

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

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

**REPLY COMMENTS OF
T-MOBILE USA, INC.**

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I. Introduction and Summary

T-Mobile USA, Inc. ("T-Mobile") submits these Reply Comments in support of the petition for declaratory ruling filed by Continental Airlines ("Continental"). The comments on that petition confirm that the Commission should declare that the Over-the-Air Reception Devices ("OTARD") rules prohibit the restrictions imposed by the Massachusetts Port Authority ("Massport") on the installation and use of antennas to create Wi-Fi hotspots in leased areas at Boston-Logan International Airport ("Logan Airport").

Massport has filed a 74-page defense of its restrictions on Wi-Fi access, on the one hand invoking various exemptions to the OTARD rules, while on the other asserting that the rules do not apply here or are beyond the Commission's authority entirely. Yet the volume of Massport's defense fails to camouflage its lack of substance. At bottom, it remains clear that Massport's actions amount to no more than an attempt to maximize revenue by monopolizing the use of spectrum that the Commission has allocated for shared unlicensed use.

The bulk of Massport's filing is dedicated to a "public safety" defense for its shutdown of all competing Wi-Fi providers at Logan Airport. According to Massport, interference from multiple Wi-Fi users at the airport threatens essential public safety communications. But Massport has identified *not one instance* of harmful interference — rather, on the theory that words can mean what it wants them to mean, Massport simply declares the existence of any detectable signal other than AWG's to be "interference," in utter disregard of the fact that the Commission has designated this spectrum for shared use. Moreover, the trumpeted "public safety" use of AWG's service is purely hypothetical: Massport has identified *not one public safety entity* that actually uses AWG's Wi-Fi service at Logan Airport, and no such entity has filed in support of Massport's position. In other words, Massport seeks to use the possibility that public safety entities — who enjoy licensed spectrum for their own exclusive use — *may* use AWG's service, and that other Wi-Fi users *may* subsequently interfere, despite the availability of avoidance techniques, to bootstrap itself into exclusive control over shared unlicensed spectrum.

This attempted monopolization runs directly counter to two strong Commission policies for unlicensed spectrum: the policy in favor of expansion in the fast-growing market for unlicensed wireless devices and networks, and the policy in favor of competition, which lies at the core of the Commission's regulatory program.

It is clear that the OTARD rules apply to the fixed wireless antennas in Continental's President's Clubs, and to similar antennas in the frequent flyer clubs of other airlines at Logan Airport. And it is equally clear that Massport's shutdown of Wi-Fi service in those tenant-controlled areas "impairs" the installation, maintenance, or use of those fixed wireless antennas, in violation of the OTARD rules. Massport's attempts to take these devices outside of the rules' protections are unavailing, and Massport has not shown that either the central antenna or the public safety exemption from those rules applies here.

Massport's attack on the rules themselves fares no better. The Commission has twice considered whether it has authority to expand the OTARD rules to apply to fixed wireless antennas. Both times it rightly found it has ancillary jurisdiction to protect users' freedom of choice of these devices in areas controlled by a tenant. In challenging the Commission's authority to set policy for transmission of fixed wireless signals, Massport wrongly claims that authority for itself. Massport boldly claims that it has the power to manage these spectrum resources, and to displace the Commission's procompetitive policies with a policy of monopoly provision by AWG. To allow Massport's monopolistic behavior to stand would set a corrosive precedent, seriously threatening innovation and consumer choice in the expanding Wi-Fi market.

The Commission should grant Continental's petition and declare Massport's actions a clear violation of the OTARD rules.

II. Two Pervasive Misconceptions About the FCC's Rules Infect Massport's Attempt to Defend Its Restrictions

A. Massport repeatedly, but erroneously, asserts that "interference" has occurred and defends its restrictions as necessary to prevent such interference

According to Massport, "[i]nterference has become a major concern for the Wi-Fi system at Logan."^{1/} But Massport has failed to document any interference, and its claim of a right to protection from interference misconceives the notion of unlicensed spectrum.

In asserting that interference has occurred, Massport points to no degradation in quality of service and to no interruption of service over the Logan Airport central antenna. Rather, its allegation of interference rests entirely on the results of a study conducted by a third-party consultant, paid by Massport, which concluded that there were a small number of "competing signals" that could be detected at certain locations within the airport.^{2/} This same consultant identified similar "interference" emanating from microwave ovens and baggage conveyer belts.^{3/} In Massport's view, problematic interference exists whenever there is a single detectable signal

^{1/} Comments of the Massachusetts Port Authority, filed Sept. 28, 2005, at 20 ("Massport Comments").

^{2/} *Id.* at Exhibit B, p. 31.

^{3/} *Id.*

other than AWG's in the same unlicensed spectrum band.^{4/} That is not cognizable as interference.^{5/}

Massport misconceives the nature of unlicensed spectrum. Such spectrum necessarily supports multiple users and provides no protection against interference from those operating consistently with FCC rules. Defining "interference" to mean any detectable signal by more than one user — and regulating to preclude such a signal — is utterly inconsistent with the shared use of this band that the Commission's rules contemplate. As the Commission noted when it expanded OTARD protections to fixed wireless devices, "[o]ne of the principal goals of the 1996 Act was 'to promote competition and reduce regulation in order to secure lower prices and higher quality of services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.'"^{6/} Massport's definition of "interference" would limit the number of providers operating in unlicensed spectrum and would discourage investment in techniques designed for more efficient spectrum use, ultimately stagnating

^{4/} *Id.* at 15, 31.

^{5/} The Commission's rules define "harmful interference" as interference that "endangers the functioning of a radio navigation service or of other safety services or *seriously* degrades, obstructs, or *repeatedly* interrupts a radiocommunications service operating in accordance with [FCC rules]." 47 C.F.R. § 15.3(m) (emphasis added). Massport has made no attempt to show that this sort of "harmful interference" exists at Logan Airport or that Continental or any other airline is running afoul of the Commission's Part 15 rules regarding the management of unlicensed spectrum.

^{6/} Order on Reconsideration, *Promotion of Competitive Networks in Local Telecommunications Markets*, 19 FCC Rcd 5637, 5640 ¶ 7 n.21 (2004) ("*Promotion of Competitive Networks in Local Telecommunications Markets*").

deployment of advanced technologies and degrading the overall quality of service available to Wi-Fi users.

In contrast to exclusive licensed spectrum, the largely commercial, nonexclusive users of unlicensed spectrum must accept interference from other users or engineer their systems to avoid such interference. Unlicensed spectrum users have no interference protection rights,^{7/} and the Commission has declined to impose “spectrum etiquette” for Part 15 bands.^{8/} The Commission has promoted the use of “smart antennas,” which “focus their transmissions according to the geographic locations of their users,” “permit greater re-use of the same radio frequencies,” and enable wireless providers “to pattern coverage areas in a way that will best suit the needs of their customers.”^{9/} Massport, however, has apparently made no attempt to employ such technology. As Massport acknowledges, other available techniques include channel mapping, power reduction, and use of alternative spectrum.^{10/} Massport has not only failed to point to any harmful interference, but also stands mute about any efforts it has made to use any possible techniques to avoid interference. Its professed fear of congestion in the band is thus entirely

^{7/} Report of the Spectrum Policy Task Force, ET Docket No. 02-135, at 18 nn.30, 32 (2002) (“Spectrum Policy Task Force Report”).

^{8/} Report and Order, *Modification of Parts 2 and 15 of the Commission’s Rules for Unlicensed Devices and Equipment Approval*, 19 FCC Rcd 13539, 13552 ¶ 54 (2004).

^{9/} “Connected & On the Go: Broadband Goes Wireless,” Report by the Wireless Broadband Access Task Force, FCC, Feb. 2005, at 53 (“Wireless Task Force Report”).

^{10/} Massport Comments at 23-25.

hypothetical. By asserting that only sole occupation of the band will “adequately resolve” its interference concerns,^{11/} Massport is effectively seeking to transform shared, unlicensed spectrum into spectrum licensed exclusively for itself.

In its comments, Massport invariably couples discussion of purported “interference” with allusions to public safety.^{12/} There is a bootstrap quality to these appeals. We are told that public safety agencies are “considering” using AWG’s service and that, if they did, they might want greater protection than the Commission’s unlicensed spectrum rules provide.^{13/} But not a single public safety entity filed comments in support of Massport’s position — and for good reason. Public safety entities are aware that unlicensed spectrum is inevitably subject to interference from other users. For that reason, this chiefly commercial, shared spectrum is inappropriate for mission-critical communications during emergencies. “[P]ublic safety entities — and particularly, first responders — require unfettered and immediate access to voice and data critical to address an emergency.”^{14/} The Commission, therefore, has allocated to these entities

^{11/} See *id.* at 23.

^{12/} Massport invokes the terrorist attacks of September 11, 2001, eight times and Hurricane Katrina three times. See *id.* at iv, 2, 5, 13, 42, 46, 47, 49.

^{13/} See, e.g., *id.* at 14-16.

^{14/} Wireless Task Force Report at 39. See also *FCC Official Warns Muni Wi-Fi Boosters on Wireless Hazards*, Communications Mosaic, Comm. Daily (Oct. 13, 2005) (“Don’t presume the [Wi-Fi] technology is suitable for critical infrastructure, such as police and fire communications, Scrim warned. . . . ‘It is not designed to be a robust service.’”) (quoting Alan J. Scrim, Chief, Policy & Rules Division, OET).

licensed frequencies for their exclusive use.^{15/} While “license-exempt spectrum may be used in supplementing public safety systems,” the Commission has recognized that “the need for dedicated spectrum for public safety will remain.”^{16/}

Massport also fails to take into account the safety needs of the airlines themselves, which are often best supported through systems of their own choosing, under their own control.^{17/} Massport’s attempt to monopolize provision of Wi-Fi at Logan Airport would stymie creative and efficient use of shared spectrum by the airlines and other users at Logan Airport, limit competition among wireless providers, and curtail customer choice. At the same time that Massport seeks to curtail these benefits of the Commission’s unlicensed spectrum policy, the Commission is moving “toward more flexible and market-oriented spectrum policies that will provide incentives for users to migrate to more technologically innovative and economically efficient uses of spectrum” and seeking to “provide room for expansion in the fast-growing market for unlicensed devices and networks.”^{18/} Massport’s *de facto* licensed approach to spectrum use at Logan Airport is antithetical to federal unlicensed spectrum policy.

^{15/} For example, the Massachusetts State Police has several exclusive use licenses for spectrum at 800 MHz, pursuant to the New England area’s Commission-approved Public Safety Plan. *See, e.g.,* Public Notice, *The New England Area (Region 19) Receives Approval for Minor Amendments to Its Public Safety Plan*, 20 FCC Rcd 3655 (2005).

^{16/} Wireless Task Force Report at 40.

^{17/} *See* Comments of the Air Transport Association of America, Inc., filed Sept. 28, 2005, at 4-5 (“ATA Comments”).

^{18/} Spectrum Policy Task Force Report at 6, 15.

B. Massport extols the virtues of AWG's service, but that is not the issue here

Nearly ten pages of Massport's comments are dedicated to describing, in glowing detail, the virtues of AWG's service at Logan Airport.^{19/} But this proceeding is not about whether AWG should be allowed to offer its wireless service. No one seeks to shut it down. Rather, contrary to the clear federal policy goal of robust competition for advanced telecommunications services, Massport seeks to shut down all Wi-Fi services in Logan Airport, except those provided by AWG.

AWG is free today to market its service to any user. If airlines, travelers, or other users in areas controlled by a tenant find that AWG meets their needs in a cost-effective way, they are free to choose it. What Massport is not free to do under Commission policy is to coerce users in areas controlled by a tenant to buy AWG's service when they would prefer alternative providers. If AWG's service is as outstanding as Massport contends, its marketing should be a success. If it is not a success, Massport should be forestalled in its attempt to create demand by engineering a monopoly.^{20/} The Commission should halt this anticompetitive behavior before it becomes the norm in airports and other multi-tenant environments across the county.

III. The OTARD Rules Clearly Prohibit Massport's Monopolistic Actions

^{19/} See Massport Comments at 11-20.

^{20/} The Airports Council acknowledges the economic nature of this dispute by opposing an "application of the OTARD rules that gives tenants broad rights to install antennas in a fashion that makes it uneconomical for an airport manager to operate an airport-wide system." Comments of Airports Council International-North America, filed Sept. 28, 2005, at 15.

A. Massport's lease restrictions contravene the OTARD rules

Many commenters agree that the OTARD rules apply with full force to both the fixed wireless antennas employed by Continental in its President's Clubs and the antennas other airlines seek to employ in providing T-Mobile HotSpot service in their frequent flyer clubs.^{21/} The OTARD rules protect airline-lessees against “[a]ny restriction, including but not limited to, any state or local law or regulation, including zoning, land-use, or building regulations, or any private covenant, contract provision, lease provision, homeowner’s association rule or similar restriction, . . . that impairs the installation, maintenance, or use” of those antennas.^{22/} Despite Massport’s contention to the contrary, it is clear that the lease restrictions on which Massport has relied to shut down all service except AWG’s in Logan Airport “impairs” the “installation, maintenance, or use” of the airlines’ antennas.

Under the OTARD rules, a lease provision “impairs” if it (1) unreasonably delays or prevents installation, maintenance, or use; (2) unreasonably increases the cost of installation maintenance, or use; or (3) precludes a person from receiving or transmitting an acceptable quality signal from an antenna covered by the rule.^{23/} Massport’s implementation of its lease

^{21/} See, e.g., Comments of T-Mobile USA, Inc., filed Sept. 28, 2005, at 12 (“T-Mobile Comments”); Comments of Enterprise Wireless Alliance, filed Sept. 28, 2005, at 3; ATA Comments at 14; Comments of Continental Airlines, Inc., filed Sept. 28, 2005, at 7 (“Continental Comments”).

^{22/} 47 C.F.R. § 1.4000(a) (emphasis added).

^{23/} 47 C.F.R. § 1.4000(a)(3)(i)-(iii).

provision runs afoul of the OTARD rules because it both unreasonably delays and unreasonably increases the costs of installation, maintenance, and use of protected antennas.

The restrictions at issue here unreasonably delay installation, maintenance, or use because they require lessees to seek prior approval of installation of any fixed wireless antenna. Approval may only be obtained by filing a Tenant Alteration Application (“TAA”) form, and Massport evidently asserts the authority to deny approval in *its sole and absolute discretion*.^{24/} The Commission has repeatedly held that prior approval procedures constitute unreasonable delay, absent legitimate public safety or historic preservation considerations.^{25/} Massport has cited no historic preservation consideration at stake in its actions, and as detailed above, its public safety assertions are speculative and factually unsupported. The TAA process thus unreasonably delays, and therefore impairs, use of airline-lessees’ fixed wireless antennas.

The lease provision also impermissibly “impairs” installation, maintenance, and use of protected antennas because it unreasonably increases associated costs. While Massport has not

^{24/} See sections 7.2, 9.4, and 9.8 of the lease agreement and “Supplemental Petition of Continental Airlines, Inc. for Declaratory Ruling,” filed July 19, 2005, at 3-5 (“Supplemental Petition”).

^{25/} See, Memorandum Opinion and Order, *In re Philip Wojcikewicz*, 18 FCC Rcd 19523, 19527-28 ¶ 12 (2003) (“A prior approval requirement constitutes an unreasonable delay and is therefore impermissible unless it is necessary for bona fide safety or historic preservation considerations.”); Memorandum Opinion and Order, *In re Star Lambert and Satellite Broadcasting and Communications Ass’n of America*, 12 FCC Rcd 10455, 10464-65 ¶¶ 22-24 (1997) (“*In re Star Lambert*”) (“Requiring a prospective user to apply for, and then to await, a pro forma permit issuance unreasonably delays installation . . .”).

provided specific data as to pricing of AWG's service, as demonstrated by Continental Airlines in its comments, under any computation of costs, the AWG service will be more expensive than Continental's chosen service.^{26/} As to costs in the clubs of those airlines which have exclusive contracts with T-Mobile, patrons of such clubs who are T-Mobile subscribers nevertheless would have no access to T-Mobile under Massport's stated position, and would have to pay AWG's hourly rate for Wi-Fi access at Logan Airport, which would otherwise be covered by their T-Mobile subscription rate. The Commission has held that *any* increase in cost "impairs" installation, maintenance, and use of antennas,^{27/} thus the lease provision at issue in this proceeding is invalid under the OTARD rules.

B. Massport's attempts to take the airlines' use of their choice of antennas outside of the OTARD rules are unavailing

Massport presents a host of arguments as to why the "impairment" demonstrated above falls outside the scope of the OTARD rules. It contends that (1) the rules do not apply in airports; (2) the rules are inapplicable in a government building; (3) various irrelevant distinctions, some of which are obvious relics of the OTARD rules' initial video-only context, serve to remove fixed wireless antennas at Logan Airport from the protection of the rules; (4) the fact that airline-lessees choose to pass on the benefits of their protection under the OTARD rules

^{26/} Continental Comments at 9-10.

^{27/} See *In re Star Lambert*, at 10457, 10464-65 ¶¶ 6, 22-24 (finding that even a \$5.00 fee "impairs" use of an antenna).

to their customers deprives the airline-lessees of the rules' protections; and, (5) if none of these arguments prevails, airports are "special use" facilities, exempt from the OTARD rules. None of these contentions has merit.

Massport urges the Commission to overlook its violation of the OTARD rules in this case, noting that "[n]one of the FCC's orders appear to enforce the [rules] in a governmental building, and the FCC has openly questioned the applicability of competitive access requirements in general for airports."^{28/} By their very terms, however, the OTARD rules apply to "any state or local law or regulation" that impairs a lessee's installation, maintenance, or use of a fixed wireless antenna within the area of its leasehold.^{29/} And just last year, the Commission's Office of Engineering and Technology reiterated that, in extending the OTARD rules to apply to fixed wireless antennas, the Commission intended those rules to protect the installation and use of such devices in multi-tenant environments, expressly including airports.^{30/} Notably, this clarification from Commission staff came largely in response to complaints concerning actions taken by Massport and other airport authorities to restrict access to unlicensed

^{28/} *Id.* at 64.

^{29/} 47 C.F.R. § 1.4000(a)(1)(i).

^{30/} "Commission Staff Clarifies FCC's Role Regarding Radio Interference Matters and Its Rules Governing Customer Antennas and Other Unlicensed Equipment," Public Notice, 19 FCC Rcd 11300 ("June 24th Public Notice").

wireless spectrum within leasehold areas.^{31/} Massport’s argument that the OTARD rules do not apply at government-run Logan Airport, therefore, is meritless.

In its attempt to deprive airlines and their customers of the competitive access protections of the OTARD rules, Massport also relies on a series of distinctions between protected and non-protected services that are either irrelevant or are vestiges of the original OTARD rules — which applied only to video services — before the Commission extended the rules to cover fixed wireless antennas. For example, Massport contends that, because the airlines offer wireless service to their customers for a fee — namely, that of access to the frequent flyer clubs — airlines’ installation and use of Wi-Fi antennas in these clubs are not protected. As authority for this assertion, Massport cites, completely out of context, the Commission’s statement that, to receive OTARD protections, equipment must be installed to serve only the customer on such premises rather than to serve as a hub for the distribution of service.^{32/} However, the Commission made the statement on which Massport relies in the context of telecommunications carriers seeking to invoke OTARD protections to permit location of “backhaul and hub or relay equipment” on the premises of a customer to avoid a “legitimate zoning regulation.”^{33/} Airlines’ efforts to allow their customers to enjoy the benefits of Wi-Fi in frequent flyer clubs is not an

^{31/} *Id.*

^{32/} Massport Comments at 55-58.

^{33/} See “*Promotion of Competitive Networks in Local Telecommunications Markets*” at 5644 ¶ 17 n.41.

attempted end-run around “legitimate zoning regulations,” and the Commission’s conclusions as to the location of common carrier equipment on customer property is utterly irrelevant in this proceeding.^{34/}

Next, Massport asserts that the OTARD rules are inapplicable here because the rules “provide[] no protection for antennas installed and used only for transmission and/or reception of signals originating within a lessee’s exclusive-use premises.”^{35/} The attempted distinction between devices that receive off-premises signals and those that receive only on-premises signals is a relic of the video context of the rules, prior to their extension to fixed wireless devices. Clearly, when the Commission extended the competitive access protections of the OTARD rules to fixed wireless antennas, it recognized that distinctions such as that urged by Massport are no longer relevant to protection under the rules.^{36/} While the Internet services provided by airlines are often brought to the leased premises via T-1 or DSL lines, the use of Wi-Fi devices on those premises does not lose the protections afforded by the OTARD rules simply by virtue of that

^{34/} In seeming contradiction of its argument about customer Wi-Fi usage, Massport also argues that the OTARD rules do not apply to the airlines’ Wi-Fi use because that use is not “commercial.” Massport Comments at 59. Massport concedes, however, that this argument would not except T-Mobile antennas from protection under the OTARD rules. *Id.*

^{35/} Massport Comments at 61-62.

^{36/} See *Promotion of Competitive Networks in Local Telecommunications Markets*, at 5638-39 ¶ 2 (“[T]he Commission found that goals expressed by Congress in the Telecommunications Act would be frustrated if the OTARD protections were applied to video and not to telecommunications services. . . . The Commission concluded . . . that distinguishing in the protection afforded based on the service provided through an antenna produces irrational results.”) (internal quotations omitted).

fact. Under Massport’s approach, the identical Internet services would be protected by the OTARD rules if they were delivered initially by satellite — just the sort of “irrational results” the Commission eschewed in extending OTARD protections to fixed wireless antennas.^{37/} In fact, if the Commission were to adopt Massport’s reading of the OTARD rules, lessees in multi-tenant environments would enjoy the protection of the OTARD rules in using fixed wireless service to bring signals onto their leased premises but not if they also use unlicensed technologies, such as Wi-Fi, to transmit signals within those premises. An illogical and unnecessary curb on deployment of Wi-Fi and other advanced technologies would be the inevitable result.

Finally, Massport argues that airline-lessees at Logan Airport, in passing on the benefits of their protection under the OTARD rules to their customers, thereby deprive themselves of that protection.^{38/} This argument, however, is directly contradicted by the Commission’s unambiguous statement that the OTARD protections apply not only to tenants using an antenna to receive service for their own use, but also to those seeking to provide service to others for a fee.^{39/} Massport also ignores the fact that the airlines and their employees make significant use

^{37/} *Id.* at 5639 ¶ 13.

^{38/} *See* Massport Comments at 65-66 (arguing that because “[t]he OTARD rule grants no protection to Presidents Club members” and because Continental failed to comply with a lease provision — one rendered illegal under the OTARD rules — the rules protections do not apply here).

^{39/} *See, e.g.*, June 24th Public Notice at 11302 (“OTARD protections apply to certain kinds of wireless technologies where customer-end antennas also function to relay service to other customers”) (citation omitted).

of wireless service, as detailed in Continental’s Supplemental Petition and the comments of the Air Transport Association of America.^{40/} Massport’s argument that airline passenger use of Wi-Fi eviscerates the protections of the OTARD rules thus is both contrary to Commission precedent and factually beside the point.

Perhaps recognizing the insufficiency of these arguments, Massport asks that it be granted an exemption from the OTARD rules as a “special-use facility.” This request for an exemption should be denied because, as noted above, the Commission’s Office of Engineering and Technology already has concluded that the OTARD rules should apply to airports.^{41/} And airports lack the key characteristics that have led the Commission to grant special-use exemptions in the past. For example, the Commission has identified a university dormitory as a “special-use” facility for purposes of the OTARD rules because a student in a dormitory possesses only limited and short-term occupancy rights incidental to his or her status as a university student. In airports, however, leasing arrangements vest in airlines traditional leasehold rights, precisely of the sort that lead to protection under the OTARD rules. In exempting university dormitories from OTARD protections, the Commission warned that similar leasehold rights would lead to application of the OTARD rules in university settings as well: where “the relationship between a university and a viewer bears sufficient attributes of a commercial landlord-tenant relationship (*e.g.*, where a university leases a single family home to a

^{40/} See Supplemental Petition at 2-3; ATA Comments at 4-5.

^{41/} See June 24th Public Notice at 11300.

faculty member), [the OTARD] rules will apply.”^{42/} Because the relationship between Massport and airlines operating at Logan Airport falls squarely within the scope of the OTARD rules, the Commission should deny Massport’s suggestion that airports be characterized as “special use” facilities under those rules.

IV. Neither the Public Safety Nor the Central Antenna Exemption Applies

A. Public safety exemption

Massport has utterly failed to make the showing required under the public safety exemption to the OTARD rules. To justify such an exemption, Massport was required to demonstrate that AWG’s monopoly on Wi-Fi service is “necessary to accomplish a clearly defined, legitimate safety objective that is . . . stated in the text . . . of the restriction . . . and . . . applied in a non-discriminatory manner”^{43/} Restrictions enacted pursuant to such a public safety objective must be “no more burdensome . . . than is necessary.”^{44/} Massport has shown none of those things.

As noted above, any public safety use of AWG’s service at Logan Airport is entirely speculative. While Massport details the sort of use that *could* be made of the service, it makes no showing of actual use of the service by public safety entities. Its claim that shutting down

^{42/} Second Report and Order, *Implementation of Section 207 of the Telecommunications Act of 1996*, 13 FCC Rcd 23874, 23889 ¶ 29 n.73 (1998).

^{43/} 47 C.F.R. § 1.4000(b)(1).

^{44/} 47 C.F.R. § 1.4000(b)(3).

competing Wi-Fi service would be necessary to accommodate public safety use of the central antenna is equally unsupported: there is no indication whatsoever that any use that public safety agencies might choose to make of AWG's service would be hindered by the presence of other providers in Logan Airport. In other words, Massport has failed to identify a "clearly defined, legitimate safety objective" that justifies its monopolistic behavior.

Furthermore, even if Massport had identified such an objective, that objective must be "stated in the text" of Massport's lease agreements with its airline-lessees. It is not. Massport points only to a provision of the lease agreement that states that lessees "shall not do or knowingly permit to be done anything which may interfere with the effectiveness or accessibility of any . . . communications system."^{45/} The quoted language does not even mention public safety, nor is the word "interfere" anywhere defined. Massport also cites to two lease amendments as "readily available" sources containing reference to a "clearly defined, legitimate safety objective," but neither amendment appears to contain any reference to public safety whatsoever.^{46/} Without any prior statement of a safety objective, Massport's *post hoc* public safety justification for its anticompetitive behavior is plainly insufficient to exempt that behavior from the OTARD rules.

^{45/} Massport Comments at 41.

^{46/} *Id.* at 41 & Exhibits D & E.

Finally, even if Massport had shown the existence of a “clearly defined, legitimate safety objective,” its failure to demonstrate that its restrictions on lessees’ use of unlicensed wireless services are “no more burdensome than is necessary” would prevent application of the public safety exemption. Massport’s complete shut-down of all competing wireless service could not be “no more burdensome than is necessary” unless it were the only available means to address Massport’s (vague and unsupported) public safety concerns. Massport readily acknowledges, however, the existence of technologies and procedures that are available that might alleviate any interference where more than one device is operating in the unlicensed band.^{47/} Massport admits that techniques such as channel mapping, power reductions, and use of alternative spectrum could all be used to ensure that multiple users co-exist in Logan Airport without causing harmful interference with one another. Also available, though not discussed by Massport, are “smart antennas,” described above, which enhance spectrum efficiency in multi-user environments. Rather than explore these techniques, however, Massport merely asserts that mitigation efforts such as these would “not adequately resolve” its interference concerns or “provide the same advantages as RF management through [its] central antenna Wi-Fi system.”^{48/} These untested assertions fail to demonstrate that Massport’s creation of a valuable monopoly for AWG is “no more burdensome than is necessary” to meet Massport’s public safety objective. In short, Massport is not entitled to a public safety exemption under the OTARD rules.

^{47/} Massport Comments at 23-25.

^{48/} *Id.* at 23.

B. Central antenna exemption

The Commission has recognized an exemption from the OTARD rules where a landlord provides access to a central antenna that meets four specific requirements. For Massport to gain relief from the OTARD rules under this exemption, it would have to show that (1) end-users at Logan Airport receive the service they desire and that they could receive with their own antennas; (2) the quality of service is as good or better than that end-users could receive with their own antennas; (3) the cost associated with the central antenna is no greater than that associated with an individual antenna; and (4) the requirement that the end-user use the central antenna does not delay service.^{49/} Massport's central antenna service cannot meet these requirements.

Massport's comments include a number of vague assertions about the diversity of Wi-Fi services available over its central antenna to suggest that "[Wi-Fi users] could likely receive the same business services" as they do over individual antennas and "could likely receive service from [their] choice of providers."^{50/} But these obfuscations cannot hide the simple fact that subscribers to T-Mobile's HotSpot service who otherwise would prefer to access that service in American and Delta passenger lounges at Logan Airport *cannot* access those services under Massport's current position. Instead, the *only* services available to them are those provided by

^{49/} Order on Reconsideration, *Implementation of Section 207 of the Telecommunications Act of 1996*, 13 FCC Rcd 18962, 18998-99 ¶¶ 86, 88 (1998).

^{50/} Massport Comments at 29-30.

AWG. Massport’s suggestion that Continental apparently uses Fiberlink for remote access and could possibly continue to do so because of AWG’s arrangements with Fiberlink is beside the point. Massport must demonstrate that Continental and other airlines are able to obtain service from the *provider of their choice*, not simply that a particular provider is available because AWG has arrangements with it. Massport did not — and could not — make this showing. Under these circumstances, Massport’s attempt to invoke the central antenna exemption is unavailing.

Massport has also provided no evidence that AWG’s service through the central antenna provides a signal quality that is “as good as, or better than” that which the airlines had received and would receive by using their own fixed wireless antennas. The strongest statement that Massport can muster is that its central Wi-Fi antenna “should provide” airlines and their customers with an acceptable wireless signal quality.^{51/} And Massport in fact admits that its “recent engineering audit has revealed that the central antenna Wi-Fi system provides a slightly weaker signal than Continental’s Wi-Fi antenna in a corner of the President’s Club.”^{52/} A weaker signal clearly is not “as good as, or better than” Continental’s preferred service. In addition, security of service is a key element of its quality. As detailed in T-Mobile’s comments, while T-Mobile has invested heavily in making its system more secure — for example, it offers the only nationwide Wi-Fi network to employ 802.1x security enhancement — there is no

^{51/} *Id.* at 33.

^{52/} *Id.* at 35.

indication that AWG's service includes similar security enhancement measures.^{53/} Furthermore, the fact that Continental and other airlines have each expressed their desire to acquire Wi-Fi service from a provider other than AWG seriously undercuts any assertion that AWG's service is "as good as, or better than" the service airlines could receive by using their own fixed wireless antennas. In a competitive marketplace, buyers show which service they think is better by buying it.

Massport's assertion that AWG's service likely would be less costly than the service airlines could receive through their own antennas has the same flaws. It is unsupported: Massport describes four alternative means of obtaining access to Wi-Fi services over the central antenna, none of which is shown to be less expensive than the service airlines would be able to provide over their own antennas, and all of which result in increased revenues for Massport and AWG. The first two alternatives would require that the user pay AWG by credit card or purchase of a prepaid AWG usage card from an airport vendor at a charge of \$7.95 for 24 hours of access.^{54/} For Continental passengers and employees, who currently receive Wi-Fi access free of charge, AWG's service is clearly more expensive. And for T-Mobile subscribers who would otherwise have Wi-Fi access at Logan Airport as part of their subscription plans, there will now be additional fees associated with access at that location. As a third alternative, Massport allows users that have an existing account with one of Massport's "authorized" service providers or

^{53/} T-Mobile Comments at 6.

^{54/} *Id.* at 19.

partners to access the central antenna.^{55/} While Massport provided no information about the costs associated with this method of access, it would necessarily involve additional costs for Continental employees and passengers, as well as T-Mobile subscribers, because these “pre-arranged accounts” would require up-front payments of duplicate subscription fees. Finally, Massport notes that users may access, in leased areas, the central antenna for free as “customers of tenants that have an agreement with AWG.”^{56/} This service, however, would certainly cost Continental’s employees and customers something in addition to any direct or indirect charges they now pay.

Finally, although it is unclear whether a requirement that airlines use AWG’s service will delay Wi-Fi access, the airlines have expressed their strong preference for alternate carriers, chiefly because those carriers are faster and cheaper than AWG. And in other airports in the country, where central antennas are not yet available, similar lease restrictions would certainly delay the provision of service.

It is plain, therefore, that AWG has failed to show it can meet even one of the requirements of the central antenna exemption. Because Massport’s insistence that all Wi-Fi access at Logan Airport be provided by AWG is nothing more than a monopolistic, revenue-seeking endeavor, it is not surprising that Massport fails to meet an exemption to the pro-

^{55/} *Id.* Each of these “authorized” providers appears to have a pre-existing relationship with AWG.

^{56/} *Id.*

competitive OTARD rules. If AWG's service sufficed to invoke the central antenna exemption, *any* central antenna service could be employed to deprive lessees of protection under the OTARD rules. To prevent the exception from swallowing the rule, the Commission should deny Massport's request for an exemption from the OTARD rules on these grounds.

V. The Commission's Exercise of Ancillary Jurisdiction in This Context Cannot Seriously Be Questioned

In the face of Commission precedent to the contrary, Massport contends that the Commission cannot grant Continental's petition because the Commission exceeded its statutory authority in expanding the OTARD rules to encompass provision of fixed wireless signals in multi-tenant environments.^{57/} Twice before, the Commission has addressed its authority to expand the OTARD rules in this manner, and twice before it has concluded that it clearly had the power to do so. The Commission was right both times: It has the authority to grant Continental's petition and declare invalid Massport's attempts to shut down competitive wireless service at Logan Airport. Massport's arguments amount to no more than an unpersuasive, and untimely, request that the Commission reconsider its prior determinations to extend the OTARD rules.

Massport's jurisdictional argument turns on a distorted reading of the D.C. Circuit's opinion in *American Library Association v. FCC*,^{58/} which held that the Commission's ancillary jurisdiction did not include the authority to regulate certain consumer electronics products when

^{57/} Massport Comments at 67-72.

^{58/} 406 F.3d 689 (D.C. Cir. 2005).

those products are not being used “in the process of radio or wire transmission.”^{59/} Unlike the “broadcast flag” regulations at issue there, which restricted “how broadcast content is used after it has been received,”^{60/} the OTARD rules address a lessee’s right to install equipment for the express purpose of transmitting and receiving fixed wireless signals. The Commission’s ancillary jurisdiction plainly reaches the installation and use of such equipment for that purpose.

In striking down the “broadcast flag” rules, the D.C. Circuit recognized that the Commission may exercise ancillary jurisdiction when “(1) the Commission’s general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”^{61/} Title I of the Communications Act of 1934 creates the Commission “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.”^{62/} While the “broadcast flag” rules were “outside of the compass of communication by wire or radio,”^{63/} the OTARD rules as applied to fixed wireless antenna service fall squarely within that compass. Furthermore,

^{59/} *Id.* at 700.

^{60/} *Id.* at 691.

^{61/} *Id.* at 691-92.

^{62/} 47 U.S.C. § 151.

^{63/} *American Library Ass’n*, 406 F.3d at 702.

sections 2, 301, 302, and 303(c)-(f) demonstrate Congress's express intent to provide the Commission with exclusive jurisdiction over all issues related to the use of radio frequencies, including the ability to resolve disputes arising from the use of unlicensed wireless devices, such as fixed wireless antennas, in multi-tenant environments. As Massport's actions threaten the ability of the Commission to "make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service," the application of the OTARD rules to ban those actions is "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."^{64/} The Commission, therefore, certainly possesses the power to grant Continental's petition and declare the restrictions imposed by Massport invalid under the OTARD rules.

VI. Massport's Assertion of the Power to Manage Unlicensed Spectrum is Anathema to the Policy Goals of Congress and the Commission

In a rather astonishing assertion of its own power, Massport claims that "[t]he public interest requires *Massport* to manage critical spectrum resources [at Logan Airport] to ensure that everyone may use unlicensed wireless devices with minimal potential for interference"^{65/} As described above, however, Congress has delegated this essential public interest duty to the Commission. The Commission has defined its role in managing unlicensed spectrum so as to ensure that it remains shared and subject to open access, allowing for maximum efficiency of

^{64/} *Id.* at 692.

^{65/} Massport Comments at 20 (emphasis added).

use, and in multi-tenant environments, does not fall victim to attempts to convert this communal resource into a valuable monopoly for a single provider. In its comments, Massport asserts the Commission's authority for itself in pursuit of goals directly contrary to established federal policy.

As described in detail in T-Mobile's comments, the restrictions Massport seeks to impose upon the provision of Wi-Fi service at Logan Airport are anathema to the policy goals of Congress and the Commission.^{66/} Undoubtedly, they hinder the development and deployment of advanced wireless technologies and are contrary to the interests of service providers and traveling consumers. Access to fixed wireless antennas while traveling is a natural use of advanced Wi-Fi technology, and Massport seeks to stop this organic development in its tracks. If permitted to continue, Massport's revenue-driven restrictions would set a dangerous precedent of elevating the financial interests of one group above those of all the intended beneficiaries of the Commission's mandate to promote the deployment of advanced wireless services.

Massport's restrictions on airline carriers' ability to employ Wi-Fi technologies to meet their own and their customers' needs also threatens the vital federal policy goal of facilitating "a pro-competitive, de-regulatory national policy framework."^{67/} Based on this congressional directive, the Commission has promulgated myriad policies that promote competition and consumer choice among telecommunications providers. Yet Massport has sought completely to

^{66/} T-Mobile Comments at 14-15.

^{67/} S. Rep. No. 104-230, at 1 (1996) (Conf. Rep.).

eliminate competition for Wi-Fi access at Logan Airport in the interest of increasing its own revenues. Allowing Massport to establish such an unwarranted monopoly would contradict the Commission's longstanding policy of ensuring competition among service providers for the benefit of consumers. A failure by the Commission affirmatively to declare Massport's actions unlawful would have disastrous consequences for competition and consumer choice among telecommunications providers in airports and in other multi-tenant environments.

Conclusion

The Commission should grant Continental's petition for a declaratory ruling and unequivocally declare that Massport's limitations on deployment of Wi-Fi networks violate the Commission's rules and thus are unlawful.

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