

January 13, 2006

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
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 December 16, 2005, the Massachusetts Port Authority ("Massport") submitted a 35-page *ex parte* filing in the above-referenced docket to purportedly provide "further detail on the statutory and constitutional infirmities" of extending the Over-the-Air Reception Devices ("OTARD") rules to fixed wireless signals.¹ By its attorneys, Continental Airlines, Inc. ("Continental") files this letter in response.

I. Massport is prohibited from seeking reconsideration of the Commission's decision to extend the OTARD rules to fixed wireless antennas.

From a procedural perspective, Massport's filing is inappropriate in that it constitutes an untimely petition for reconsideration of the Commission's decision in WT Docket No. 99-217 extending the OTARD rules to antennas used for fixed wireless service.² Massport had an opportunity to participate in that proceeding and to seek reconsideration of the

¹ Massport's *Ex Parte*, ET Docket No. 05-247, filed December 16, 2005.

² See *Competitive Networks First Report and Order*, WT Docket No. 99-217, FCC 00-366, 15 FCC Rcd 22983 (2000) (*Competitive Networks First Report and Order*); *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, FCC 04-41, Order on Reconsideration, 19 FCC Rcd 5637 (2004) (*OTARD Order on Reconsideration*).

Commission's decision at that time, but did not take advantage of that opportunity. Therefore, Massport is now precluded from seeking reconsideration of that decision.³

Massport's attempt to revisit the Commission's decision is barred by the doctrine of administrative finality. The courts have a strong policy in favor of administrative finality, and have held that proceedings that have become final will not be reopened unless there has been fraud on the agency's or court's processes, or unless the result is manifestly unconscionable.⁴ The Commission has applied this standard to its own proceedings.⁵ If this were not the case, the Commission would be involved "in a never ending process of review that would frustrate the Commission's ability to conduct its business in an orderly fashion."⁶ In this case, Massport has neither alleged fraud on the Commission's processes, nor has it made a case that failure to reconsider would result in a decision that is manifestly unconscionable.

II. The Commission acted within its statutory authority when it extended the OTARD rules to fixed wireless signals.

Massport argues that the Commission lacks the statutory authority to expand the scope of the OTARD rules to encompass the provision of "fixed wireless signals."⁷ Procedurally, this is clearly something Massport should have asked the Commission to deal with on reconsideration of the Commission's decision in the *Competitive Networks First*

³ See 47 C.F.R. § 1.429(d) (stating that a petition for reconsideration "shall be filed within 30 days from the date of public notice" of the Commission's action); see also *The Public Service Commission of Maryland; Petition for Declaratory Ruling Regarding Billing and Collection Services*, DA 87-361, Memorandum Opinion and Order, 2 FCC Rcd 1998, ¶ 32 (1987) ("If the Maryland PSC believes that the Commission decision was unlawful or unwise, the Maryland PSC should have filed a petition for reconsideration with the Commission or a petition for review with an appropriate court of appeals within the applicable time limits.").

⁴ See *San Francisco IVDS, Inc.*, Memorandum Opinion and Order on Reconsideration, 18 FCC Rcd 724, 733 at n. 24 (2003); *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238 (1944); *Greater Boston Television Corp. v. FCC*, 463 F. 2d 268 (D.C. Cir. 1971).

⁵ See *Petition of Radio Para La Raza*, Memorandum Opinion and Order, 40 FCC 2d 1102, 1104 (1973).

⁶ *Restrictions on Interconnection Between ITT World Communications Inc. and United States Transmission Systems, Inc.*, FCC 78-512, Memorandum Opinion and Order, 68 FCC 2d 1153, 1155 n. 5 (1978) (citing *Atlantic City Broadcasting Company*, FCC 61-964, 21 R.R. 164a).

⁷ Massport *Ex Parte* at p 2.

Report and Order, which Massport did not do. As previously mentioned, the policy favoring administrative finality requires that Massport not get another bite at this apple. Substantively, the Commission has clearly demonstrated twice before that it possesses the authority to extend the OTARD requirements to such services, and accordingly, has the power to grant Continental's Petition. In the *Competitive Networks First Report and Order*, the Commission stated that, "in light of our finding that the existing OTARD regulatory regime effectively hinders one of the principal goals of the 1996 Act, and because Commission action is reasonably ancillary to several explicit statutory provisions, we conclude that the Commission has the statutory authority to extend the OTARD protections to antennas used to transmit or receive fixed wireless signals."⁸ On reconsideration, the Commission affirmed this decision, holding that sections 1 and 706, as well as Title II of the Communications Act empower the Commission to extend the rules to fixed wireless services.⁹

III. The Commission has the authority to preempt restrictions that prohibit the installation and use of Wi-Fi antennas at Logan Airport.

Massport argues that in the absence of an express or implied indication by Congress, the Commission lacks preemptive authority over state or local governments acting in their proprietary capacity.¹⁰ Massport ignores the fact that the Commission adopted the OTARD rules in response to a direct Congressional mandate in Section 207 of the 1996 Act to promulgate restrictions affecting over-the-air reception devices "pursuant to section 303 of the Communications Act."¹¹ In addition to this express preemption provision, the Commission has held that "the scope of the section 207 directive to exercise our authority under section 303 does not limit our independent exercise of the same authority under section 303 and other provisions in a broader context."¹²

⁸ *Competitive Networks First Report and Order*, 15 FCC Rcd 22983, ¶ 101.

⁹ *OTARD Order on Reconsideration*, 19 FCC Rcd 5637, ¶ 8.

¹⁰ Massport's *Ex Parte* at p. 11-12. If Massport and other property owners were able to remove their restrictions from the reach of the OTARD rules by merely asserting that those restrictions are imposed in their "proprietary capacity," the OTARD rules would be rendered meaningless. Most if not all of the entities that are in a position to restrict the installation, maintenance and use of antennas are property owners who are trying to enforce terms such as are at issue in restrictive covenants or lease agreements.

¹¹ 47 U.S.C. § 303.

¹² *Competitive Networks First Report and Order*, 15 FCC Rcd 22983, ¶ 97.

Notwithstanding the foregoing, the OTARD rules are sensitive to federal preemption concerns. In drafting the rules, the Commission carefully considered the concerns of state and local governments and tailored the rules to minimize their impact on them.¹³ The OTARD rules do not preempt all regulation of fixed wireless devices, only those regulations that unreasonably impair their use or installation. They also contain exceptions that provide that if the restrictions or lease provisions fall within these exceptions, they are not affected by the OTARD rules.¹⁴ However, none of these exceptions, as shown by the overwhelming evidence and supporting Comments in this matter, apply.

In sum, the Commission adopted the OTARD rules in response to a direct Congressional mandate in section 207 and these rules constitute a fair, balanced and sensitive approach to federal preemption.

IV. Enforcement of the OTARD rules would not violate the Takings Clause of the Fifth Amendment.

Massport repeats the argument found in its other filings in this proceeding that a finding by the Commission in favor of Continental would implicate the Takings Clause of the Fifth Amendment.¹⁵ The Commission has dealt with this issue in the *OTARD Second Report and Order*, where it found that the property rights identified by the Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*¹⁶ (i.e., the right to possess, use and dispose of property) would not be compromised by extending the OTARD rules to leased property. Specifically, the Commission noted that when landlords execute leases, they voluntarily relinquish two of these rights (the rights to possess and use) and are free to retain the third right (the right to dispose of property).¹⁷

¹³ See *Implementation of Section 207 of the Telecommunications Act of 1996*, CS Docket No. 96-83, Report and Order, 11 FCC Rcd 19276, 19282, 19289, ¶¶ 7, 23-27 (1996).

¹⁴ See 47 C.F.R. § 1.4000(b)(1)(2) (safety and historic preservation exemptions); § 1.4000(d) (local government waiver).

¹⁵ Massport's *Ex Parte* at pp. 20-27.

¹⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

¹⁷ *Implementation of Section 207 of the Telecommunications Act of 1996*, CS Docket No. 96-83, FCC 98-273, Second Report and Order, 13 FCC Rcd 23874, ¶ 19. In fact, the Commission minimized Taking Clause concerns and found that prohibiting restrictions on the installation of an OTARD device is indistinguishable "in a constitutional sense from prohibiting restrictions on the installation of 'rabbit ears' – a section 207 reception device – on the top of a television set." *Id.* at 23883-85, ¶¶ 19-20.

Despite the Commission's clear findings with regard to the takings issue, Massport resurrects the issue by arguing that because every Wi-Fi antenna must have a wireline connection, typically through a T-1 line that may run through common areas, an expansion of the OTARD rules to these antennas would constitute a physical taking. To repeat Continental's position, Continental's Petition does not seek a ruling that the OTARD rules require Massport to provide Continental with access to a wireline connection, nor is there any evidence to the contrary. Continental's Petition is limited to Massport's restrictions on the installation, maintenance and use of a fixed wireless antenna located on property within its exclusive use or control.¹⁸ Thus, Massport argues a point that is not relevant to Continental's Petition. Massport also argues that the Commission would engage in a regulatory taking if it applied the OTARD rules to Continental's Wi-Fi antenna. Procedurally, this argument must fail because Massport has not brought suit for compensation, which is a prerequisite for raising a regulatory takings claim.

Furthermore, the OTARD rules do not impermissibly make contracts void. They do not require landlords to lease their property nor do they rescind existing contracts. In this case, the OTARD rules would make inoperable only certain restrictions in the lease that impair the installation and use of the antenna in the Presidents Club. Those types of restrictions have been determined by the Commission to be contrary to public policy.¹⁹

V. Continental's antenna is protected by the OTARD rules.

Massport repeats the arguments it made in its Comments and Reply Comments that Continental has not installed an OTARD-protected antenna.²⁰ Continental has addressed

¹⁸ However, Continental does not mean to suggest that if Massport were to unreasonably deny Continental the ability to connect its leased premises at Logan to the public networks, such action by Massport would be problem-free. To the contrary, Continental agrees with T-Mobile's statement on page 3 of T-Mobile's January 9, 2006 *Ex Parte* filing: "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 Wi-Fi traffic, that would be an unreasonable restriction in violation of the Communications Act."

¹⁹ As noted on page 2 of T-Mobile's January 9, 2006 *Ex Parte* filing: "Such regulations in furtherance of public policy are accepted in many contexts (*e.g.*, building codes, zoning codes, prohibitions on certain restrictive covenants), and they are acceptable in this context as well." (referencing *Implementation of Section 207 of the Telecommunications Act of 1996*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276, 19303, ¶ 44 (1996)).

²⁰ See Massport Comments at pp. 55-63; Massport Reply Comments at pp. 8-9.

these arguments in its own Comments and Reply Comments and it will not repeat itself here.²¹ However, Continental reemphasizes that its antenna at Logan clearly falls within the protection of the OTARD rules.

Furthermore, Massport's arguments create an entirely new construct for the OTARD rules. For example, Massport argues that Continental has no right to install and use the antenna because the OTARD protections apply only to "customer-end" antennas. The record in this proceeding is clear that Continental's use of the antenna includes use by its employees, customers, and other visitors to its lounge and nothing in the OTARD rules suggests that such use of an antenna precludes the antenna from the protections afforded by the OTARD rules. To the contrary, the Commission has specifically stated that the protections of the OTARD rules apply to customer-end antennas that have "the additional functionality of routing service to additional users."²²

Another example of Massport's attempt to force a new construct, albeit inconsistent with the position above, is its position that Continental's antenna does not transmit or receive "commercial" signals and that in order for the antenna to comply with this requirement, Continental must charge its customers for Wi-Fi service.²³ However, Massport cites nothing in the OTARD rules to support this interpretation nor does it provide a legitimate reason for such a new construction. Massport also ignores the fact that Continental is providing Wi-Fi service in its Presidents Club in a commercial setting.

Similarly, Massport repeats its argument that the OTARD rules do not apply because Continental's antenna does not receive wireless signals that originate or terminate outside the premises. There is no such requirement in the OTARD rules.

Finally, under Massport's new construct, a fixed wireless antenna is not protected under the rules if Internet access service is received over a T-1 line and the antenna is used to transmit the signal within the premises, but the same antenna is protected if the signal is delivered in the first instance via satellite or other wireless service. This is precisely the kind of "irrational result" that the Commission intended to avoid when it extended the OTARD rules to fixed wireless antennas.²⁴

²¹ See Continental Comments at p. 7; Continental Reply Comments at pp. 5-17.

²² *OTARD Order on Reconsideration*, 19 FCC Rcd 5637, ¶¶ 13-16.

²³ Massport *Ex Parte* at p. 30 ("Because Continental has boasted that it offers Wi-Fi service for 'free' ... it cannot now claim that its provides 'commercial' service").

²⁴ *Competitive Networks First Report and Order*, 15 FCC Rcd 22983, ¶ 98.

VI. Conclusion

The Commission should allow the unlicensed spectrum to continue to function at Logan as intended by the Commission and confirm Continental's right to operate its Wi-Fi antenna as requested at Logan Airport under the OTARD rules. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS with your office. Should you have any questions, please contact the undersigned.

Respectfully submitted,

/s/ Henry M. Rivera
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