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November 30, 2005

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

On November 29, 2005, Donna Katos, Robert Edwards and John W. Stelly of Continental Airlines, Inc. ("Continental"), David A. Berg and Sophy Chen of the Air Transport Association of America ("ATA"), Inc., Mark E. Crosby of the Enterprise Wireless Alliance, Timothy B. Totten of United Parcel Service, Josh L. Roland of Wilmer Cutler Pickering Hale and Dorr LLP, counsel to ATA, Henry M. Rivera and the undersigned, both of Vinson & Elkins LLP and counsel to Continental Airlines, met with Bruce Franca, Julius Knapp, Bruce Romano, Lauren Van Wazer, Alan Scrime, Gary Thayer, Jamison Prime and Nicholas Oros of the Office of Engineering and Technology. At this meeting, we discussed Continental's petition seeking a determination that the restrictions imposed by the Massachusetts Port Authority on the installation, maintenance and use of Continental's Wi-Fi antenna at Boston's Logan Airport are prohibited by the Commission's Over-the-Air Reception Devices rules. We also discussed the significance of this proceeding to the entire airline industry.

A copy of the presentation distributed at the meeting, which contains the issues discussed, is attached to this letter. Pursuant to Sections 1.49(f) and 1.1206(b) of the Commission's rules, this letter and its attachment has been filed electronically.

Respectfully submitted,

/s/ Edgar Class
Edgar Class
Counsel to Continental Airlines, Inc.

Attachment

cc: Bruce Franca
Julius Knapp
Bruce Romano
Lauren Van Wazer
Alan Scrime
Gary Thayer
Jamison Prime
Nicholas Oros

Use of Unlicensed Spectrum at Airports

Presentation to the FCC
Office of Engineering and Technology

Continental Airlines
The Air Transport Association of America
United Parcel Service
Enterprise Wireless Alliance

November 29, 2005
Washington, D.C.

Who We Are

- Robert Edwards
  - Continental's Staff Vice President of IT Operations, Technology Department
- John W. Stelly
  - Continental's Managing Director, Technology Department
- Donna Katos
  - Continental's Managing Attorney – Litigation
- David Berg
  - Air Transport Association of America, Vice President and General Counsel
- Sophy Chen
  - Air Transport Association of America, Senior Attorney
- Mark E. Crosby
  - President/CEO, Enterprise Wireless Alliance
- Tim Totten
  - Wireless Manager, UPS
  - Chairman, Enterprise Wireless Alliance

Massport's Restriction is Contrary to FCC Rules and Policies, Congressional Mandate and Administration's Agenda

- Purpose of OTARD rules
  - Ensure that consumers have access to a broad range of services
  - Foster full and fair competition among different types of services and service providers
- FCC Internet Policy Statement
  - Consumers are entitled to competition among network providers, application, service and content providers
- Section 706 Mandate
  - Encourage the deployment on a reasonable and timely basis of advanced telecommunications capabilities to all Americans
- Administration's Technology Agenda
  - "We ought to have…universal, affordable access for broadband technology by the year 2007" (President Bush, March 26, 2004)

Policy Implications

- Allowing Massport's restriction to stand would:
  - Open the door to future efforts by airports and other landlords to restrict use of unlicensed wireless services
  - Deprive airlines and their customers of a choice among competing Internet service providers
  - Subject airport tenants to further restrictions on the use of unlicensed wireless systems that bring a wide range of benefits to businesses and their customers
  - Frustrate the FCC's policies to ensure the open and interconnected nature of the public Internet
  - Place the economic interests of landlords such as Massport above the policies favoring expansion of the use of unlicensed wireless devices and networks for the benefit of all Americans
  - Threaten innovation and consumer choice in the Wi-Fi market

Background

- Petition for Declaratory Ruling
  - Seeks determination that Massport's attempt to prevent Continental's installation and use of a Wi-Fi antenna in the Presidents Club at Logan Airport is contrary to the OTARD rules
- OET placed Petition on Public Notice
  - Approximately 2,000 supporting comments filed by frequent flyers
  - Supporting comments also filed by the Air Transport Association, Enterprise Wireless Alliance, T-Mobile, American Airlines, the Personal Communications Industry Association (PCIA), the Consumer Electronics Association, and the Alliance for Public Technology
  - Massport, a few other airports, and the the airports' trade association (Airports Council International) oppose the Petition

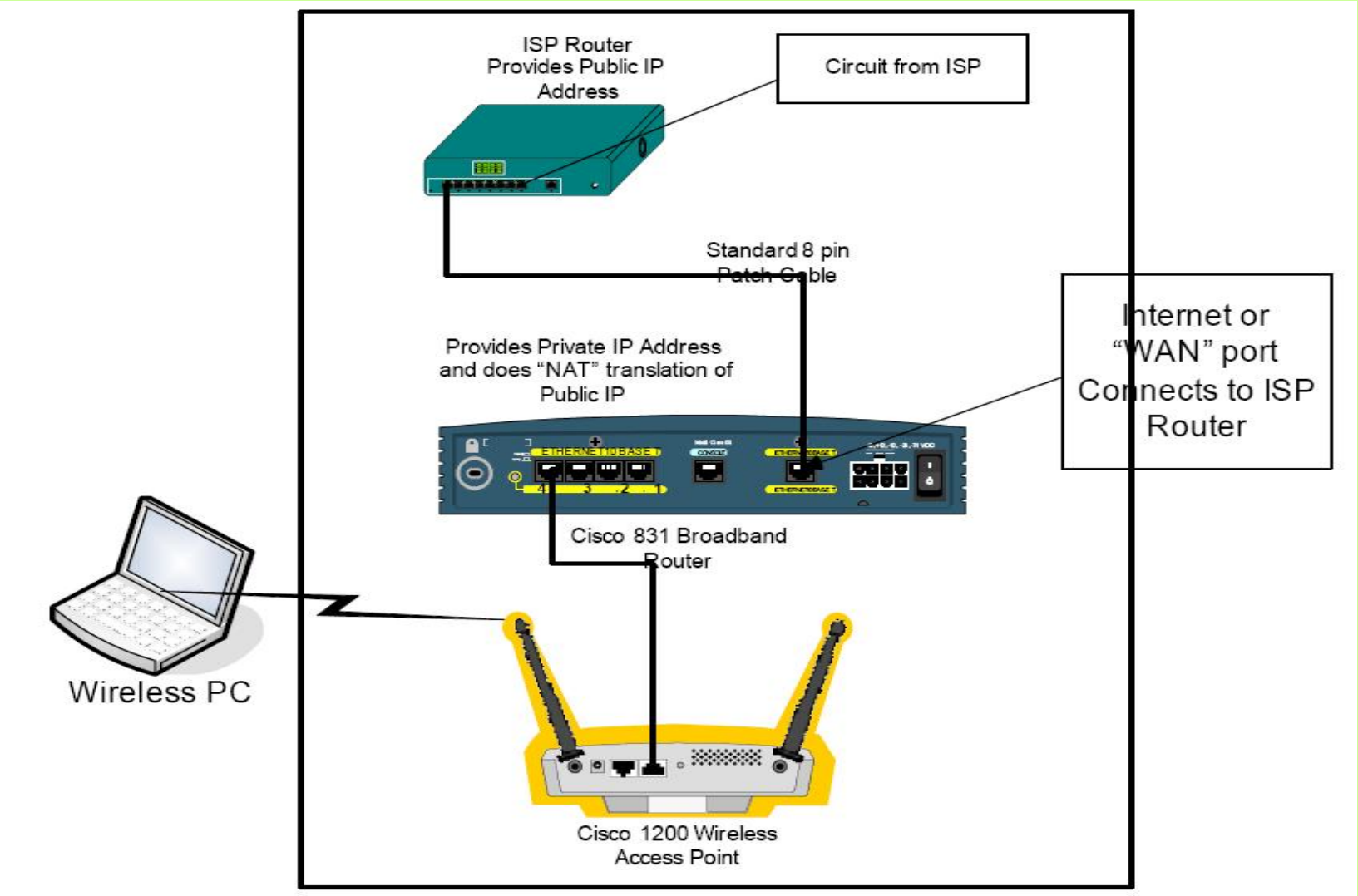
Continental’s Wi-Fi Antenna

- Antenna installed in July 2004
  - Located in Presidents Club lounge at Logan Airport
  - Enables anyone with an 802.11b Wi-Fi enabled computer to access the Internet from anywhere in the club

Continental's Wi-Fi Antenna (cont'd)

- Antenna used by Continental employees
  - Wireless access to corporate network
- Antenna used by passengers in the Club premises
  - Wireless access to the Internet
- Instant connection
  - No log-on screen, user names or passwords
- No fees or charges

Continental's Wi-Fi Antenna (cont'd)

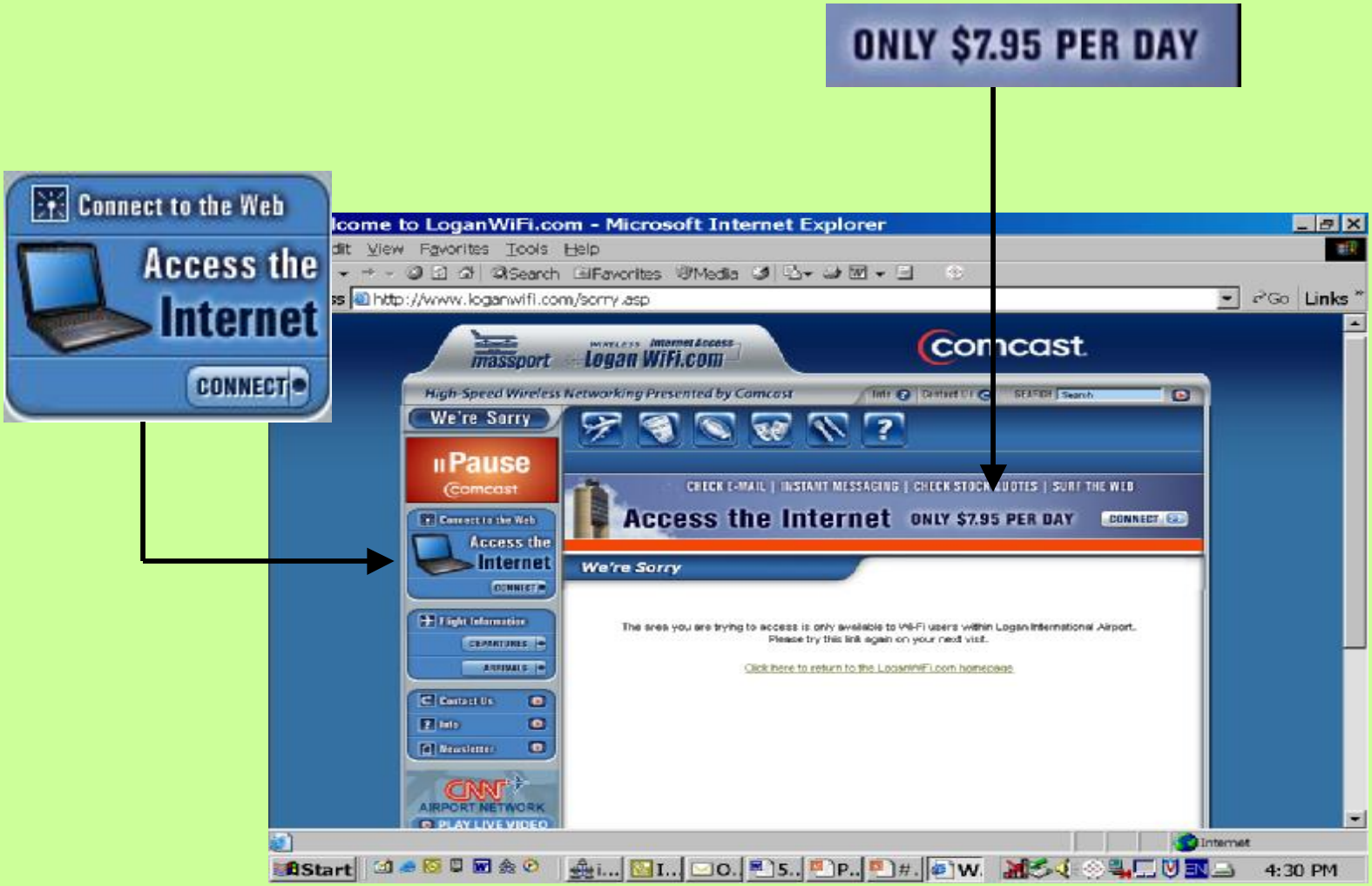


Massport's Wi-Fi System

- Exclusive contract given to AWG for installation, operation and maintenance of an airport-wide commercial Wi-Fi system
  - Everyone at Logan must use the AWG-installed system
- User options to access the Internet:
  - Pay $7.95 per day via credit card or pre-paid card, OR
  - Become a customer of iPass or Boingo or one of their partners, OR
  - Tenant (such as Continental) buys the service from AWG to allow its employees and customers to access the Internet
- Massport and AWG receive a portion of the revenues from wireless Internet access service, regardless of how a user gains access to the Internet (Massport Comments p. 19, footnote 44)

Massport's Wi-Fi System (cont'd)

- Requires log-on ID, password and $7.95 per day per user (www.loganwifi.com)



Use of Unlicensed Spectrum by the Airline Industry

- Airlines operate or provide access to Wi-Fi hot spots and other unlicensed wireless services at airports across the country to meet their own communications needs, as well as the needs of their customers

- Uses of unlicensed services are expanding rapidly

- Unlicensed wireless services increase airlines' efficiency and are essential during periods of irregular operations, such as times of emergency or weather delays

Use of Unlicensed Spectrum by the Airline Industry (cont'd)

- Airlines' use of unlicensed wireless services extends far beyond Wi-Fi services:
  - Curbside check-in and baggage check
  - Mobile passenger check-in and boarding capabilities
  - Flexible, real-time equipment deployment
  - Baggage tracking
  - Cargo, parcel, and U.S. mail tracking
  - Maintenance details, fuel information, navigation database updates and other critical flight data to the cockpit
  - Ramp asset tracking
  - Seamless communications by mobile gate equipment crews
  - Support services (*e.g.*, wheelchair dispatch, unaccompanied minor services, medically required oxygen distribution, and cabin service warehouse management)
  - Remote connectivity to cargo scales in support of FAA-mandated safety initiatives

FCC Authority to Provide the Relief Requested

- Massport argues that the FCC lacks the statutory authority to extend the OTARD rules to fixed wireless signals. However:
  - In 2004, the FCC considered and rejected identical arguments that it acted outside the scope of its authority in extending OTARD to fixed wireless services (Order on Recon, WT Docket 99-217 ¶ 8)
  - Furthermore, the Commission has unequivocally stated that the right to install and operate customer antennas applies to unlicensed equipment such as Wi-Fi access points (June 24, 2004 Public Notice)

The OTARD Rules Apply

- The OTARD rules apply because:
  - Massport imposed a restriction that impairs the installation, maintenance or use of Continental's antenna
  - The antenna is located on property within Continental's exclusive control or use
  - The antenna is used to transmit fixed wireless signals
    - Defined as commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location
  - The antenna is one meter or less in diameter or diagonal measurement
- In invoking the protections of the OTARD rules, it does not matter if the end-user is an employee or a customer
  - The Commission did not distinguish between private and commercial use when it extended the OTARD rules to fixed wireless

Safety Exception Does Not Apply

- Use of the airport-wide commercial Wi-Fi system by public safety entities would not automatically trigger the safety exception
  - The safety exception is not a public safety exception that can be invoked by asserting that public safety entities will use the airport's commercial Wi-Fi system
  - The safety exception was meant to allow restrictions directly related to the physical safety of citizens (*e.g.*, restrictions requiring minimum distances from high voltage power lines, fire codes preventing installation of antennas on fire escapes, etc.)
  - The Commission recently clarified that no user, even a public safety user, has priority rights in unlicensed spectrum
    - "It does not matter who operates the unlicensed equipment or the purpose for which the equipment used – no protection against received interference is provided or available." Order, FCC 05-194, November 18, 2005

Restriction Ignores FCC's Part 15 Spectrum Management Approach

- Massport says the public interest requires it to manage and prioritize spectrum resources at Logan, but:
  - Congress has delegated this function to the FCC
  - Under Part 15, unlicensed frequencies are shared and subject to open access and Massport cannot prioritize their use
  - Unlicensed Part 15 devices may not cause harmful interference to and must accept any interference from authorized radio users
  - FCC has provided licensed spectrum for mission-critical public safety communications

Central Antenna Exception Does Not Apply

- Massport must show that: (1) Continental would be able to select its provider of choice; (2) Continental would not incur costs greater than the costs of installation and use of the individual antenna; and (3) use of the airport-wide commercial Wi-Fi system does not unreasonably delay Continental's ability to receive fixed wireless service

- The exception does not apply because:
  - Continental's ability to select its provider of choice is impaired by Massport's restriction
    - Options limited to AWG, iPass, Boingo, or their affiliated partners
  - The costs associated with the use of Massport's airport-wide commercial Wi-Fi system are greater than the costs of installation, maintenance and use of the individual antenna

No Exception for Government Entities

- Massport argues that the OTARD rules should not apply to government entities
  - This ignores the plain language of the rules (prohibiting “any restriction”) and the fact that the FCC has affirmed that the rules apply to unlicensed devices at airports (June 24, 2004 Public Notice)

- In the alternative, Massport argues the FCC should grant a blanket waiver to all airports
  - A waiver applicant must make a showing that:
    - Local concerns of a highly specialized or unusual nature warrant such waiver (Rule 1.4000(d))
    - The underlying purpose of promoting greater competition and consumer choice would not be served, OR, given unique or unusual circumstances, application of the rules would be inequitable, unduly burdensome, or contrary to the public interest, or that there are no reasonable alternatives (Rule 1.925(b)(3)).
  - Massport has failed to meet these criteria

The OTARD Rules Do Not Effect a Taking

- The Commission has twice rejected takings challenges to the OTARD rules (FCC 98-273 and FCC ¶ 19)
- The DC Circuit upheld the OTARD rules against a takings challenge in BOMA v. FCC
- The *per se* taking prohibition outlined in Loretto is not implicated because the OTARD rules apply only where there is "consent to the occupation of the property."
- There is no regulatory taking because:
  - OTARD promotes the substantial government interests of choice and competition in the fixed wireless marketplace
  - There is no evidence that the economic impact on Massport will be significant
  - There is no evidence that the rules interfere with reasonable investment-backed expectations (FCC 98-273 ¶¶ 24-26)