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

Re: Ex Parte Notice in ET Docket No. 05-247 – In the Matter of Petition by Continental Airlines, Inc. for a 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:

T-Mobile USA, Inc. ("T-Mobile") submits the following *ex parte* letter in the above-captioned proceeding to address issues raised in the Comments and previous *ex partes* in this proceeding. These submissions have raised questions relating to federal preemption, voiding of private contracts, takings under the Fifth Amendment to the U.S. Constitution, and proper interpretation of the OTARD rules (including whether the rules' protection varies depending on the identity of the end-user, whether WiFi fits within the rules' definition of "fixed wireless," and whether any public safety use of a central antenna would trigger the rules' "safety exception"). We also address whether T-Mobile could — or should — provide the sort of priority WiFi access to public safety entities that Massport claims AWG offers at Logan Airport. In this letter, T-Mobile answers these questions and further demonstrates that the Commission should grant the declaratory ruling requested in Continental's petition.

While federal preemption of state or local regulations is a serious matter to be undertaken only after careful balancing of the interests at stake, application of the OTARD rules to the frequent flyer lounges at Logan Airport would not risk federal over-reaching. The OTARD rules themselves reflect an appropriate balancing and were written to be sensitive to federal preemption concerns. The Commission has previously recognized that the rules were tailored to minimize impact on state and local governments.[1/] To that end, the OTARD rules do not preempt all regulation of fixed wireless devices; they displace only regulations that *unreasonably impair* the use or installation of such devices.[2/] Furthermore, the rules contain several exemptions specifically designed to protect legitimate concerns of state and local government.[3/] Where a state or local regulation is reasonable, or falls within the exceptions carved out

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1/ *See* Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, *Implementation of Section 207 of the Telecommunications Act of 1996*, 11 FCC Rcd 19276, 19282, 19289-293 ¶¶ 7, 23-27 (1996) ("*First Report and Order*").

2/ This limitation on the OTARD rules' application was designed to limit interference with local regulations. *Id.* at 19282 ¶ 7.

3/ *See* 47 C.F.R. § 1.4000(b)(2) (safety and historic preservation exemptions); § 1.4000(d) (local government waiver).

of the OTARD rules in recognition of genuine local interests, the OTARD rules allow the regulation to stand. The rules affect only *unreasonable* impairment of fixed wireless antenna use, such as that undertaken by the Massachusetts Port Authority ("Massport") at Logan Airport. A local government's interest in such impairment is clearly outweighed by the federal policy goals of robust competition, consumer choice, and innovation in wireless technologies.

Some participants in this proceeding have suggested that a ruling in Continental's favor might impermissibly void private contracts, but the OTARD rules do no such thing. The rules do not force landowners to lease their property, nor do they void existing leases. Rather, like many other laws, they merely invalidate particular contract provisions that the government has determined are contrary to public policy (here the firmly established, widely accepted federal policies in favor of competition, consumer choice, and deployment of advanced technologies). Such regulations in furtherance of public policy are accepted in many contexts (*e.g.*, building codes, zoning codes, prohibitions on certain restrictive covenants),[4/] and they are acceptable in this context as well.

Contrary to arguments put forth by Massport and the Airports Council International-North America ("ACI-NA"), the OTARD rules do not effect a taking. Both the Commission and the D.C. Circuit have rejected takings challenges to the rules,[5/] and neither Massport nor ACI-NA has offered any reason to reach a different conclusion in this proceeding. As explained by the D.C. Circuit, "the landlord affected by the amended OTARD rule will have voluntarily ceded control of an interest in his or her property to a tenant. Having ceded such possession of the property, a landlord thereby submits to the Commission's rightful regulation of a term of that occupation."[6/] Recognizing that Commission and D.C. Circuit precedents foreclose any facial challenge to the OTARD rules on takings grounds, Massport and ACI-NA attempt to launch an as-applied challenge here, but they cite no facts particular to this case that would take it outside of the holding quoted above. To the extent that Massport and ACI-NA argue that the OTARD rules constitute a regulatory taking, they have not met prerequisites for raising such a claim.[7/]

In alleging that application of the OTARD rules in this context would violate the Fifth Amendment, Massport and ACI-NA make much of the Supreme Court's holding in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which held that permanent occupation of private property constitutes a *per se* taking. *Loretto*, however, is not implicated here. As the D.C. Circuit recognized, the OTARD rules fall "outside

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4/ *See, e.g.*, *First Report and Order*, at 19303 ¶ 44 ("The government may abrogate restrictive covenants that interfere with federal objectives enunciated in a regulation.").

5/ *See* Second Report and Order, *Implementation of Section 207 of the Telecommunications Act of 1996*, 13 FCC Rcd 23874, 23883-84 ¶ 19 (1998) ("*Second Report and Order*"), *aff'd*, *Building Owners and Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 98 (D.C. Cir. 2001).

6/ *See Building Owners*, 254 F.3d at 98.

7/ *See id.* at 99 (in order to prevail on a regulatory takings claim, a petitioner must first bring a suit for compensation).

the scope of *Loretto*" because they apply only where the landlord has given "consent to the occupation of the property."[8] To the extent that Massport and ACI-NA base their *per se* takings argument on the necessity of T1 or DSL lines outside of tenant-controlled areas to connect with WiFi access points within tenant-controlled areas, it is unavailing. The Commission has declined to apply the OTARD rules in common or restricted areas;[9] thus, if airlines have arranged for T1 or DSL lines that cross common or restricted areas, they are not doing so by virtue of the OTARD rules. Whatever telecommunications facilities the airlines have to connect their leased premises to public networks are in place through voluntary arrangements, and, if Massport unreasonably sought to forbid the use of those facilities to connect WiFi traffic, that would be an unreasonable restriction in violation of the Communications Act. In short, the *per se* takings argument offered by Massport and ACI-NA must fail.

In interpreting the OTARD rules in the context of Continental's Petition, participants in this proceeding have addressed the legal import — or lack thereof — of what sorts of persons are end-users of WiFi access points at Logan airport. In particular, T-Mobile and several other Commenters have disputed Massport's contention that it is essential in invoking the OTARD rules that Continental employees actually use the Continental access point and that some of the use is thus "private" to the airline, rather than "commercial" use by airline customers. In extending OTARD protections to fixed wireless, the Commission did not distinguish between "private" and "commercial" use in this fashion. Rather, protection for "commercial" use of WiFi is implicit in the rules: When the Commission extended the rules to fixed wireless, it was clear that WiFi access points would be used by third parties, as WiFi users typically do not travel with their own access points. Furthermore, the definition of "fixed wireless" in the rules expressly includes "commercial" communications, as discussed below.

The scope of the "safety exception" contained within the OTARD rules has also been the subject of debate. Massport has invoked this exception in justifying its monopolistic behavior. While Massport has not identified any current use of the central antenna by public safety entities, even if it did identify such use, that use would not automatically trigger the safety exception to the OTARD rules. The safety exception was meant to allow restrictions directly related to physical safety of citizens; it is not available merely because a "public safety entity" uses unlicensed spectrum.[10] The Commission recently clarified that no user, not 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 is used — no protection against received interference is

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[8] *See Building Owners*, 254 F.3d at 97; *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 252-53 (1987) (distinction between the taking in *Loretto* and valid regulations of landlord-tenant relationships "is the unambiguous distinction between a commercial lessee and an interloper with a government license").

[9] *Building Owners*, 254 F.3d at 93; *see also Second Report and Order* at 23894-898 ¶ 39-45 (recognizing that extension of the OTARD rules to areas outside a tenant's leasehold could result in a taking).

[10] *See First Report and Order* at 19290-91 ¶ 24 (safety exception meant to preserve "regulations that serve a stated safety purpose" such as those "requiring minimum distances from high voltage power lines," "provisions of the model fire code," and others related to identified safety hazards).

provided or available."[11] The OTARD rules' safety exception, therefore, is not based on the status of the user but on the existence of a genuine threat to physical safety. Massport has not identified any such threat at Logan Airport that is addressed by its restriction on WiFi access.

Massport has attempted to take WiFi out from under the OTARD protections also by advancing an unreasonably cramped interpretation of the rules' definition of "fixed wireless," focusing on the rules' reference to "commercial" signals. But this interpretation should be rejected. Clearly, WiFi is fixed wireless in the commonly understood meaning of that term: It involves the transmission of communications signals via wireless technology to and/or from a fixed customer location. The reference to "commercial" signals in the rules should not be read narrowly to make the application of the rules depend on the precise nature of the relationship between the tenant and any end user. Airline clubs at airports plainly are commercial premises.[12] Furthermore, in extending the OTARD rules, the Commission rejected as irrational distinctions "in the protection afforded based on the services provided through an antenna."[13]

Finally, Massport has contrasted the service of AWG to that of T-Mobile, pointing to the former's ability to provide priority WiFi access to public safety entities. It is true that facilities and systems are not now in place for T-Mobile to provide the priority access described by Massport. Even if such priority access were technologically feasible, it would be inimical to Commission policy on use of unlicensed spectrum.[14]

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[11] *See* Order, *Remington Arms Company, Inc. Request for a Waiver of the Part 15 Regulations*, ET Docket No. 05-183, FCC 05-194 ¶ 10 (rel. Nov. 18, 2005) ("*Remington Arms*").

[12] *See*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217; Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, *Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services*, 15 FCC Rcd 22983, 23027, 23035 ¶¶ 97, 117 and nn. 249-50 ("*Promotion of Competitive Networks*"). The Commission stated: "For the purpose of the OTARD rules, 'fixed wireless signals' are any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location." It added: "We recognize that today's revision of the OTARD rules will extend the benefits of that rule[] to fixed wireless devices that have the capability to transmit as well as receive signals." Finally, it clarified in footnotes that: (1) "Although the definition of 'fixed wireless signals' does not apply to broadcast signals, we note that television broadcast signals continue to be covered under our OTARD rules," and (2) the definition of "fixed wireless signals" does not include AM/FM, HAM, Citizen's Band, and Digital Audio Radio Service. Nothing in those specific exclusions indicates an intent that "fixed wireless" be read narrowly to exclude WiFi. To the contrary, the absence of WiFi from the list of specific exclusions tends to confirm that WiFi is within the coverage of the rules.

[13] *See Promotion of Competitive Networks* at 23027 ¶ 98.

[14] As noted above, the Commission recently reiterated its position that, regardless of who the user of unlicensed spectrum may be, no user in the shared band has rights against interference from any other user in the band. In response to comments that a Remington "Eyeball" could cause interference with public safety users of Part 15 devices in the 2.4 GHz band, the Commission declared: "It does not matter who operates the unlicensed equipment or the purpose for which the equipment is used — no protection against received interference is provided or available." *See Remington Arms* at ¶ 10.

As outlined here, and in T-Mobile's Comments and Reply Comments in this proceeding, Massport has set forth no basis for failing to apply the OTARD rules to fixed wireless antennas in frequent flyer lounges. The need for a declaratory ruling such as that sought by Continental is clear. WiFi use is spreading rapidly and, in the very near future, WiFi access points will be nearly ubiquitous; the Commission's management of unlicensed spectrum is partly responsible for this rapid expansion,[15/] and the agency should continue to manage this spectrum to promote expansion and innovation. Validating Massport's actions would curb this robust growth in innovative technologies. The Commission should preserve the benefits of its sound policies in this area by granting the requested declaratory ruling.

Respectfully Submitted,

/s/ Thomas J. Sugrue

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15/ *See Promotion of Competitive Networks* at 22987-88 ¶¶ 6 (in extending OTARD rules to fixed wireless devices, the Commission intended "to promote the continued deployment of competitive and advanced telecommunications services and reduce the substantial barriers that remain to deployment of these services in [multitenant environments]").