictions on Antenna Installation Are Permissible under the Commission's Over-the-Air Reception Devices (OTARD) Rules, ET Docket No. 05-247, *Order Extending Comment Period*, DA 05-2335 (2005).

² 47 C.F.R. § 1.415 (2004).

I. THE OTARD RULE PERMITS MASSPORT TO RESTRICT THE INSTALLATION AND USE OF INDIVIDUAL WI-FI ANTENNAS AT LOGAN

The comments confirm that Massport has not violated the Over-the-Air Reception Device ("OTARD") rule by restricting the installation and use of Continental's individual Wi-Fi antenna at Logan. The FCC permits Massport to require the use of the central Wi-Fi antenna system under certain conditions. Neither Continental nor any other commenter has demonstrated that Massport failed to meet those conditions. Massport has also shown that the restrictions are necessary to address its legitimate safety concern about the occurrence of interference to safety and security communications on the central Wi-Fi antenna system. Even if Massport could not satisfy these exceptions, the OTARD rule does not appear to apply to the situations raised in the comments. Based on these reasons, the FCC should not exercise its preemption authority to invalidate Massport's lease agreements.

A. Massport May Require the Use of the Central Wi-Fi Antenna System

Massport may restrict the installation and use of individual Wi-Fi antennas because of the existing central Wi-Fi antenna system at Logan. Although Continental acknowledges the existence of the central antenna system exception to the OTARD rule, it claims that the central Wi-Fi antenna system at Logan would not qualify for this exception because it (1) prevents Continental from selecting a service provider of its choice, (2) unreasonably increases the cost of wireless Internet access service, and (3) delays Continental's ability to receive fixed wireless service.³ Continental is mistaken with respect to each of these claims.

The central Wi-Fi antenna system is a neutral-host/common-use system that offers users a broad selection of Internet service providers. Although Continental complains that Massport

³ Comments of Continental Airlines, Inc., ET Docket No. 05-247, at 7-11, 12-14 (Sept. 28, 2005) [hereinafter *Continental Comments*].

would force it to use a single service provider,⁴ the comments reflect a continued misunderstanding of the entire purpose of a neutral-host/common-use system: to permit numerous Internet service providers to serve their subscribers over a single, integrated wireless broadband system. As discussed in Massport's Comments, the central Wi-Fi antenna system enables customers of hundreds of Internet service providers to receive wireless access to the Internet without paying additional charges to AWG or Massport.⁵ Continental could continue to use its preferred remote access provider, Fiberlink, over the central Wi-Fi antenna system.⁶

The central Wi-Fi antenna system is also less expensive than Continental's individual Wi-Fi antenna. Although Continental concedes that it has not requested information regarding the rates charged by AWG for access to the central Wi-Fi antenna system, it engages in an elaborate, but incorrect, "computation" of the cost.⁷ In a letter to Continental, Massport stated its understanding that AWG had "a very reasonable rate structure for airline use based on the number of enplanements at Logan Airport or on the number of "hits."⁸ Because AWG controls the pricing of the central Wi-Fi antenna system, Massport did not presume to quote prices and advised Continental to contact AWG directly for rate information. Continental instead chose to "compute" rates for access to the central Wi-Fi antenna system, using artificially high numbers

⁴ *Id.* at 13.

⁵ Comments of The Massachusetts Port Authority, ET Docket No. 05-247, at 19, 32 (Sept. 28, 2005) [hereinafter *Massport Comments*].

⁶ *Id.* at 30-31.

⁷ *Continental Comments* at 9-10, 14.

⁸ Petition of Continental Airlines, Inc. for a Declaratory Ruling, ET Docket No. 05-247, Exhibit C (July 8, 2005) [hereinafter *Petition*].

based in some instances on the charge for individual walk-up customers without monthly service agreements rather than a corporate rate.⁹

Continental also confirms that its individual Wi-Fi antenna is more expensive than the central Wi-Fi antenna system. In particular, Continental discloses that it "incurs a *minimal* monthly fee of approximately \$600 to support the free wireless service to its customers."¹⁰

Because Continental describes this price as its "minimal" monthly fee, it suggests that its average per-month cost is even higher. This price also includes only the cost of Internet access service for its customers; Continental neglected to disclose the amount it pays to provide wireless Internet access service to its employees.¹¹ Although Continental has still not provided complete information about the price of its individual Wi-Fi antenna, maintenance plan, and wireless Internet access service, the exact price is irrelevant. Continental's employees appear to have access to the central Wi-Fi antenna system at no additional charge from AWG or Massport

⁹ Many service providers charge higher rates for walk-up Wi-Fi customers who have not entered into monthly agreements. For example, T-Mobile charges \$6.00 *per hour* or \$29.99 per month for Wi-Fi service, T-Mobile, HotSpot, Services, http://www.t-mobile.com/hotspot/services_about.htm (last visited Oct. 11, 2005), and Sprint PCS has charged \$9.95 for 24 hours of unlimited access in a supported location or \$49.95 for a month-to-month plan. In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, WT Docket No. 05-71, *Tenth Report*, FCC 05-173 ¶ 203, ¶ 203 n. 532 (2005) [*Tenth Wireless Competition Report*]. By comparison, AWG charges a reasonable \$7.95 for 24 hours of unlimited access and offers free access to subscribers of Internet service providers that have roaming agreements for use of the central Wi-Fi antenna system.

¹⁰ *Continental Comments* at 10 (emphasis added).

¹¹ Although Continental suggests that Massport offered a "temporary, free-of-charge solution merely in an attempt to dissuade Continental from pursuing its Petition," *id.* at 10-11, 14, Massport held discussions with Continental to try to help its tenant cure a breach of the Lease Agreement and to reduce the interference caused by Continental's unauthorized Wi-Fi antenna. Continental also has absolutely no basis to accuse Massport of potentially passing on the cost of free Wi-Fi service through other charges. *Id.* at 11.

through the existing agreement with Fiberlink, and Continental's preferred passengers have no OTARD rights.¹²

The central Wi-Fi antenna system would not delay Continental's receipt of fixed wireless service. Although Continental asserts that it would have to prepare and file a TAA form requesting prior approval,¹³ the TAA form is only necessary to install communications devices or otherwise make changes to the leased space. As discussed in Massport's Comments, Continental would not need to install an individual Wi-Fi antenna to use the existing central Wi-Fi antenna system. Continental could receive access to the central Wi-Fi antenna system in the Presidents Club immediately because AWG has installed 245 access points to provide ubiquitous coverage at Logan from curbside to the tail of the aircraft.¹⁴ If Continental requires additional capacity, AWG could install another access point in or near the Presidents Club in one day.¹⁵

B. Massport Has Demonstrated the Existence of a Legitimate Safety Concern

The restrictions on Continental's individual Wi-Fi antenna are necessary to achieve legitimate safety objectives. Continental, American, T-Mobile, and the ATA claim that Massport did not initially mention its safety concerns as a reason to restrict the use of Continental's or any other tenant's antenna.¹⁶ Although these commenters also argued that

¹² *Massport Comments* at 36-38, 65-66. Although the OTARD rule does not grant any rights to Continental's preferential passengers who are members of the Presidents Club, nothing would prevent Continental from purchasing an account with Boingo or one of its partner service providers and allowing its passengers to use the account to access the Internet. *Id.* at 37. These passengers could also purchase their own account with Boingo or one of its Internet service provider partners. *Id.*

¹³ *Continental Comments* at 14.

¹⁴ *Massport Comments* at 33.

¹⁵ *Id.* at 38-39.

¹⁶ *Continental Comments* at 16; Comments of The Air Transport Association of America, Inc., ET Docket No. 05-247, at 16 (Sept. 28, 2005) [hereinafter *ATA Comments*]; Comments of T-

(continued...)

Massport has not provided a concrete basis for its generalized statements,¹⁷ they neglect to recognize that the FCC has concluded that generalized statements are permissible if the safety objective is clearly apparent on the face of the restriction.¹⁸ As discussed in Massport's Comments, the text of the standard lease agreement alerts Continental and other tenants of the safety objectives associated with the use of the terminal at Logan.¹⁹ The safety and security objectives also appear in other private documents that are readily available to Continental and other tenants, as well as in the extensive regulations regarding airport security.²⁰ Finally, despite American's assertions, Massport mentioned these safety objectives in its letters to American dated December 21, 2004, and January 10, 2005, and in a number of telephone calls and meetings with representatives of the airlines.²¹

Mobile USA, Inc., ET Docket No. 05-247, at 13 (Sept. 28, 2005) [hereinafter *T-Mobile Comments*].

¹⁷ *Continental Comments* at 16; *ATA Comments* at 16; *T-Mobile Comments* at 13.

¹⁸ In re Frankfurt, CSR-5238-O, *Memorandum Opinion and Order*, 16 FCC Rcd 2875, 2885 ¶ 30 (2001).

¹⁹ *Massport Comments* at 40-41.

²⁰ *Id.* at 41-42. Several commenters agree with Massport that "Continental and the other airlines, as well as other airport tenants, are extremely sophisticated and knowledgeable organizations" that do not require the same degree of protection as individual homeowners or apartment residents. Comments of Manchester Airport, ET Docket No. 05-247, at 4 (Sept. 30, 2005) [hereinafter *Manchester Comments*]; Comments of Tampa International Airport (Hillsborough County Aviation Authority), ET Docket No. 05-247, at 4 (Sept. 28, 2005) [hereinafter *HCAA Comments*]; Comments of Phoenix Sky Harbor International Airport, ET Docket No. 05-247, at 4 (Sept. 28, 2005) [hereinafter *Phoenix Comments*].

²¹ Comments of American Airlines, Inc., ET Docket No. 05-247, at 3, Exhibit B, Exhibit D (Sept. 27, 2005) [hereinafter *American Comments*]. Common sense reinforces these sources of information. An airport simply cannot have undocumented sources of interference potentially interfering with critical radio communications. For example, investigators with the Federal Aviation Administration feared that an unknown source of radio interference had disrupted the operation of a radar system at Logan. Mac Daniel & Peter J. Howe, *FAA Eyes Antenna for Radar Errors: Logan Officials Ask FBI to Rule out Sabotage*, Boston Globe, Oct. 12, 2005.

(continued...)

Although Massport expected some resistance to the shared use of the central Wi-Fi antenna system, it is surprised by the cavalier attitude toward safety and security communications expressed by Continental, American Airlines, and the ATA. These commenters suggest that the Transportation Security Administration ("TSA") and Massachusetts State Police should not receive the benefits of the 2.4 GHz band because a handful of airline club members would like to use individual Wi-Fi antennas for wireless Internet access.²²

The central Wi-Fi antenna system offers public safety agencies numerous benefits. In a letter attached to Massport's Comments, the TSA disclosed that it has successfully completed a pilot program on the central Wi-Fi antenna system and found the results so promising that it is exploring possible uses of this communications system.²³ The Massachusetts State Police has also provided a declaration confirming that "the iPAQ device using WiFi will have additional functionality . . . because the speed and bandwidth available with the 2.4 GHz band allows for the faster transmission of images . . ." ²⁴ The State Police further indicated that "[i]t is in the interests of the State Police to have a communications environment at Logan Airport that would allow the State Police communications security and priority and that would minimize degradation or other communications interference."²⁵ Based on these experiences, Massport cannot exhibit the same disregard as the airline commenters for the need of public safety

Because of these types of issues, Massport requires its tenants to follow the process set forth in the lease agreement for seeking approval before installing any antennas.

²² *ATA Comments* at 16; *Continental Comments* at 16 n.33; *T-Mobile Comments* at 14 n.28.

²³ *Massport Comments* at 14, 50, Exhibit C.

²⁴ Declaration of Major Scott Pare in Support of the Comments of The Massachusetts Port Authority, attached as Exhibit A.

²⁵ *Id.*

agencies for state-of-the-art equipment, enhanced functionalities, a secure network, and redundancy and reliability that are available with the central Wi-Fi antenna system.²⁶

Although the central Wi-Fi antenna system operates on unlicensed spectrum, Massport agrees with commenters that state that "it is not enough for OET to simply say that unlicensed Wi-Fi frequencies should not be used for mission-critical applications. Not only are they being used for such purposes, but such use is likely to grow."²⁷ Unlike the airline commenters, Massport believes that public safety personnel should have every advantage in fulfilling their statutory responsibilities to protect passengers and tenants at Logan.

C. The OTARD Rule Does Not Appear to Apply to the Situations Raised in the Comments

The OTARD rule contains specific limitations and does not authorize every installation and use of an individual Wi-Fi antenna at Logan. Although Continental, American Airlines, T-Mobile, and the ATA assert or imply that the OTARD rule permits certain prior, actual, or proposed Wi-Fi antennas, the plain language of the OTARD rule would bar the installation and use of those antennas.

1. Continental

Continental has no right to install and use an individual Wi-Fi antenna in the Presidents Club. As explained in Massport's Comments, the OTARD rule would not apply because Continental either resells commercial wireless Internet access service or does not receive or

²⁶ *Massport Comments* at 43-48; see Declaration of Dennis Treece in Support of the Comments of The Massachusetts Port Authority, attached as Exhibit B.

²⁷ *Phoenix Comments* at 4; see *Manchester Comments* at 4; Comments of The Airports Council International-North America, ET Docket No. 05-247, at 24-25 (Sept. 28, 2005) [hereinafter *ACI-NA Comments*].

transmit a commercial non-broadcast communications signal over the antenna.²⁸ In addition, the OTARD rules should not apply because Continental does not use its individual Wi-Fi antenna to communicate with a fixed wireless service provider outside of the Presidents Club.²⁹ The FCC should also exempt Logan from the OTARD rule as a special-use governmental facility.³⁰

2. T-Mobile

Although American Airlines and T-Mobile complain that Massport forced T-Mobile out of the Admirals Club at Logan, nothing in the OTARD rule authorizes T-Mobile to install and use a Wi-Fi antenna at this location. In 1999 or 2000, American permitted T-Mobile to start providing Wi-Fi service in American's private, members-only Admirals Club at Logan to preferential passengers who were also T-Mobile subscribers.³¹ To install the service, American apparently allowed T-Mobile to enter the common and restricted areas of Logan and run a T-1 cable into the Admirals Club.³² Neither American nor T-Mobile ever prepared or submitted a TAA form to request permission to run cable for T-Mobile's use through these common or restricted areas. In addition, T-Mobile never entered into a Commercial Service Operating Agreement, which establishes the rules and requirements for *any entity* conducting business at Logan and requires the payment of a fee for the opportunity to offer service. American also

²⁸ *Massport Comments* at 55-61. Continental mistakenly claims that Massport does not dispute that the individual Wi-Fi antenna in the Presidents Club "is used to receive or transmit fixed wireless signals." *Continental Comments* at 7.

²⁹ *Massport Comments* at 61-63.

³⁰ *Id.* at 64-65.

³¹ *American Comments* at 1; *T-Mobile Comments* at 3, 6, 7, 8.

³² *T-Mobile Comments* at 3, 6.

allowed T-Mobile to advertise its service in the Admirals Club, which is something that no tenant may do under Massport's lease agreements.³³

After Massport discovered T-Mobile's operation of the unauthorized commercial business at Logan, Massport repeatedly demanded that American require T-Mobile to cease operating its individual Wi-Fi antenna in the Admirals Club.³⁴ Massport specifically noted that American had violated its lease by not submitting a TAA for the installation of T-Mobile's Wi-Fi antenna and for allowing commercial operations in its leased space without authorization.³⁵ Although T-Mobile eventually removed the Wi-Fi antenna, it apparently continued to use its T-1 cable to offer Internet access service in the Admirals Club.³⁶ Massport again advised American to require T-Mobile to remove its unauthorized communications equipment.³⁷ Despite these activities, which were evidently designed to circumvent the prior approval process and the fee for conducting a commercial business at Logan, American and T-Mobile now unabashedly complain that Massport objected to their illicit behavior.

Nothing in the OTARD rule would permit American and T-Mobile to engage in these activities. Although the ATA claims that the FCC applies the OTARD rule "to those seeking to provide service to others for a fee,"³⁸ it fails to note the limitations on this interpretation. The FCC has specifically stated that it "d[id] not intend that carriers may simply locate their hub-sites on the premises of a customer in order to avoid compliance with a legitimate zoning

³³ *E.g.*, Boston-Logan International Airport, Terminal Lease between The Massachusetts Port Authority and Continental Airlines, Inc., L-7936 § 8.12, attached as Exhibit C.

³⁴ *American Comments* at Exhibit A, Exhibit B, Exhibit D, Exhibit E.

³⁵ *Id.*

³⁶ *Id.* at Exhibit G.

³⁷ *Id.*

³⁸ *ATA Comments* at 13.

regulation."³⁹ As discussed in Massport's Comments, the FCC requires the commercial provider to offer service to the tenant.⁴⁰ Because American has made clear that the Wi-Fi service is for its Admiral's Club patrons, and not for its own operations, the OTARD rule does not authorize a non-tenant third party like T-Mobile to install a Wi-Fi antenna.⁴¹ Even if American were a T-Mobile subscriber, the FCC has stated that the OTARD rule does not "apply to installations that are designed *primarily* for use as hubs for distribution of service."⁴²

The OTARD rule also does not protect T-Mobile's individual Wi-Fi antenna because it does not receive or transmit signals originating or terminating outside of the Admiral's Club.⁴³ Because T-Mobile uses a T-1 cable to carry the Internet access traffic to and from the Admiral's Club,⁴⁴ the OTARD rule would not authorize T-Mobile's installation and use of the Wi-Fi antenna.

If the FCC were to interpret the OTARD rule to permit T-Mobile, or any other entity, to install and use a Wi-Fi antenna at Logan, it would encounter additional legal difficulties. For example, as described in further detail below, this interpretation would violate the Takings Clause of the Fifth Amendment and exceed the FCC's acknowledged limits on its statutory authority.

³⁹ In re Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, *Order on Reconsideration*, 19 FCC Rcd 5637, 5644 ¶ 17 (2004) [hereinafter *Competitive Markets Order on Reconsideration*].

⁴⁰ *Massport Comments* at 55-59; see *ACI-NA Comments* at 18 ("Section 207 was never intended as a means of allowing commercial entities to use their premises as a base of operations for selling wireless service to third parties.").

⁴¹ *American Comments* at 1.

⁴² *Competitive Markets Order on Reconsideration*, 19 FCC Rcd at 5644 ¶ 17 (emphasis added).

⁴³ *Massport Comments* at 61-63.

⁴⁴ *T-Mobile Comments* at 3, 6.

3. Airlines

Finally, the OTARD rule limits the installation and use of individual Wi-Fi antennas to areas within the tenant's exclusive use and control. Although the ATA catalogs actual or potential uses of Wi-Fi antennas in airports, many of those uses would involve the placement of antennas in common areas.⁴⁵ For example, the ATA mentions the installation of Wi-Fi antennas for curbside check-in and baggage and cargo tracking in ramp areas,⁴⁶ which are traditionally common areas at Logan. Based on the limited information provided by the ATA, Massport and possibly other airport managers would have every right to restrict installation or require removal of Wi-Fi antennas in those areas.

D. The FCC Should Not Preempt Massport's Lease Agreements

The FCC should not exercise its preemption authority to invalidate Massport's lease agreements. T-Mobile and the ATA assert that the FCC has "the exclusive authority to regulate all issues relating to radio frequency emissions," including disputes over the use of Wi-Fi devices.⁴⁷ The ATA also argues that the FCC should preempt Massport's restrictions as an unlawful attempt to regulate interference among individual Wi-Fi antennas at Logan.⁴⁸

Although Massport does not dispute the FCC's authority to preempt state and local governmental regulation of radiofrequency interference, Massport notes that the lease restrictions do not impinge on the FCC's exclusive jurisdiction. As discussed above, the FCC specifically permits Massport and other landlords to restrict the installation and use of individual Wi-Fi antennas (1) by offering a central Wi-Fi antenna system, (2) based on legitimate safety concerns,

⁴⁵ *ATA Comments* at 6-7.

⁴⁶ *Id.* at 7.

⁴⁷ *T-Mobile Comments* at 9-11; *ATA Comments* at 8-12.

⁴⁸ *ATA Comments* at 11-12.

or (3) if the antenna would not qualify for protection under the OTARD rule. Thus, because all these circumstances exist at Logan, Massport has not engaged in an unlawful attempt to regulate interference and should not be subject to preemption.

II. THE EXPANSION OF THE OTARD RULE TO WI-FI ANTENNAS WOULD VIOLATE THE FIFTH AMENDMENT AND EXCEED THE FCC'S STATUTORY AUTHORITY

Massport agrees with the Airports Council International-North America that the FCC would violate the Takings Clause of the Fifth Amendment if it interpreted the OTARD rule to allow the installation and use of individual Wi-Fi antennas at Logan by Continental, T-Mobile, and others.⁴⁹ The Takings Clause prohibits the government from taking "private property . . . for public use, without just compensation."⁵⁰ Although the OTARD rule has survived a Takings Clause challenge, that case addressed the placement of antennas on property under the exclusive use or control of the tenant.⁵¹ By contrast, the application of the OTARD rule to Wi-Fi antennas would involve the placement of wires or cables in common and restricted areas at Logan. The expansion of the OTARD rule to authorize the taking of property would also exceed the acknowledged limits of the FCC's statutory authority.

The U.S. Supreme Court has held that "a permanent physical occupation authorized by government is a taking"⁵² In *Loretto*, the Supreme Court struck down a New York statute authorizing a cable television company to place cable equipment onto private property without

⁴⁹ *ACI-NA Comments* at 15-17. The Fifth Amendment limits the ability of the federal government to take property belonging to state or local governments without just compensation. *United States v. 50 Acres of Land*, 469 U.S. 24 (1984); *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273 (1983).

⁵⁰ U.S. Const. amend. V.

⁵¹ *Building Owners and Managers Ass'n Int'l v. FCC*, 254 F.3d 89 (D.C. Cir. 2001).

⁵² *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

the owner's consent as a violation of the Takings Clause.⁵³ "The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall."⁵⁴ Thus, the Supreme Court ruled that the statute was a per se taking.⁵⁵

When the FCC extended the OTARD rule to tenants, it noted that "the permanent physical occupation found to constitute a per se taking in *Loretto* appears comparable to the physical occupation of the common and restricted access areas" of a landlord's property.⁵⁶ Based on this finding, the FCC limited the OTARD protections to the placement of antennas on property within the exclusive use or control of the tenant.

The expansion of the OTARD rule to Wi-Fi antennas would constitute a physical taking. Even if a tenant placed the Wi-Fi antenna on property under its exclusive use or control, the operation of the Wi-Fi antenna would likely involve "the physical occupation of the common and restricted access areas" of Logan. "To provide Internet access, every Wi-Fi antenna must have some form of access to the Internet; unless the user can establish a wireless link between the access point and off-airport facilities, the user must have a wireline connection."⁵⁷ As discussed in Massport's Comments, Continental appears to take service over a T-1 or DSL line and to transmit the signal over its Wi-Fi antenna.⁵⁸ T-Mobile has likewise confirmed that all of its hot

⁵³ *Id.* at 438-39.

⁵⁴ *Id.* at 438.

⁵⁵ *Id.* at 419.

⁵⁶ In re Implementation of Section 207 of the Telecommunications Act of 1996, CS Docket No. 96-83, *Second Report and Order*, 13 FCC Rcd 23874, 23894-95 ¶ 40 (1998) [hereinafter *OTARD Second Report and Order*].

⁵⁷ *ACI-NA Comments* at 15.

⁵⁸ *Massport Comments* at 31, 54, 60, 63.

spots are connected to the Internet via a T-1 cable.⁵⁹ The FCC has also found that "[h]ot spots typically rely on high-speed landline technologies, such as T-1 lines, DSL, or cable modems, to connect to the PSTN and Internet."⁶⁰ Thus, an expansion of the OTARD rule to permit Continental, T-Mobile, and other tenants to install and use individual Wi-Fi antennas would require the placement of wires or cables in common and restricted areas of Logan and would constitute a taking under the Fifth Amendment.

The expansion of the OTARD rule to authorize the taking of property would also exceed the acknowledged limits of the FCC's statutory authority. The FCC has recognized that section 207 of the Telecommunications Act of 1996 "does not authorize [it] . . . to permit the taking of private property."⁶¹ As mentioned above, the FCC agreed that the installation of antennas in common and restricted access areas would appear to constitute a per se taking.⁶² The FCC further noted that "there is no compensation mechanism authorized by the statute."⁶³ Thus, the expansion of the OTARD rule would not only violate the Takings Clause of the Fifth Amendment, but it would also exceed the FCC's statutory authority.

III. THE CENTRAL WI-FI ANTENNA SYSTEM ADVANCES THE POLICIES SET FORTH IN THE COMMUNICATIONS ACT

The central Wi-Fi antenna system is consistent with the policies set forth in the Communications Act. Although the airlines rely primarily on policy arguments to attempt to

⁵⁹ *T-Mobile Comments* at 3, 6.

⁶⁰ *Tenth Wireless Competition Report*, FCC 05-173 ¶ 202 n.521.

⁶¹ *OTARD Second Report and Order*, 13 FCC Rcd at 23882 ¶ 17.

⁶² *Id.* at 23894-95 ¶ 40.

⁶³ *Id.* at 23897 ¶ 44

circumvent the limited rights conferred by the OTARD rule,⁶⁴ these policies either support Massport's lease restrictions or do not apply to the provision of information services. By contrast, the central Wi-Fi antenna system enables the FCC to comply with its dual statutory responsibilities of promoting the safety of life and property through the use of wire and radio communication, while simultaneously promoting the deployment of competitive services and new technologies.

A. The Central Wi-Fi Antenna System Promotes Public Safety Communications

The central Wi-Fi antenna system advances the FCC's statutory responsibility to promote safety and security communications. In particular, section 1 of the Communications Act of 1934 charges the FCC with "promoting safety of life and property through the use of wire and radio communication."⁶⁵ The FCC has exercised its authority under this statutory provision "[t]o fully and effectively carry out its role in promoting homeland security, network protection, interoperability, redundancy, and reliability"⁶⁶

Following the tragic events of September 11, 2001, the FCC has taken several additional steps to protect the safety of life and property. For example, the FCC adopted a series of objectives, including the "develop[ment of] policies that promote access to effective communications services by public safety, public health, and other emergency and defense personnel in emergency situations."⁶⁷ The FCC also created a Homeland Security Policy Council "to help ensure effective public safety communications" and "to promote the evolution of new

⁶⁴ *Continental Comments* at 5, 7, 11-12; *T-Mobile Comments* at 14-15; *ATA Comments* at 17-20.

⁶⁵ 47 U.S.C. § 151 (2001).

⁶⁶ Federal Communications Commission, *Strategic Goals, Public Safety & Homeland Security*, <http://www.fcc.gov/homeland/> (last visited Oct. 6, 2005).

⁶⁷ *Id.*

technologies that support Homeland Security."⁶⁸ In addition, the FCC established an Office of Homeland Security as part of the Enforcement Bureau.⁶⁹ The FCC also adopted a Homeland Security Action Plan to foster partnerships with other governmental entities in order to "[p]romote access to effective communications services by public safety, public health, and other emergency personnel."⁷⁰ Finally, the devastation wrought by Hurricanes Katrina and Rita has spurred the FCC to propose the creation of a new Public Safety/Homeland Security Bureau and to explore ways "to improve disaster preparedness, network reliability, and communication among first responders such as police, fire fighters and emergency medical personnel."⁷¹

The central Wi-Fi antenna system will assist the FCC in satisfying these homeland security objectives.⁷² Although the FCC has created, or proposed the creation of, several different policy councils, offices, or bureaus, they all share the same objective of promoting the availability of effective communications services for public safety personnel. As discussed in the Comments, the TSA, Massachusetts State Police, and three airlines use, are scheduled to start

⁶⁸ News Release, Homeland Security Policy Council Highlights FCC Actions Promoting Homeland Security, Aug. 4, 2004, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-250521A1.pdf; see News Release, Federal Communications Commission Announces Creation of Homeland Security Policy Council, Nov. 14, 2001, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-217676A1.pdf.

⁶⁹ News Release, FCC Establishes Office of Homeland Security; James Daily Named Director, July 10, 2003, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-236436A1.pdf.

⁷⁰ FCC Homeland Security Action Plan, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-236428A2.pdf (July 10, 2003).

⁷¹ Written Statement of Kevin J. Martin, Chairman, Federal Communications Commission, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, U.S. House of Representatives 5-6 (Sept. 29, 2005), *available at* <http://energycommerce.house.gov/108/hearings/09292005Hearing1648/Martin.pdf>.

⁷² Other commenters note that airports should have "broad latitude in the safety area" and that the FCC could not address airport safety issues on a case-by-case basis in a timely and effective fashion." *Manchester Comments* at 4; see *HCAA Comments* at 5; *Phoenix Comments* at 4; *ACI-NA Comments* at 7.

using, or are considering the use of the central Wi-Fi antenna system for communications related to the safety and security of the airport environment.⁷³ The TSA has successfully completed a pilot program on the central Wi-Fi antenna system and found the results so promising that it is exploring possible uses of this communications system.⁷⁴ The Massachusetts State Police also concluded that the central Wi-Fi antenna system would provide "additional functionality . . . because the speed and bandwidth available with the 2.4 GHz band allow for the faster transmission of images," as well as secure and prioritized communications.⁷⁵ The central Wi-Fi antenna system will provide public safety personnel with cost savings, enhanced functionalities, a secure network, and redundancy and reliability that is highly valued for carrying out their responsibilities at Logan.

B. The Central Wi-Fi Antenna System Promotes the Deployment of Competitive Services and New Technologies

The central Wi-Fi antenna system also promotes the deployment of competitive high-speed Internet access service and new technologies. Continental, T-Mobile, and ATA rely heavily on general pro-competition policy statements in the Communications Act and legislative history in a futile attempt to overcome the limitations of the OTARD rule.⁷⁶ These commenters

⁷³ *Massport Comments* at 14.

⁷⁴ *Id.* at 14, 50, Exhibit C.

⁷⁵ Declaration of Major Scott Pare in Support of the Comments of The Massachusetts Port Authority, attached as Exhibit A.

⁷⁶ *ATA Comments* at 19-20 (citing policies in the Communications Act and legislative history authorizing the FCC to "make available . . . a rapid, efficient, Nation-wide, and world-wide, wire and radio communications service with adequate facilities at reasonable charges" and to foster "a pro-competitive, de-regulatory national policy framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies"); *T-Mobile Comments* at 14-15 (same); *Continental Comments* at 8 (citing section 706 of the Telecommunications Act as requiring the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans").

falsely accuse Massport of monopolizing the provision of Wi-Fi, denying businesses and consumers access to wireless services, and elevating their financial interests above the interests of the intended beneficiaries.⁷⁷

Massport has not monopolized the provision of Wi-Fi service at Logan because the central Wi-Fi antenna system offers a broad selection of service providers. As discussed in Massport's Comments, the central Wi-Fi antenna system is a neutral-host/common-use system that enables customers of hundreds of Internet service providers to receive wireless access to the Internet without paying additional charges to AWG or Massport.⁷⁸ Although the central Wi-Fi antenna system has a single network provider, this arrangement is permissible under the FCC's interpretation of the OTARD impairment standard.

Massport also has not denied businesses and consumers access to wireless service. The central Wi-Fi antenna system actually makes high-speed Internet access available to a much larger population than Continental's or T-Mobile's Wi-Fi antennas. As discussed in the Comments, the central Wi-Fi antenna system is available to everyone throughout Logan, from curb of the terminal to the tail of the aircraft, and averages 40,000 visits to the web site and 10,000 users per month.⁷⁹ The central Wi-Fi antenna system also grants access to customers of hundreds of Internet service providers without any additional charge from AWG or Massport.⁸⁰ By contrast, Continental limits the availability of its resold Internet access service to preferential passengers and select employees in the Presidents Club and estimates that the service is used by

⁷⁷ *ATA Comments* at 19-20; *T-Mobile Comments* at 14-15; *American Comments* at 3.

⁷⁸ *Massport Comments* at 19, 29-32.

⁷⁹ *Id.* at 12, 18.

⁸⁰ *Id.* at 19, 29-32.

only 32 people per day.⁸¹ T-Mobile offers Internet access service to an even more restricted group, which is comprised of preferential passengers of American Airlines who are also T-Mobile subscribers.⁸²

Massport has not elevated its financial interests above the interests of the intended beneficiaries but manages the central Wi-Fi antenna system for the benefit of everyone at Logan. Although several commenters accuse Massport of attempting to exercise control over the Internet solely for its commercial gain,⁸³ this purported explanation disregards the complex balancing of the competing Wi-Fi users at Logan. As discussed in Massport's Comments, the central Wi-Fi antenna system accommodates the interests of everyone at Logan in a fair and reasonable manner.⁸⁴ Other commenters concur that the priority for airports is "to serve the traveling public" and "to manage the facility for the benefit of all."⁸⁵

Massport has acknowledged receiving compensation for every user of the central Wi-Fi antenna system,⁸⁶ but the very airlines and commercial providers who complain about Massport's financial interest undoubtedly would receive compensation for offering wireless Internet access service in the form of customer payments, membership fees, increased business, side deals with

⁸¹ *Petition* at Affidavit.

⁸² *T-Mobile Comments* at 8.

⁸³ *ATA Comments* at 19-20; *American Comments* at 3.

⁸⁴ *Massport Comments* at 3-4.

⁸⁵ *Manchester Comments* at 2, 5; Comments of The Metropolitan Washington Airports Authority, ET Docket No. 05-247, at 3, 6 (Sept. 28, 2005); *HCAA Comments* at 2, 6; *Phoenix Comments* at 3; *ACI-NA Comments* at 7, 10.

⁸⁶ *Massport Comments* at 19 n.44.

commercial providers, or some other arrangement.⁸⁷ Unlike Massport, however, these airlines and commercial providers would not attempt to balance the interests of all airport users.

Finally, the central Wi-Fi antenna system also promotes the deployment of a broader array of new technologies. As discussed in Massport's Comments, AWG has designed the central Wi-Fi antenna system to support the State Police's proposed use of iPAQ™ devices and remote-controlled robots.⁸⁸ AWG also stated that "it supports most authentication and encryption standards and protocols" and "will support any new, technologically feasible standards and protocols as well."⁸⁹ Although T-Mobile asserts that its "encryption and security features [802.1x] are not available for users of AWG's Wi-Fi network at Logan Airport,"⁹⁰ the central Wi-Fi antenna system employs the 802.1x security enhancement every day. AWG has also offered to support the security protocols needed by the TSA and the Massachusetts State Police, which are almost certainly more stringent than those of commercial providers. If tenants could install their own individual Wi-Fi antennas, the Airports Council International-North America predicts that the "lack of central management authority may hinder the deployment of valuable new technological capabilities" because of the increased risk of interference.⁹¹

⁸⁷ Although commenters complain that customers would have to pay \$7.95 for 24 hours of unlimited access to the central Wi-Fi antenna system, other service providers charge similar amounts for customers without monthly service agreements. For example, T-Mobile charges \$6.00 *per hour* for Wi-Fi service, T-Mobile, HotSpot, Services, http://www.t-mobile.com/hotspot/services_about.htm (last visited Oct. 11, 2005), and Sprint PCS has charged \$9.95 for 24 hours of unlimited access in a supported location. *Tenth Wireless Competition Report*, FCC 05-173 ¶ 203, ¶ 203 n.532.

⁸⁸ *Massport Comments* at 14-15, 51-52.

⁸⁹ *Id.* at 13.

⁹⁰ *T-Mobile Comments* at 6.

⁹¹ *ACI-NA Comments* at 11.

C. The Central Wi-Fi Antenna System Is Consistent with the FCC's *Policy Statement on the Open and Interconnected Nature of the Internet*

The central Wi-Fi antenna system complies with the FCC's *Policy Statement* "[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the Internet."⁹² In the *Policy Statement*, the FCC adopted the following principles: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers.⁹³

As an initial matter, the *Policy Statement* has no practical impact on Massport or the central Wi-Fi antenna system at Logan. The *Policy Statement* merely "offers guidance and insight into [the FCC's] approach to the Internet and broadband" and contains no binding rules.⁹⁴ Thus, these principles could not possibly trump the plain language of the OTARD rule, which permits Massport to restrict the installation and use of individual Wi-Fi antennas at Logan, or important State or local governmental rights to manage government property, *i.e.*, airports.

Even if the *Policy Statement* were binding authority, the central Wi-Fi antenna system satisfies the four principles. Although Continental interprets these basic statements as enabling tenants to "select[] the service provider of their choice,"⁹⁵ consumers are only entitled to

⁹² In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, *Policy Statement*, FCC 05-151 ¶ 4 (2005) [hereinafter *Policy Statement*].

⁹³ *Id.*

⁹⁴ *Id.* ¶ 3, ¶ 5 n.15.

⁹⁵ *Continental Comments* at 12.

competition among service providers.⁹⁶ As discussed in Massport's Comments, the central Wi-Fi antenna system offers access to a broad selection of service providers through its neutral-host/common-use design.⁹⁷ Continental may also use its preferred provider, Fiberlink, on the central Wi-Fi antenna system.

The central Wi-Fi antenna system also meets the other three principles. In particular, consumers may access the lawful Internet content of their choice, run applications and use services of their choice, and connect their choice of legal devices that do not harm the network.⁹⁸ Although Continental complains about quality of service and reasonable rates,⁹⁹ the *Policy Statement* never specifically addresses these concerns. Nevertheless, the central Wi-Fi antenna system offers the same signal quality as Continental's Wi-Fi antenna and grants Continental access to its preferred service provider, *i.e.*, Fiberlink, at no extra charge to AWG or Massport.¹⁰⁰

⁹⁶ *Policy Statement*, FCC 05-151 ¶ 4.

⁹⁷ *Massport Comments* at 19, 29-32. Although the central Wi-Fi antenna system does not provide choice among network providers, the FCC has specifically recognized that the OTARD rule permits landlords to require the use of a central antenna system as long as tenants have their choice of service provider. In re Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices, CS Docket No. 96-83, *Order on Reconsideration*, 13 FCC Rcd 18962, 18999 ¶ 88 (1998). The *Policy Statement* also indicates that "[t]he principles are subject to reasonable network management." *Policy Statement*, FCC 05-151 ¶ 5 n.15.

⁹⁸ Although Partners HealthCare System, Inc. worried that not all unlicensed devices could connect to a central antenna, Comments of Partners HealthCare System, Inc., ET Docket No. 05-247, at 2-4 (Aug. 30, 2005), AWG believes that the central Wi-Fi antenna system is compatible with such technologies.

⁹⁹ *Continental Comments* at 12.

¹⁰⁰ *Massport Comments* at 19, 29-32.

D. The Multi-Tenant Environment Rules Would Not Permit the Installation of a Wi-Fi Antenna at Logan

The central Wi-Fi antenna system does not violate the rules governing competitive access to multi-tenant environments ("MTE"). The ATA argues that Massport has contravened the rules by entering into an exclusive contract with AWG for the installation and operation of a central Wi-Fi antenna system at Logan.¹⁰¹ The MTE rules do not apply to this contract.

In the MTE proceeding, the FCC "prohibit[ed] carriers, in commercial settings, from entering into contracts that effectively restrict premises owners or their agents from permitting access to other *telecommunications service providers*."¹⁰² The FCC reasoned that "[t]he use of exclusive contracts in commercial settings poses a risk of limiting the choices of tenants in MTEs in purchasing *telecommunications services*, and of increasing the prices paid by tenants for *telecommunications services*."¹⁰³ Because AWG is not a telecommunications service provider, and Internet access service is not a telecommunications service,¹⁰⁴ the MTE rules simply do not apply to its contract with Massport.¹⁰⁵ The MTE rules also imposes restrictions

¹⁰¹ *ATA Comments* at 17-18.

¹⁰² In re Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, *First Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22983, 22996-97 ¶¶ 25, 27 (2000) (emphasis added) [hereinafter *Competitive Networks First Report and Order*].

¹⁰³ *Id.* at 22997 ¶¶ 27 (emphasis added).

¹⁰⁴ *Id.*

¹⁰⁵ ATA makes several other misguided policy arguments addressing competition for *telecommunications services*, even though this proceeding deals with the installation and use of an antenna to provide an *information service*. Specifically, the ATA argues that Massport may have "prohibited the ability of any entity to provide any interstate or intrastate telecommunications service" or "regulate[d] the entry of or the rates charged by any commercial mobile service or any private mobile service." 47 U.S.C. §§ 253(a), 332(c)(3). For the reasons discussed above, these arguments are inapplicable to the exclusive contract between Massport and AWG.

only on telecommunications services providers and not on property owners, such as Massport.¹⁰⁶ In addition, as mentioned in Massport's Comments, the FCC has still not decided if it should apply the MTE rules to airports.¹⁰⁷

Even if the MTE rules were to apply to T-Mobile, they would not unilaterally authorize T-Mobile to provide wired or wireless Internet access service at Logan. As mentioned above, the MTE rules do not apply to the provision of information services. The MTE rules also would not grant T-Mobile FCC-mandated access to serve non-tenants at Logan, such as American's preferential passengers in the Admirals Club.¹⁰⁸ Finally, the MTE rules were not in effect at the time of T-Mobile's trespass at Logan and, in any event, do not permit telecommunications service providers to install wires or cables in a governmental building without entering into a contract with the owner.¹⁰⁹

¹⁰⁶ 47 C.F.R. § 64.2500.

¹⁰⁷ *Massport Comments* at 64 (citing *Competitive Networks First Report and Order*, 15 FCC Rcd at 23049-50 ¶ 152).

¹⁰⁸ 47 C.F.R. § 64.2500.

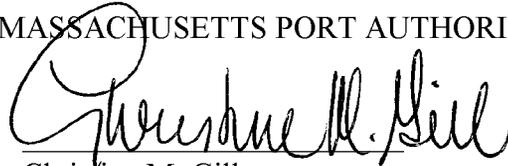
¹⁰⁹ *Id.* §§ 64.2500 through 64.2502.

WHEREFORE, THE PREMISES CONSIDERED, Massport respectfully requests that the FCC consider these Reply Comments and proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

THE MASSACHUSETTS PORT AUTHORITY

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CERTIFICATE OF SERVICE

I, Michelle Speirs, do hereby certify that on this 13th day of October 2005, a copy of the foregoing "Reply Comments of The Massachusetts Port Authority" was sent by first-class mail, postage prepaid, except as otherwise noted, to the following:

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