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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* in response to the April 20, 2006 *ex parte* submission of the Airports Council International – North America ("ACI-NA") in the above-captioned proceeding.[1] UPS has previously urged the Commission to draw a clear line between what is at issue in this proceeding (a landlord's ability to restrict the placement of communications infrastructure under the Over-the-Air Reception Devices (OTARD) rule[2]) and what is not (the FCC's plenary authority to regulate use of the radio spectrum).[3] However, ACI-NA continues to confuse the distinction in an effort to support Massport's request for waiver of the OTARD rule and to make the case that airports should be permitted to encroach upon the FCC's exclusive authority to regulate the use of unlicensed spectrum.

The confusion arises in ACI-NA's description of the rights under negotiation in airport concession contracts. ACI-NA argues that "exclusive use" provisions in retail concession contracts are not as important in the airport context because "using a space granted for the sole purpose of operating a specific airport concession for the additional purpose of *transmission of communications signals* . . . is not only typically expressly forbidden by a concession contract, but not within the scope of the rights a concessionaire would normally expect to have."[4] In fact, ACI-NA has

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[1] *See* Letter from Matthew C. Ames, Counsel for ACI-NA, to Lauren Van Wazer, FCC, ET Docket No. 05-247 (Apr. 20, 2006) ("ACI-NA *Ex Parte*")

[2] 47 C.F.R. § 1.4000.

[3] *See* Letter from Scott Delacourt, Counsel for UPS, to Marlene H. Dortch, Secretary, FCC, ET Docket No. 05-247 (Jan. 3, 2006) ("UPS Jan. 3 *Ex Parte*"). In addition, UPS has participated actively in this proceeding through its trade associations, *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).

[4] ACI-NA *Ex Parte* at 2 (emphasis added).

it reversed. Because spectrum management is the exclusive province of the FCC, an airport authority has no power to grant, deny or burden the right of a concessionaire to transmit signals on unlicensed spectrum. This principle is as clear with respect to unlicensed as it is to licensed services. For example, ACI-NA surely would not challenge a concessionaire's right to use an unlicensed Bluetooth headset anymore than the concessionaire's right to make a cell phone call. Regulation of any other use of unlicensed spectrum is equally outside the province of the airport authority.

ACI-NA's erroneous statement that the *transmission* of signals is "typically forbidden" appears to be intended to augment its argument that "for purposes of applying the Over-the-Air-Reception Devices ("OTARD") rule … we cannot say as a general matter that concessionaires have the exclusive right to use their space."[5] If so, ACI-NA is comparing apples and oranges. The OTARD rule, which applies to the installation of antennas, is at issue in this proceeding. The transmission of signals on unlicensed spectrum is not.

This conflation of infrastructure and spectrum regulation is reflected in ACI-NA's bottom line about the use of unlicensed spectrum in the airport environment. ACI-NA concludes that: "The installation and *operation* of communications equipment by airport tenants . . . often poses no threat [to safe and efficient operations.] When difficulties arise, however, airport management must have the final say."[6] Airports may well restrict the *installation* of antennas, consistent with the limitations of the OTARD rule. But they may not restrict unlicensed wireless *operations*. Regulation of such activity is the sole province of the FCC.[7]

ACI-NA seems to recognize that in requesting the right to restrict unlicensed use on airport grounds, it is requesting a change in FCC policy. ACI-NA asks the FCC to grant relief under the central antenna exception "in the absence of a finer tuned alternative"[8] – a euphemistic admission that the exception does not apply. Alternatively, ACI-NA seeks an exception to the OTARD rule for airports. Neither form of relief is merited in this case. As discussed elsewhere by UPS and other parties,[9] the Commission cannot grant a waiver because Massport has not

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5 *Id.*
6 *Id.* at 3.
7 *See* UPS Jan. 3 *Ex Parte* at 3.
8 ACI-NA *Ex Parte* at 3.
9 *See, e.g.* UPS Jan. 3 *Ex Parte* at 1-2 and accompanying footnotes 5 and 6.

satisfied the waiver standard. Furthermore, absent a proper justification for waiver under the OTARD rule, the FCC should not create an "airport exception" to the OTARD rule. Airports have no more grounds for an OTARD exception than other multi-tenant environments – apartment buildings, malls, and office parks. Accordingly, the Commission should deny such waiver requests and grant Continental's Petition for Declaratory Ruling.

Finally, UPS urges the Commission to reiterate its longstanding policy that landlords – at airports and elsewhere – are not *de facto* spectrum managers. To the extent that ACI-NA is concerned that "commercial entities are introducing new and varied uses of unlicensed spectrum that will inevitably raise conflicts with other airport uses,"[10] that is clearly a matter for the FCC to evaluate, not individual airports.[11] The Commission should reiterate that the FCC has exclusive jurisdiction to manage the radio spectrum, and that such authority is not delegated to landlords. Of course, unlicensed users may coordinate their operations – on a voluntary basis – to reduce interference. The WLAN Working group cited in ACI-NA's *ex parte* is dedicated to developing consensus-based best practices for just such coordination.[12]

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[10] ACI-NA *Ex Parte* at 2.

[11] There is no evidence that existing rules are not adequate to address deployment of new technologies in the airport environment. Indeed, new unlicensed offerings – such as the Boeing and Airbus programs ACI-NA mentions, *see* ACI-NA *Ex Parte* at 2 – are in planning or deployment. These programs have been developed assuming a stable regulatory environment. The Commission should reject calls to change current law in a way that will upset investment-backed expectations.

[12] ACI-NA *Ex Parte* at 1 and Exhibit A. UPS is a member and active participant in the WLAN Working Group, and supports such voluntary, consensus-building efforts.

But no unlicensed user can unilaterally dictate the outcome of those negotiations, including an airport authority.

Respectfully submitted,

/s/ Scott Delacourt

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