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September 28, 2006

VIA ELECTRONIC SUBMISSION

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Presentation; ET Docket No. 05-247

Dear Ms. Dortch:

This is to provide additional information in this proceeding in connection with meetings which The Massachusetts Port Authority (Massport) and the Airports Council International – North America had with the offices of Commissioners McDowell, Adelstein, Copps, and Tate. This presentation highlights particular issues in connection with Continental's Petition for Declaratory Ruling regarding whether certain restrictions on antenna installations at Logan Airport are permissible under the Commission's Over-the-Air Reception Devices (OTARD) rule.

The fact that airport premises are unique and not analogous to other multi-tenant environments, such as shopping malls, apartment buildings, or office buildings, is a compelling basis for an exception to the OTARD rule. Although Massport and others have reiterated these points in their filings in this proceeding, Massport believes it is helpful to summarize the basis for distinguishing airport premises from other multi-tenant environments as follows:

- Airports are part of a nationwide transportation system operated by governmental entities.
- Several federal and state agencies operate at the airport (*i.e.*, TSA, Customs, Immigration, FAA, and State Police).
- Airport operation must comply with strict federal safety and security regulations related to airport operations (*e.g.*, passenger and hold baggage screening, baggage reconciliation, adequate local law enforcement presence, security badging, perimeter security, and access control through sterile areas).
- Consequences of miscommunication and error in airport operations are far reaching and can be catastrophic.

- Airport operators must accommodate the communication needs of all airport users (*e.g.*, airlines, concessionaires, FAA, TSA, State Police, Customs, Immigration, and the traveling public). The operations of all of these different groups must be coordinated to ensure that the airport as a whole functions efficiently and safely.
- The relationship between the landlord and tenant in an airport situation is not typical; the landlord, in this case Massport, retains the dominant use of the premises and all tenant rights under leases and concession contracts are subordinate to the landlord's activities on the premises, in particular, and as an airport operator, in general. The landlord also retains the right to relocate tenants or to have them share leased space. Thus, the concept of "exclusive use" cannot be applied in the same way it may be applied to an apartment building or a shopping mall.
- The physical proximity and configuration of the activities of the landlord and other tenants' premises is not typical. Many of the tenant spaces, such as ticket counters, passenger hold areas, and certain concession spaces, are not even enclosed by walls. Many airport users engage in activities which, by their nature, are mobile and/or not confined to particular tenant's premises (*e.g.*, State Police, TSA, airlines).
- In other contexts, the U.S. Supreme Court, other federal courts, and the FCC have previously recognized that airports are unique environments. For example, the federal courts have held that airports are not public forums and may restrict the constitutional rights of their visitors in certain circumstances. *E.g.*, *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 681-83, 685 (1992); *ISKCON Miami, Inc. v. Metropolitan Dade County*, 147 F.3d 1282, 1287-88 (11th Cir.1998); *Jacobsen v. City of Rapid City*, 128 F.3d 660, 662, 664-65 (8th Cir. 1997). Likewise, less stringent Fourth Amendment search and seizure standards are applied to airports because of their unique operational requirements. *E.g.*, *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973). In fact, the FCC itself has labeled airports as "special offices or facilities," equating them to major military installations, key government facilities, and nuclear power plants for outage reporting purposes. 47 C.F.R. § 4.5(b) (2005).

The FCC should explicitly state that the OTARD rule is not a mandatory access provision for wireless carriers, regardless of its ruling on Continental's Petition. Based on the intense interest shown in this proceeding by T-Mobile and CTIA, they obviously view a decision in favor of Continental as an opportunity to greatly expand the ability of wireless carriers to use the OTARD rule to site antennas on airport property over the objection of the airport authorities. If the FCC fails to clarify the limited nature of the OTARD rule, the door would be open for carriers, such as T-Mobile, to ask airport tenants to allow the siting of their antennas at the airport under the pretext that the airline tenant's employees might use the service. This expansive interpretation of the OTARD rule would obliterate the qualifying factor that the customer install the antenna in the leased space for its own use and not primarily to serve members of the public who are non-tenants and have no OTARD rights. Thus, the Commission should ensure that the language in

any decision regarding Continental's situation does not engender this type of abuse under the narrowly crafted OTARD rule.

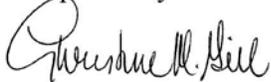
The FCC should clarify that any decision in this proceeding applies only to the lease agreement between Massport and Continental. Assuming, *arguendo*, that the OTARD rule applies to Wi-Fi antennas, section 1.4000(e) of the FCC's rules permits parties to "petition the Commission for a declaratory ruling . . . to determine whether a *particular* restriction is permissible or prohibited." 47 C.F.R. § 1.4000(e) (emphasis added). As indicated by the plain language of the OTARD rule, the FCC must engage in a fact-specific inquiry into the nature of the antenna, including whether the antenna meets the size requirement, transmits commercial non-broadcast communications signals via wireless technology, is installed on exclusive-use property, and is used primarily by the tenant itself. The FCC also must investigate whether the restriction satisfies an exception to the OTARD rule, such as the central antenna exception.

Continental is the only tenant at Logan Airport that has filed a petition complaining about the agreed-upon restrictions in its lease. On July 29, 2005, the Office of Engineering and Technology issued a public notice requesting comment specifically on Continental's Petition. This case-by-case review is appropriate because (1) Massport negotiates individualized lease agreements with each of its tenants in its proprietary capacity, and (2) the specific characteristics of the tenant's antenna and service are crucial to the OTARD analysis. While Continental has provided some information about its lease and antenna in its pleadings (and even then has failed to disclose evidence responsive to Massport's central antenna defense), no other tenant has as much as filed a petition. Thus, the record lacks sufficient detail for the FCC to rule on the permissibility of any other tenant's lease at Logan Airport.

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These aspects of airport operations and leases strongly suggest that airport premises should not be treated as identical to typical business or residential property. We trust that this information has been helpful to the Commission as it considers this crucial matter.

Respectfully submitted,



Christine M. Gill

Marlene H. Dortch
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cc: Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
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