



1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

February 3, 2006

Scott D. Delacourt
202.719.7459
sdelacourt@wrf.com

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte Notice in ET Docket No. 05-247; In the Matter of Petition for Declaratory Ruling of Continental Airlines, Inc.

Dear Ms. Dortch:

United Parcel Service, Inc. (UPS) submits the following *ex parte* to address issues raised in the above-captioned proceeding that are critical to its interests as the world's largest package delivery company and a leading global provider of specialized transportation and logistics services. UPS has participated actively in this proceeding through its trade associations – the Air Transport Association of America, Inc. (ATA) and the Enterprise Wireless Alliance (EWA) – and fully supports the comments submitted by those organizations.¹ The purpose of this separate submission is to urge the Commission to highlight the narrow scope of the proceeding and to clarify what is *not* at issue. Specifically, UPS urges the agency to strongly reiterate that while the line between a landlord and a tenant's authority over the placement of communications infrastructure – the subject of the Over-the-Air Reception Devices (OTARD) rule² – is in play, authority to regulate use of the radio spectrum is not. In the domain of spectrum regulation, the FCC's authority is plenary.

By highlighting the distinction between the scope of OTARD and the FCC's spectrum management authority, UPS does not suggest any ambiguity about the fact that the OTARD rule applies in this case. The provision of wireless services to unlicensed devices authorized under Part 15 of the Commission's rules involves the

¹ See *Comments of the Air Transport Association of America, Inc.* (filed Sept. 28, 2005); *Reply Comments of the Air Transport Association of America, Inc.* (filed Oct. 13, 2005); *Comments of the Enterprise Wireless Alliance* (filed Sept. 28, 2005); *Reply Comments of the Enterprise Wireless Alliance* (filed Oct. 13, 2005). UPS, along with other interested parties, participated in a November 30, 2005 *ex parte* meeting with staff of the FCC's Office of Engineering and Technology to discuss issues raised in this proceeding. See *Ex Parte* Letter from Edgar Class, Counsel for Continental Airlines, to Marlene Dortch, Secretary, Federal Communications Commission, ET Docket 05-247 (Nov. 30, 2005).

² 47 C.F.R. § 1.400.

Marlene Dortch
February 3, 2006
Page 2

provision of “fixed wireless signals” as that term is used in the OTARD rule.³ Antennas used to provide such service, whether the service in question is WiFi or any number of other unlicensed technologies,⁴ fall within the ambit of the rule. The lease provision the Massachusetts Port Authority (Massport) seeks to enforce against Continental Airlines, Inc. (Continental) violates the letter and spirit of the OTARD rule.⁵ Moreover, Massport has failed to demonstrate eligibility for any of the rule’s exceptions.⁶ Accordingly, Continental’s Petition for Declaratory Ruling should be granted.

However, UPS writes separately not to reiterate these points but to correct the conflation of infrastructure regulation and spectrum regulation reflected in some comments. Some commenters reason that, because the OTARD rule does not protect fixed antennas installed on property outside a tenant’s “exclusive use or

³ As used in the OTARD rule, “fixed wireless signal” means “any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location.” 47 C.F.R. § 1.400(a)(2).

⁴ For example of the range of unlicensed technologies protected by the OTARD rules, *see Comments of the Air Transport Association of America, Inc.* (filed Sept. 28, 2005) at 2, n.4 (“Examples of such technologies include, but are not limited to WiMax, Bluetooth, proprietary point-to-point wireless links, wireless microphones and headsets, radio frequency identification (RFID) systems, proprietary wireless backhaul solutions (such as Motorola’s Canopy), legacy 802.11 frequency hopping (FH) systems, cordless telephones, wireless smoke detectors, wireless cameras, wireless RS-232 links, and lone worker emergency notification systems.”)

⁵ The Continental antenna in question is: “on property within the exclusive use or control of the antenna user,” “[u]sed . . . to receive or transmit fixed wireless signals”, and is “one meter or less in diameter or diagonal measurement.” 47 C.F.R. § 1.4000(a)(1), (a)(1)(ii)(A), (a)(1)(ii)(B). In addition, contrary to the underlying purpose of the OTARD rule, Massport’s enforcement of the lease restriction in questions appears to be for the anticompetitive purpose of favoring Massport’s preferred airport-wide WiFi provider. *See Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 22031 ¶ 107 (2000) (extending OTARD to fixed wireless signals in part because state and local regulations that unreasonably restrict antennas to provide such service impede the federal objective of “promot[ing] . . . telecommunications competition and customer choice.”)

⁶ The central antenna exception is not available because the cost to Continental of using Massport’s central antenna would be greater than using Continental’s own antenna. *See Implementation of Section 207 of the Telecommunications Act of 1996*, 13 FCC Rcd 18962, 18999 ¶ 88 (1998) (the third element of the central antenna exception provides that “the costs associated with the use of the central antenna are not greater than the cost of installation, maintenance and use of an individual antenna.”) Similarly, the public safety exception is not available because Massport’s public safety concern was articulated only after the dispute arose and has not been articulated in the way the OTARD rule requires. *See* 47 C.F.R. § 1400(b)(1) (specifying that the public safety exception applies only to a “clearly defined, legitimate public safety objective” that is “described as applying to [the antenna placement] restriction in a document that is readily available to antenna users.”)

Marlene Dortch
February 3, 2006
Page 3

control,” *no wireless device* is entitled to protection outside exclusive use areas.⁷ Following this reasoning, these commenters conclude that electromagnetic signals outside of tenant-controlled areas impinge on a landlord's property rights and fall within the landlord's jurisdiction to limit, regulate, and control.⁸

The Commission should clearly repudiate these arguments as contrary to settled law. A landlord no more holds property rights in the radio spectrum – licensed or unlicensed – within the geographic boundaries of his property than to the mineral rights far below the earth or the air traffic routes in the sky above. The FCC has confirmed this state of affairs repeatedly and recently,⁹ including in its 2003 Anne Arundel County decision.¹⁰ In that case, Anne Arundel County sought to use the zoning process to address concerns about mobile phones in the 800 MHz band interfering with public safety radios. The County imposed regulations requiring carriers seeking to erect towers within the county to certify that their services would not interfere with public safety.¹¹ Despite the legitimate interference concerns, the FCC preempted the regulations for extending beyond Anne Arundel's legitimate authority over the placement of infrastructure and intruding upon the FCC's exclusive jurisdiction in matters of spectrum management.¹²

The sound policy reasons that underlie exclusive federal jurisdiction are implicated in this case. The balkanized approach to radio spectrum regulation advanced by some commenters would disrupt the flow of wireless communications – a result clearly contrary to the public interest. Such an approach would be unthinkable if applied to licensed services. For example, Massport presumably has not considered restricting the use of mobile phones in common areas, despite the fact that such

⁷ See, e.g., *Comments of the Airports Council International-North America* (filed Sept. 28, 2005) at 20. In practice, UPS has experienced a number of attempts by airport authorities to limit the use of devices such as those listed in footnote 4, *supra*. None of these devices require a fixed antenna in areas outside of UPS's exclusive use or control.

⁸ See *id.* See also *Comments of Des Moines International Airport* (filed Oct. 11, 2005) at 4-5 (suggesting that the possibility of interference justifies the exercise of spectrum management authority by an airport.)

⁹ *960 Radio*, 1985 WL 193883, *1-3 ¶¶ 4-6 (1985) (finding that Sections 2, 301, and 303(c)-(f) of the Communications Act, taken together, “comprehensively regulate interference, [and therefore] Congress undoubtedly intended federal regulation to completely occupy that field to the exclusion of local and state governments.”); *Petition of Cingular Wireless L.L.C.*, 18 FCC Rcd 13126, 13131-13138 ¶¶ 12-17 (WTB 2003) (*Anne Arundel Order*); *Mobilecomm of New York, Inc.*, 2 FCC Rcd 5519, 5520-5521 ¶¶ 8-11 (CCB 1987).

¹⁰ *Anne Arundel Order* at 13131-13135 ¶¶ 12-17.

¹¹ *Id.* at 13126-13127 ¶ 1.

¹² *Id.* at 13135-13138 ¶ 18-22.

Marlene Dortch
February 3, 2006
Page 4

devices communicate with antennas located in areas outside Massport's control. Indeed, the fact that mobile phones operate in public spaces, particularly transit hubs like airports, train stations and bus depots, is one of their chief benefits.

Any attempt on the part of a landlord to regulate spectrum allocated for use by unlicensed devices would be equally absurd, contrary to the public interest and preempted by FCC rules. Indeed, the Commission reaffirmed in its June 2004 Public Notice that its exclusive authority applies to unlicensed wireless devices.¹³ Thus, while Massport may restrict tenants' installation of antennas, consistent with OTARD, it may not impose compulsory lease terms restricting the flow of RF energy. Such restrictions, whether they purport to limit the flow of RF energy by geographic boundary, signal strength or transmit frequency, must be categorically rejected as outside the scope of landlord authority.

For the foregoing reasons, the Continental Petition for Declaratory Ruling should be granted. Moreover, because there appears to be considerable misunderstanding on this key point, the Commission should clarify that compulsory lease terms impinging on the operation of wireless devices not requiring a fixed antenna, whether in exclusive use or other areas; regulating the signal strength of RF

¹³ See *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, 11300 (OET 2004) (“[W]e reaffirm that, under the Communications Act, the FCC has exclusive authority to resolve matters involving radio frequency interference . . . when unlicensed devices are being used, regardless of venue.”)

Wiley Rein & Fielding LLP

Marlene Dortch
February 3, 2006
Page 5

emissions; or restricting tenant use of particular radio frequencies intrude on the FCC's exclusive jurisdiction in the area of spectrum management and are preempted.

Respectfully submitted,

United Parcel Service, Inc.
Nicholas Lewis
Corporate Public Affairs
United Parcel Service
316 Pennsylvania Ave, SE
Ste 300
Washington, DC 20003-1185

Timothy Totten
Global Network Systems
United Parcel Service
911 Grade Lane
Building 113
Louisville, KY 40213-2618

/s/ Scott Delacourt
Wiley Rein & Fielding LLP
Scott Delacourt
Michael Lewis, Consulting Engr.
1776 K Street, NW
Washington, DC 20036
(202) 719-7000

Counsel to United Parcel Service, Inc.