Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Continental Airlines	)	
	)	ET Docket No. 05-247
Petition for Declaratory Ruling	)	
Regarding the Over-the-Air	)	
Reception Devices (OTARD)	)	
Rules	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 2006 **Released:** November 1, 2006

By the Commission: Commissioners Copps and Adelstein issuing separate statements.

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a Petition for Declaratory Ruling filed by Continental Airlines, Inc. (Continental) pertaining to its installation and use of a Wi-Fi antenna within its lounge at Boston-Logan International Airport (Logan Airport).[1] Continental claims that the Massachusetts Port Authority (Massport), the owner of Logan Airport, has demanded that Continental remove its Wi-Fi antenna, and that such restrictions are prohibited by the Commission's Over-the-Air Reception Devices (OTARD) rules.[2] For the reasons stated below, we find that Massport's restrictions on Continental's use of its Wi-Fi antenna are pre-empted by the OTARD rules and we therefore grant Continental's petition.

II. BACKGROUND

2. The Commission's OTARD rules prohibit restrictions on property that impair the use of certain antennas. For the OTARD rules to apply, the antenna must be installed "on property within the exclusive use or control of an antenna user where the user has a direct or indirect ownership or leasehold interest in the property" upon which the antenna is located.[3] Restrictions prohibited by the OTARD rules include lease provisions (as is the situation here), as well as restrictions imposed by state or local laws or regulations, private covenants, contract provisions, or homeowner's association rules.[4] Restrictions are prohibited by the OTARD rules if they unreasonably delay or prevent the installation, maintenance, or use of the antenna; unreasonably increase the cost of installation, maintenance or use of

[1] *Petition of Continental Airlines for a Declaratory Ruling*, ET Docket No. 05-247, filed July 8, 2005; Supplement to Petition of Continental Airlines, Inc. for a Declaratory Ruling, ET Docket No. 05-247, filed July 27, 2005.

[2] 47 C.F.R. § 1.4000.

[3] 47 C.F.R. § 1.4000(a)(1).

[4] *Id.*

the antenna; or preclude the reception of an acceptable quality signal via the antenna.[5] No distinctions are made in the OTARD rules based upon the setting (*e.g.*, residential vs. commercial). There are exceptions in the OTARD rules for restrictions necessary to address valid and clearly articulated safety or historic preservation objectives, provided such restrictions are narrowly tailored, impose as little burden as possible, and apply in a nondiscriminatory manner.[6]

3. The Commission adopted the OTARD rules in 1996 in response to Section 207 of the 1996 Telecommunications Act (1996 Act), which required the Commission to promulgate rules that "prohibit restrictions that impair a viewer's ability to receive video programming services" via antennas.[7] This provision was part of the 1996 Act, which had as its overarching goals promoting competition in telecommunications, increasing consumer choice, and encouraging the rapid deployment of new technologies. In 1998, the Commission modified the OTARD rules to extend their applicability to rental property.[8] In 2001, the Court of Appeals for the D.C. Circuit upheld the Commission's statutory authority and discretion to extend OTARD protections to rental environments and to preempt any contractual provisions to the contrary.[9]

4. The OTARD rules, as originally adopted, applied only to antennas used to receive video signals. However, the OTARD rules were modified in 2000 by the Commission's *Competitive Networks* proceeding to apply to customer-end antennas serving customers on the premises that transmit and/or receive fixed wireless signals.[10] Fixed wireless signals are defined to be "any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location."[11] Under the current rules, only a relatively few types of signals (such as amateur, AM and FM broadcast, and Citizens Band radio) are enumerated as being excluded from protection.[12]

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[5] 47 C.F.R. § 1.4000(a)(3).

[6] 47 C.F.R. § 1.4000(b).

[7] Telecommunications Act of 1996, Pub.L. No. 104-104, § 207, 110 Stat. 56 (1996); 47 C.F.R. § 1.4000; Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996; and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, CS Docket No. 96-83, 11 FCC Rcd 19276 (1996).

[8] Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, *Second Report and Order*, CS Docket No. 96-83, 13 FCC Rcd 23874, 23880-91 ¶¶ 12-32 (1998).

[9] *Blg. Owners & Managers Ass'n Int'l v. FCC,* 254 F.3d 89, 93-96 (D.C. Cir. 2001).

[10] *See* 47 C.F.R. § 1.4000 (a)(1)(ii)(A); Promotion of Competitive Networks in Local Telecommunications Markets, *First Report and Order and Further Notice of Proposed Rulemaking*, *Fifth Report and Order and Memorandum Opinion and Order, Fourth Report and Order and Memorandum Opinion and Order*, WT Docket No. 99-217, 15 FCC Rcd 22983, 23027-28 ¶¶ 97-100 (2000) (*Competitive Networks Report and Order)*. Because Section 207 of the 1996 Act is written in the context of video programming services, the Commission concluded that a number of other substantive statutory provisions — specifically Sections 1, 201(b), 202(a), 205(a), and 303(r) of the Communications Act, as well as the Preamble to and Section 706 of the 1996 Act — embodied goals that would be furthered by application of the OTARD rules to antennas that transmit and/or receive fixed wireless signals. *Id*., 15 FCC Rcd at 23028-35 ¶¶ 101-116.

[11] 47 C.F.R. § 1.4000 (a)(2).

[12] *Id*.; *see also Competitive Networks Report and Order,* 15 FCC Rcd at 23027 ¶ 97 n.251 (noting that amateur radio antenna placement is addressed by other rules, but not otherwise discussing the exclusion of these specific types of signals).

5. When it extended the OTARD rules to apply to fixed wireless signals, the Commission concluded that distinguishing the protection afforded to the use of antennas based solely on the nature of services provided through an antenna produces "irrational" results.[13] For example, the Commission cited a scenario in which a consumer who desires to receive only Internet service via an antenna would be forced to receive both Internet service and video programming to be protected by the prior OTARD rules, which would distort the competitive market. Thus, the Commission concluded that OTARD should not distinguish among services based on their nature (*e.g.*, voice, video, data) or among antennas based on their function (*i.e.*, transmit or receive, or both).[14] Furthermore, the Commission found that applying a blanket rule against most restrictions on the placement of such antennas at a customer's site is consistent with the broad pro-competitive goals of the 1996 Act and the specific pro-competitive goals of the limitations on state and local regulation set forth in Section 332(c)(7) of the Communications Act.[15] In particular, the Commission reasoned that, although it was preempting most state and local regulation on customer-end antennas, state and local regulation regarding the placement, construction and modification of "hub" antennas, which are used to transmit and/or receive signals from multiple customer locations and are not commonly located inside a customer premises, would continue to be governed under Section 332(c)(7).[16]

6. In a 2004 *Order on Reconsideration*, the Commission specified that the OTARD rules apply to 'customer-end' antennas that also relay or route signals to other customers, so long as they are used by the owner (*e.g.,* the 'tenant') primarily to provide service at the same location.[17] The Commission observed in the *Competitive Networks Order on Reconsideration* that the equipment deployed in these networks share the same physical characteristics as other customer-end equipment, and that the only difference was the additional functionality of routing service to additional users. The Commission concluded that the OTARD protections also extend to such technologies when they otherwise meet the requirements of the rules. The Commission explained that the OTARD rules should not disadvantage more efficient technologies where each customer device also serves as a relay device, such as in point-to-point-to-point or mesh topologies.[18]

III. DISCUSSION

7. The OTARD rules provide that parties who are affected by antenna restrictions may petition the Commission to determine if the restrictions are permissible or prohibited by the rule and sets forth specific filing procedures.[19] Such a determination is highly dependant on the facts alleged by the parties involved. Consequently, we begin this discussion with a brief overview of the dispute

[13] *Competitive Networks Report and Order,* 15 FCC Rcd at 23027 ¶ 98.

[14] *Id.,* 15 FCC Rcd at 23027-28 ¶ 98-99.

[15] *Id.,* 15 FCC Rcd at 23034 ¶ 114. Section 332(c)(7) allows state and local governments to exercise zoning authority, with certain limitations, over the placement of personal wireless service facilities. 47 U.S.C. § 332(c)(7).

[16] *Competitive Networks Report and Order,* 15 FCC Rcd at 23032-33 ¶¶ 109-110.

[17] Promotion of Competitive Networks in Local Telecommunications Markets, *Order on Reconsideration*, WT Docket No. 99-217, 19 FCC Rcd 5637, 5643-44 ¶¶ 13-18 (2004) (*Competitive Networks Reconsideration Order*).

[18] *Id*., 19 FCC Rcd at 5643 ¶¶ 13, 16. In these technologies a customer antenna not only receives or sends signals destined for or created by the customer but also routes signals to and from other customer antennas.

[19] 47 C.F.R. § 1.4000(e). Copies of the petition and all responsive pleadings must be served on all interested parties. 47 C.F.R. § 1.4000(e),(f). Responsive pleadings must be filed and served on the interested parties within 30 days after the Commission releases a public notice that the petition has been filed. 47 C.F.R. § 1.4000(e). Replies must be filed and served on all interested parties within 15 days thereafter. *Id*. All allegations of fact contained in petitions and related pleadings must be supported by an affidavit of a person with actual knowledge of the alleged facts. 47 C.F.R. § 1.4000(h).

between Continental and Massport. We then apply the requirements of the OTARD rules to the alleged facts to determine if Massport's restrictions are prohibited by OTARD while keeping in mind that the burden of demonstrating that a challenged restriction complies with the rule is on the party seeking to impose the restriction.[20] Next, we address whether, as Massport claims, a safety exception under the OTARD rules applies therefore precluding Continental's Wi-Fi installation. Applicability of the safety exception would allow Massport to impose restrictions on Continental's use of its Wi-Fi antenna even though all the requirements of OTARD are otherwise satisfied. We also briefly discuss whether Massport has shown why it should otherwise be granted an exemption from OTARD. Finally, we address legal arguments Massport has made regarding the Commission's statutory authority to extend OTARD to fixed wireless signals and possible takings issues.

8. We note that this is the first time the Commission has addressed a petition that involves the application of the OTARD rules to unlicensed devices that operate under Part 15 of our rules. The Part 15 unlicensed devices include a great variety of radio frequency technologies, such as Continental's Wi-Fi device. The OTARD rules make no distinction between radio devices using licensed technologies and those using unlicensed technologies. The Commission's OTARD rules cover antennas used to send or receive "fixed wireless signals." Such fixed wireless signals may be sent and received by devices using either licensed or unlicensed technologies, and the same antenna may be used for both licensed and unlicensed transmissions. Just as the Commission noted in the *Competitive Networks* proceeding that it makes no sense to distinguish between identical antennas based on the services provided via the antenna, there is no justification for distinguishing between antennas based on whether they are used with licensed services or unlicensed devices.[21] Hence we conclude that OTARD applies to the antennas of unlicensed devices operating under Part 15 of our rules to the same extent as to the antennas of licensed services.

A. Overview of Dispute

9. In July 2004, Continental installed a wireless Wi-Fi system in its "President's Club" frequent flyer lounge at Logan Airport.[22] The Wi-Fi system is comprised of a Cisco 1200 wireless access point of the type commonly used by consumers that is connected to the Internet over a T-1 line that was pre-existing before installation of the Wi-Fi system.[23] The system, which is located on a shelf in a closet within the lounge, is used to provide wireless Internet access to passengers and Continental's employees in the lounge. Passengers who have access to the frequent flyer lounge receive wireless Internet service via the Wi-Fi system for no additional charge. Passengers can obtain access to the lounge by a variety of means, including purchasing a club membership, showing a valid boarding pass and Platinum American Express Card, buying a book of passes, or by being a member of a partner airline's frequent flyer club.[24] Certain Continental employees also have access to the lounge and are

[20] 47 C.F.R. § 1.4000(g).

[21] *Competitive Networks Report and Order,* 15 FCC Rcd at 23027 ¶ 98. In 2004, the Commission explained that OTARD should not disadvantage more efficient technologies such as point-to-point-to-point and mesh topologies by prohibiting covered antennas from routing signals to other customers. *Competitive Networks Order on Reconsideration*, 19 FCC Rcd at 5643 ¶ 16. These point-to-point-to-point and mesh architectures are being actively developed and deployed to provide service on both a licensed and unlicensed basis. *See also* Commission Staff Clarifies FCC's Role Regarding Radio Interference Matters and Its Rules Governing Customer Antennas and Other Unlicensed Equipment, *Public Notice*, DA 04-1844, June 24, 2004.

[22] *Reply Comments of Continental Airlines, Inc*., ET Docket No. 05-247, filed October 13, 2005, Exhibit A ¶ 2.

[23] *Id*. at Exhibit B ¶ 2-3.

[24] *Id*. at Exhibit A ¶ 2.

able to use the Wi-Fi system to receive wireless Internet service.[25]

10. On June 10, 2005, Massport demanded that Continental remove the Wi-Fi system on the basis that it is prohibited by the terms of Continental's lease.[26] Continental replied to Massport that the provisions of the lease prohibiting the Wi-Fi system could not be enforced because of the Commission's over-the-air reception device (OTARD) rules, 47 C.F.R. § 1.4000.[27] Massport responded that the OTARD rules do not apply because of the availability of an airport-wide Wi-Fi backbone.[28] Massport also asserted that Continental's Wi-Fi system was a potential source of interference to other communications including public safety communications.[29] The airport Wi-Fi backbone was installed by Advanced Wireless Group (AWG) under contract with Massport.[30] AWG operates the airport Wi-Fi backbone as a commercial enterprise while providing revenue to Massport.[31] The airport Wi-Fi backbone provides service both to airport tenants for operational uses (*e.g.*, baggage services) as well as the general public using the airport facilities.[32] The general public can receive wireless Internet service over the Wi-Fi backbone in a number of ways.[33] First, wireless Internet access is available for a fee of $7.95 a day. Second, people with service from an Internet service provider with a roaming agreement with AWG can receive wireless Internet service at no additional cost. Third, an agreement can be negotiated directly between AWG and the tenant.

11. Continental filed a petition under the Commission's OTARD rules on July 7, 2005, and the petition was placed on public notice on July 29, 2005.[34] The Commission received more than 2300 comments. The Air Transport Association of America, American Airlines, Alliance for Public Technology, Cellular Telecommunications and Internet Association, Media Access Project, a group of six state public utility commissioners, Consumer Electronics Association, Enterprise Wireless Alliance, and T-Mobile, among others, filed in support of Continental's petition.[35] Numerous brief comments (including more than 2000 single-paragraph responses) from individuals, many of whom identify themselves as frequent passengers of Continental, also express strong support for Continental's petition. The Airports Council International as well as a number of individual airport authorities filed comments

[25] *Id*.; *Supplement to Petition of Continental Airlines, Inc. for a Declaratory Ruling*, ET Docket No. 05-247, filed July 27, 2005, 2-3.

[26] *Petition of Continental Airlines, Inc. for a Declaratory Ruling*, ET Docket No. 05-247, filed July 8, 2005, Exhibit A (letter from Massport to Continental of June 10, 2005).

[27] *Id*. at Exhibit B (letter from Continental to Massport of June 23, 2005).

[28] *Id*. at Exhibit C (letter from Massport to Continental of July 5, 2005).

[29] *Id*.

[30] *Comments of the Massachusetts Port Authority*, ET Docket 05-247, filed September 28, 2005, 11.

[31] *Id*. at 12-13, 19 n.44; *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 22.

[32] AWG has installed approximately 245 wireless access points throughout the airport. *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 12.

[33] *Id*. at 18-20.

[34] *Petition of Continental Airlines for a Declaratory Ruling*, ET Docket No. 05-247, filed July 8, 2005; *Public Notice*, ET Docket No. 05-247, DA 05-2213, July 29, 2005.

[35] Comments and *ex parte* presentations supporting Continental were also filed by the Wireless Infrastructure Association, United Parcel Service, and Partners Healthcare.

in support of Massport's position.[36]

B. Application of the OTARD Rules

12. Three conditions must be satisfied in order for Continental's Wi-Fi antenna to be covered by the OTARD rules. First, the antenna must be one meter or less in diameter or diagonal measurement.[37] Second, the antenna must be located on property within the exclusive use and control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property.[38] Lastly, the antenna must be used to receive or transmit fixed wireless signals.[39] Massport concedes that Continental's Wi-Fi antenna satisfies the first condition, *i.e.*, the antenna is less than one meter in diagonal measurement. As described in more detail below, we find that the second and third conditions are also satisfied by Continental's Wi-Fi antenna. We also find that the restrictions in the lease for the President's Club frequent flyer lounge unreasonably impair the use of Continental's OTARD-covered antenna, and that Massport has not demonstrated that any exemption from the OTARD rules applies here. Therefore, we conclude that the restrictions in the lease are preempted by the OTARD rules.

1. Exclusive Use and Control

13. As noted above, Continental's Wi-Fi antenna is located in a closet within its President's Club frequent flyer lounge at Logan Airport. There is no dispute that Continental has a direct leasehold interest in the President's Club lounge.[40] In addition to having a leasehold interest, the OTARD rules require that the antenna user have exclusive use and control of the location where the antenna is placed.[41] The President's Club is a private lounge in which travelers may make use of amenities provided by Continental.[42] Access to the lounge is restricted to parties who meet specific admission criteria as well as to Continental employees. There is no indication in the record that the lounge is not exclusively used and controlled by Continental. Accordingly, to the extent that Continental is using the antenna, the requirement that the antenna be located on property under the exclusive use and control of the antenna user where the antenna user has a direct or indirect leasehold in the property is satisfied.

14. Massport has noted that the terms of the lease for the President's Club lounge allow Massport access to the club for maintenance, security, construction work, or to place utilities in, over, or through the premises.[43] This does not affect our conclusion with respect to the exclusive use and control element. The Commission has previously ruled that the rights of third parties to enter and/or exercise control over a property owner's exclusive-use area for such reasons as inspection or maintenance do not defeat the owner's rights under the OTARD rules.[44] For example, in *Wojcikewicz*

[36] *See, e.g.*, Comments of the Metropolitan Washington Airports Authority, Manchester Airport, Phoenix Sky Harbor International Airport, Des Moines Airport, Louisville Regional Airport Authority, and Norfolk Airport Authority.

[37] 47 C.F.R. § 1.4000(a)(ii)(B). *Reply Comments of Continental Airlines, Inc.*, ET Docket No. 05-247, filed October 13, 2005, Exhibit B ¶ 4.

[38] 47 C.F.R. § 1.4000(a)(1).

[39] 47 C.F.R. § 1.4000(a)(ii)(A).

[40] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 8-10.

[41] 47 C.F.R. § 1.4000(a)(1).

[42] *Reply Comments of Continental Airlines, Inc*., ET Docket No. 05-247, filed October 13, 2005, 7-8.

[43] *Ex parte Notice of the Massachusetts Port Authority*, ET Docket No. 05-247, filed June 1, 2006, 2.

[44] *In re* Lourie, *Memorandum Opinion and Order*, CSR 5185-0, 13 FCC Rcd 16760, 16763-64 ¶¶ 10-11 (1998) (finding that townhome owner's satellite dish installed on a chimney was covered by the OTARD rule despite fact (continued....)

the owner of a townhome was found to have a right under the OTARD rules to install a rooftop antenna despite the fact that a homeowners association has responsibility for maintaining the roof.[45] While prior Commission rulings on this issue are directed at property owners, the same result holds for leased property. The mere fact that a landlord has the right to enter leased property for maintenance or security purposes does not change our conclusion that Continental has exclusive use and control of the lounge.

15. Massport also asserts that Continental is not the antenna "user" for purposes of the OTARD rule. It argues that Continental's passengers (*i.e.*, the President's Club members and other qualified users) are the primary, if not exclusive, "users" of the Wi-Fi antenna, and because those users do not have a leasehold interest in the lounge, the leasehold requirement has not been met.[46] We disagree. The rules require that the party who installs an antenna and asserts rights under OTARD must have a leasehold interest in and exclusive use and control of the premises where the antenna is installed. It is Continental – not the passengers – that is asserting rights under the OTARD rules, and it is Continental that is "using" the antenna to send and receive signals from its customers and employees within the President's Club lounge and has exclusive use and control of the leased premises. That Continental's invitees also use the antenna does not alter the analysis. Continental is thus the antenna user for purposes of the OTARD rules and may assert that OTARD applies to its Wi-Fi antenna.

2. Used to Receive or Transmit "Fixed Wireless Signals"

16. To be covered by OTARD, Continental's Wi-Fi antenna must transmit or receive fixed wireless signals, *i.e.*, "commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location."[47] To meet this definition the communications signals sent or received by the Wi-Fi antenna must be 1) commercial, 2) non-broadcast, and 3) transmitted via wireless technology to and/or from a fixed customer location. Of these requirements, there is no dispute that the signals are non-broadcast. As discussed below, we find that the other two requirements – that commercial signals be transmitted to and/or from a fixed customer location – are also satisfied.

17. Massport argues that because Continental's passengers receive wireless Internet service in the lounge as a complimentary amenity, Continental "cannot now claim that it provides 'commercial' service."[48] The rule does not, however, require that the antenna user provide a commercial "service." Rather, it requires that the antenna transmit or receive a commercial "signal." Whether or not Continental's passengers pay for receiving wireless Internet service has no bearing on whether the

(...continued from previous page)
that homeowners association had responsibility for repair, replacement and maintenance of chimney surface). *In re* Frankfort, *Memorandum Opinion and Order*, CSR 5024-0, 12 FCC Rcd 17631, 17636 ¶ 16 (1997) (finding that townhome owner's antenna installed on a balcony was covered by the OTARD rule despite fact the townhouse association had an easement to enter the balcony for maintenance). *See also* Woodbridge Condo. Owners Ass'n v. Jennings, No. 2003-L-122, slip op. at 4-5 (Ohio Ct. App. 11 Dist. 2003) (finding that the OTARD rules apply to antenna on patio of condominium despite fact that association had right to enter patio to enforce association rules). *See* Implementation of Section 207 of the Telecommunications Act of 1996, *Order on Reconsideration*, CS Docket No. 96-83, 13 FCC Rcd 18962, 18995-96 ¶¶ 79-81 (1998) (discussing reconsideration of the 1996 *Report and Order*).

[45] *In re* Wojcikewicz, *Memorandum Opinion and Order*, CSR-6030-0, 18 FCC Rcd 19523, 19525-26 ¶¶ 5-8 (2003).

[46] *Ex parte Notice of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 34-35.

[47] 47 C.F.R. § 1.4000(a)(2).

[48] *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 30-32; *see also Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 59-61.

transmitted signals are commercial under the OTARD rules. Continental uses its Wi-Fi antenna to access a commercial Internet service that it receives over a wireline connection and uses the antenna to transmit those same commercial signals within the President's Club lounge. We therefore conclude that the Wi-Fi antenna is transmitting a commercial signal.[49]

18. Massport argues that the OTARD rules apply only to fixed antennas used for signals originating or terminating outside of the leased premises.[50] Massport's arguments are unconvincing. The OTARD rules do not require that antennas covered by OTARD transmit or receive signals from outside the user's premises. Instead the rules require that signals be transmitted to and/or from a "fixed customer location." According to the plain language of the rules, the signals can be both received *and* transmitted from within the customer location and still be "fixed wireless signals."

19. Massport, however, contends that the rules cannot be read to protect fixed antennas that function in this manner because the Commission's decision to extend OTARD rules to antennas used to transmit or receive fixed wireless signals was based on "the need for a customer to receive services from outside of its exclusive-use premises."[51] Massport misunderstands the bases for the Commission's decision to extend the OTARD rules to such antennas, which was not limited to this one scenario. In the *Competitive Networks Report and Order*, the Commission stated that the rules were necessary to realize several statutory goals, including: (1) the promotion of competition and reduction of regulation to secure lower prices and higher quality services and encourage the rapid deployment of new technologies,[52] (2) the encouragement of the deployment of advanced services,[53] and (3) the furtherance of consumer protection measures.[54] A lease provision prohibiting installation of an antenna that transmits and receives signals solely within a customer's leased premises would impede the full achievement of these important federal objectives, and thus falls within the scope of the Commission's decision. For example, the antenna deployed by Continental provides it with a wireless alternative to Massport's Wi-Fi network,[55] enhances the quality of the Internet service received by Continental (by providing wireless distribution within the leased premises), and promotes the availability of advanced services. If Continental was unable to deploy the antenna, it would be forced to use Massport's Wi-Fi network to access Internet signals using Wi-Fi equipment rather than its own antenna in conjunction with its existing wireline Internet access. This result would disadvantage Continental's wireline

[49] Moreover, the Internet is used to conduct a variety of commercial activities, including on-line shopping, auctions, banking, and travel planning. *See generally* the Pew Internet & American Life Project, www.pewinternet.com.

[50] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 61-63; *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 32-34. To the extent that Massport suggests that section 207 of the 1996 Act implicitly limits the applicability of the OTARD rules to fixed antennas in this manner, we observe that even if section 207 contains such limits in the video programming context, the Commission drew on a broader statutory authority when it extended the OTARD rules to fixed wireless signals. *See* Section (C)(1), *infra*. Thus, the scope of section 207 is not dispositive in determining what transmissions qualify as "fixed wireless signals." *Competitive Networks Report and Order*, 15 FCC Rcd at 23028-35 ¶¶ 101-116.

[51] *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 33.

[52] *Competitive Networks Report and Order*, 15 FCC Rcd at 23028-29 ¶¶ 101-102 (*citing* Telecommunications Act of 1996, Pub. L. No. 104-04, purpose statement, 110 Stat. 56, 56 (1996); 47 U.S.C. § 151).

[53] *Competitive Networks Report and Order*, 15 FCC Rcd at 23030 ¶ 103 (*citing* 47 U.S.C. § 157 note).

[54] *Competitive Networks Report and Order*, 15 FCC Rcd at 23030 ¶ 104 (*citing* 47 U.S.C. §§ 201(b), 202(a), and 205(a)).

[55] This potential competitive concern is one of the bases of Massport's complaints – that application of the OTARD rules in this case would "increase Massport's operating costs and decrease its revenues." *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 22.

Internet access provider, potentially raise the price Continental must pay for Wi-Fi access,[56] reduce the utility of Continental's wireline Internet access, and, *ipso facto*, hinder the deployment of advanced services.

20. Massport also argues that Continental's Wi-Fi antenna is not covered by the OTARD rules because it is a "hub" antenna used to distribute service to others.[57] When the OTARD rules were extended to antennas used to transmit and receive fixed wireless signals, the Commission determined that the protection of the OTARD rules applies only to antennas at a customer location for the purpose of providing fixed wireless services to one or more customers at that location, and that the OTARD rules would not cover "hub or relay antennas used to transmit signals to and/or receive signals from multiple customer locations."[58] In excluding hub and relay antennas from the OTARD rules, the Commission acknowledged the "well-established rights of state and local governments under Section 332(c)(7) to regulate the placement, construction and modification of carrier hub sites" as "personal wireless service facilities" and made it clear that it was not seeking to circumvent those rights.[59] The Commission provided further guidance in its *Competitive Networks Reconsideration Order*, clarifying that customer-end equipment possessing "the additional functionality of routing service to additional users,"[60] would not be treated as a hub or relay antenna and thereby lose OTARD protection, so long as the equipment was "*installed in order to serve the customer on [its] premises*" and otherwise complied with all the rules' limitations (*e.g.*, antenna size).[61] The Commission cautioned, however, that this clarification was not intended to allow carriers "simply [to] locate their hub-sites on the premises of a customer in order to avoid compliance with a legitimate [Section 332(c)(7)-preserved] zoning regulation."[62] Rather, the Commission included routing functions within the ambit of customer-end antennas to account for "other types of deployment of advanced services [that] may no longer rely on the traditional configurations addressed in the *Competitive Networks [Report and] Order*,[63] noting that, "[f]or purposes of the OTARD protections, the equipment deployed in such networks shares the same physical characteristics of other customer-end equipment, distinguished only by the additional [routing] functionality."[64]

21. According to Massport, Continental's Wi-Fi antenna should be excluded from the OTARD rules because it was installed primarily as a hub to serve Continental's passengers rather than as a customer-end antenna intended to serve Continental. Massport asserts that Continental is using the antenna primarily to resell wireless Internet service to its passengers while in the President's Club lounge, who pay for the Internet service through their membership dues in the President's Club.[65] This

[57] *See Competitive Networks Report and Order*, 15 FCC Rcd at 23034 ¶ 114. *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 28-30.

[58] *Competitive Networks Report and Order*, 15 FCC Rcd at 23028 ¶ 99 (2000).

[59] *Id.* at 23032 ¶ 109. In contrast, the Commission explained that customer-end antennas used for transmitting or receiving telecommunications signals do not constitute "personal wireless service facilities" and therefore are not covered by Section 332(c)(7). *Id.* at 23032-34 ¶¶ 108-115. Accordingly, the Commission concluded that Section 332(c)(7) neither "prevent[s] the Commission from restricting state and local government regulation of these antennas," nor "preserve[s] state and local authority over [them]." *Id.* at 23032, 23034 ¶¶ 109 and 115.

[60] Promotion of Competitive Networks in Local Telecommunications Markets, *Order on Reconsideration*, WT Docket No. 99-217, 19 FCC Rcd 5637, 5644 ¶ 16 (2004) (*Competitive Networks Reconsideration Order*).

[61] *Competitive Networks Reconsideration Order*, 19 FCC Rcd at 5644 ¶ 17 (emphasis in original).

[62] *Id*. (parenthetical added).

[63] *Competitive Networks Reconsideration Order*, 19 FCC Rcd at 5643 ¶ 16.

[64] *Id*.

[65] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 58-59.

argument fails because use of an antenna to route signals strictly within an antenna user's premises does not constitute use of the antenna as a hub for distribution of services. When a leaseholder or property owner uses an antenna to send and receive signals strictly within its premises, and not to "multiple customer locations," the antenna user is using the antenna for its own purposes under the OTARD rules.[66] This is true even if invitees on the premises, such as houseguests or business customers, receive the signals, because the invitees are presumably present at the antenna user's invitation and for the antenna user's own purposes.[67] In these circumstances, Continental cannot be considered a carrier that is trying to circumvent section 332(c)(7) by locating a hub site on the premises of a customer.[68] Consequently, we find that the facts presented here – which involve the sending of signals to and from an OTARD-covered antenna strictly within the premises under the exclusive use and control of the antenna user – does not turn Continental's Wi-Fi antenna into a hub antenna.

3. Restrictions Unreasonably Impair Installation, Maintenance, or Use

22. The OTARD rules do not nullify all restrictions that impair the installation, maintenance and use of qualifying antennas. Rather, a restriction runs afoul of the OTARD rules if it unreasonably delays, prevents, or increases the cost of the installation, maintenance, or use of the antenna or precludes reception of or transmission of an acceptable quality signal. We find that the restrictions contained in Massport's lease with Continental for the President's Club lounge unreasonably impair the use of Continental's antenna in at least two ways.

23. First, Massport claims that the terms of the lease require Continental to remove its Wi-Fi antenna from the President's Club lounge. The lease terms that Massport claims are violated by Continental's Wi-Fi antenna include provisions limiting use of the premises to the uses specified in the lease and a provision prohibiting the interference with the effectiveness of any communications system.[69] If these lease provisions require that Continental discontinue use of or remove its Wi-Fi antenna, they would prevent the installation and use of a qualifying antenna. Restrictions that prevent installation and use of an antenna, *ipso facto*, impair its installation or use, and are preempted by the

[66] To the extent Continental's antenna incidentally transmits signals outside of the leased premises, it is not transmitting them to "customer locations," because Continental does not have any "customers" outside of its President's Club lounge.

[67] Given that Continental is not transmitting or receiving commercial signals from multiple customer locations, we need not determine whether the fact that some of Continental's invitees pay membership dues to Continental for entrance to the lounge renders the antenna a hub. We note, however, that Continental does not offer wireless service for a fee directly to the public or for an additional charge to its President's Club members. Instead, access to the Wi-Fi signals transmitted by Continental's antenna is incidental to club access. Moreover, as noted *supra* paragraph 9, there are several ways in which access to Continental's lounges can be gained without any dues payment. Finally, the use of Continental's antenna by its passengers does not change any conceivably relevant attribute that the antenna would have – or introduce any greater burden on Massport than the antenna would otherwise place – were it used exclusively for Continental personnel.

[68] As we observed in the *Competitive Networks Report and Order*, when Congress promulgated section 332(c)(7), its focus was on preserving local zoning authority with respect to such matters as the location of 50-foot towers, not the use of customer-end antennas. *Competitive Networks Report and Order*, 15 FCC Rcd at 23033 ¶ 112. Unlike the targeted subjects of local zoning authorities, Continental's antenna is of a type commonly used by consumers, is located indoors, and is being used to provide service to the antenna user solely within the leased premises. In these circumstances, it cannot be said that Continental's use of its Wi-Fi antenna on leased premises is an attempt to "avoid compliance with a legitimate zoning regulation." *Competitive Networks Reconsideration Order*, 19 FCC Rcd at 5644 ¶ 17.

[69] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 8, Appendix A §§ 7.1, 7.2, 10.3.

OTARD rules absent the application of some exception to the rules.[70]

24. Second, the lease also prohibits making alterations to the leased premises without submitting an application to and receiving the prior approval of Massport.[71] According to Massport this provision required Continental to request approval from Massport before installing its Wi-Fi antenna in the lounge and, because Continental did not do this, the lease was violated. Commission precedent is clear that prior approval requirements before installation of OTARD qualifying antennas are not permitted under the OTARD rules.[72] These decisions are based on the conclusion that such pre-approval requirements unreasonably delay the installation of antennas and discourage people from attempting to use such antennas due to the added inconvenience and uncertainty they create.

25. While the only enumerated exceptions under OTARD are for safety and historic preservation, Massport argues that the restrictions in the lease do not impair installation or use of Continental's antenna because the airport Wi-Fi backbone qualifies under what it characterizes as a "central antenna exception" to the OTARD rules.[73] The Commission has explicitly declined to adopt a central antenna exception to the OTARD rule. Instead, to the extent it is relevant, the availability of a central antenna must be analyzed in the context of impairment – *i.e.,* whether the restrictions on the installation and use of an antenna constitute impairment if the landlord offers a central antenna that may be used by the tenant.[74]

26. The Commission has consistently recognized that delay in access to services desired by an antenna user is relevant in determining the issue of impairment. Indeed, when it adopted the original OTARD rules, it prohibited the imposition of procedural hurdles, such as requiring a user to obtain permits or charging fees before installing an antenna. At the time, the Commission noted that these requirements would cause unreasonable delays in access to services for the purposes of OTARD.[75] In

[70] *See* 47 C.F.R. § 1.4000(a)(1) (stating that restrictions that impair "installation" or "use" of an antenna covered by the OTARD rules are prohibited).

[71] *Id*. at 8-9; Appendix A § 9.4.

[72] *In re* Pinter, *Memorandum Opinion and Order*, CSR 6245-0, 19 FCC Rcd 17385, 17390-91 ¶ 13 (2004) (finding that association policy requiring prior approval to place an antenna does not comport with rule); *In re* Wojcikewicz, *Memorandum Opinion and Order*, CSR-6030-0, 18 FCC Rcd 19523, 19527-28 ¶ 12 (2003) (finding that prior approval requirement before installing antenna constitutes impermissible delay); *In re* Frankfort, *Memorandum Opinion and Order*, CSR 5238-0, 18 FCC Rcd 18431, 18432-34 ¶¶ 6-8 (2003) (finding that blanket pre-approval processes impose an unreasonable delay on antenna users unless for reasons of safety or historic preservation); *In re* Bell Atlantic Video Services Co., *Memorandum Opinion and Order*, CSR 5398-0, 15 FCC Rcd 7366, 7370 ¶ 10 (2000) (finding that prior approval requirement before installing antenna is impermissible unless for safety or historic preservation); *In re* Holliday, *Memorandum Opinion and Order*, CSR 5399-0, 14 FCC Rcd 17167, 17170 ¶ 10 (1999) (finding that requirement to get approval from Association committee before installing antenna is prohibited); *See also In re* Sadler, *Memorandum Opinion and Order*, CSR 5074-0, 13 FCC Rcd 12559, 12569-70 ¶¶ 32-34 (1998); *In re* Wireless Broadcasting Sys. of Sacramento, *Memorandum Opinion and Order*, CSR 97-2506, 12 FCC Rcd 19746, 19751 ¶¶ 10-11 (1997).

[73] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 27-39; *Reply Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed October 13, 2005, 15-25.

[74] "[T]he same standard of impairment can be applied to a restriction based on the existence of a central antenna as is applied to any other antenna restriction. That . . . it does not impair installation, maintenance, and use." Implementation of Section 207 of the Telecommunications Act of 1996, *Order on Reconsideration*, CS Docket No. 96-83, 13 FCC Rcd 18962, 18998-99 ¶¶ 86 (1998).

[75] Prior approval, permitting, or fee requirements are prohibited by OTARD unless for safety and historic preservation reasons. Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996; and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, *Report and Order, Memorandum Opinion and*

(continued....)

the instant case, Massport and AWG made what they argue is an offer for comparable service eight months after Continental filed a petition with the Commission, and more than nine months after Massport demanded that Continental remove its antenna.[76] The OTARD rules were adopted to enable access to competitive services – a delay of nine months and an offer triggered only by an antenna user pursuing its legal remedies countervails the overarching policies of the OTARD rules and existing legal precedent, amounts to an effective denial of competitive access, and is thus an unreasonable impairment of antenna use for the purposes of OTARD.

27. Even if the access delay was not a factor here, we nevertheless would not be able to find that the provision of AWG's airport backbone under Massport's and AWG's most recent proposal would make reasonable Massport's restrictions on the installation and use of Continental's antenna. If Continental were required to use this backbone, it would be denied the ability to choose its own service provider and would be limited to whatever type of services, level of network security, quality of service, and signal strength that Massport's contractor, AWG provided, and to the cost and timeframe at which AWG chose to provide the service. Thus, Continental would be impaired in its efforts to obtain the terms and quality of service that it desires. Furthermore, the record indicates that several key factors, such as cost and service quality are still in dispute. [77] For example, even with AWG's latest offer, Continental's cost of using AWG's service as compared with its own antenna, may actually be higher since the offer is for 1000 hours of Internet service at a fixed price and Continental's actual usage may be higher now or at some point in the future.[78] Thus, in this context, the central antenna option now being offered by Massport and AWG is insufficient to meet Massport's burden of demonstrating that the restrictions in the lease do not unreasonably impair Continental's use of its own Wi-Fi antenna.[79]

4. Safety Exception

28. Massport claims that the restrictions in its lease qualify for the safety exception to the

(...continued from previous page)
Order, and Further Notice of Proposed Rulemaking, CS Docket No. 96-83, 11 FCC Rcd 19276, 19286-87, ¶ 17 (1996).

[76] *Ex Parte Presentation of the Massachusetts Port Authority*, ET Docket No. 05-247, filed March 20, 2006.

[77] For example, there is some dispute in the record as to whether the airport Wi-Fi backbone provides as strong a signal in the President's Club lounge as Continental's Wi-Fi system. *Reply Comments of the Air Transport Associations of America, Inc.*, ET Docket No. 05-247, filed October 13, 2005, 20 (noting that Massport has admitted that an engineering audit showed the airport Wi-Fi backbone provided a slightly weaker signal than Continental's Wi-Fi in one corner of the lounge); *Ex parte Presentation of the Massachusetts Port Authority*, ET Docket No. 05-247, filed March 31, 2006 (claiming that the airport Wi-Fi backbone has provided an equal or stronger signal than Continental's Wi-Fi for six months).

[78] *Ex parte Submission of Continental Airlines*, ET Docket No. 05-247, filed March 24, 2006.

[79] The Commission noted when adopting the original OTARD rules that letting local governments require pre-approval before installing antennas would harm the ability of service providers who utilize antennas to compete by creating extra hurdles for consumers. Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996; and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, CS Docket No. 96-83, 11 FCC Rcd 19276, 19286-87, ¶ 17 (1996). Hence when formulating the OTARD rules the Commission has been concerned with the impact on competitive communications providers, such as Continental's Internet service provider (ISP). Not allowing Continental to use its own Wi-Fi antenna would harm the competitive position of ISP's desiring to provide service to Continental via wire since Continental would be unable to relay service wirelessly within its premises. Continental would in effect be limited to a choice of one provider to obtain wireless Internet service, AWG, instead of having the option of choosing from a multitude of ISPs.

OTARD rules.[80] According to Massport, the Massachusetts State Police plans on using the airport Wi-Fi backbone for communications in the future and the Transportation Safety Authority (TSA) has conducted a trial using the airport Wi-Fi backbone.[81] Massport also asserts that Continental's Wi-Fi antenna may cause interference to the airport Wi-Fi backbone. Consequently, Massport argues that Continental's Wi-Fi antenna may cause interference to future public safety communications, and that the restrictions in the lease are therefore necessary to accomplish a legitimate safety objective. Massport misreads the purpose of the safety exception in our rules, and misconstrues the applicable regulatory framework governing the operation of Part 15 devices, such as Continental's Wi-Fi system, the airport Wi-Fi backbone, and Wi-Fi systems operated by other airlines at Logan Airport.[82] The spectrum used by these unlicensed Wi-Fi systems may be used by any type of unlicensed device that meets the Commission's rules. The Commission has authorized a wide variety of consumer products for this frequency band, including Bluetooth devices, ad hoc wireless local area network devices, RF ID devices, cordless telephones, etc. All of these devices operate under the conditions that they may not cause harmful interference and must accept any interference received, including interference caused by other unlicensed devices.[83]

29. The safety exception addresses potential dangers to the physical safety and health of the public and not interference to other radio device users. The fact that this exception is directed at physical safety is evident from the OTARD rules' language which requires that the antenna restrictions falling within the safety exception apply to other "appurtenances, devices, or fixtures that are comparable in size and weight and pose a similar or greater safety risk as these antennas."[84] This general applicability requirement is inconsistent with Massport's view that radio-frequency (RF) interference concerns fall within the public safety exception, because devices or fixtures other than antennas do not pose a RF interference safety risk that is similar to or greater than that of an antenna. In adopting the safety exception, the Commission explained the safety exception in physical terms, identifying such hazards as interference with the line of sight at an intersection, inadequate bolting or guying of antennas, and obstructing fire exits, as well as compliance with our RF emissions standards and local health regulations.[85] Our prior declaratory rulings have applied the safety exception only to physical safety issues.[86] Under the Communications Act of 1934, as amended, the Commission holds

[80] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 42-55; 47 C.F.R. § 1.4000(b)(1).

[81] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 48-51. There is no indication from the record that any public safety agency currently uses the airport Wi-Fi backbone. Furthermore, no public safety agency has filed comments in this proceeding.

[82] According to Continental, three other airlines operate unlicensed wireless systems at Logan airport. These systems are used for curbside check-in of baggage and on the airport ramps for baggage and mail handling as well as ramp operations. *Ex parte Notice of Continental Airlines*, ET Docket No. 05-247, filed February 7, 2006.

[83] 47 C.F.R. § 15.5(b).

[84] 47 C.F.R. § 1.4000(b)(1).

[85] Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 95-59, 11 FCC Rcd 19276, 19290-91 ¶ 24 (1996). The relevant RF emissions standards are for the protection of health and not for prevention of interference with other radio devices. *Id*. at 19291 ¶ 24 n.60.

[86] *In re* Frankfort, *Memorandum Opinion and Order*, CSR 5238-0, 16 FCC Rcd 2875, 2887, 2889 ¶¶ 38, 42 (2001) (finding that requirements that antennas withstand 50 mph winds and be properly grounded were valid safety restrictions); *In re* Frankfort, *Memorandum Opinion and Order*, CSR 5238-0, 18 FCC Rcd 18431, 18432-34 ¶¶ 6-8 (2003) (finding that association must specify provisions of National Electric Code (NEC) it wants enforced and describe and specify how provision furthers articulated safety objective rather than just require compliance with NEC). *In re* MacDonald, *Memorandum Opinion and Order,* CSR 4922-0, 13 FCC Rcd 4844, 4851 ¶ 24 (1997) (finding that passing reference in association regulation to safety does not qualify for OTARD safety exception).

exclusive jurisdiction over the regulation and resolution of RF interference issues.[87] In short, the safety exception concerns health and physical safety and is simply inapplicable to complaints of potential RF interference with other radio devices. Accordingly, we find that Massport has not stated a legitimate safety objective for purposes of the OTARD safety exception.

30. Even if the OTARD safety exception did apply to RF interference issues, the safety exception would still not apply here because the Wi-Fi device that Continental is using in the President's Club operates as permitted under Part 15 of our rules.[88] Part 15 specifies power levels, frequency bands, and conditions under which devices may transmit RF signals without requiring a license.[89] Part 15 devices do not receive interference protection from other Part 15 devices. Therefore, because Massport's airport Wi-Fi backbone is composed of Part 15 devices, Massport has no right to operate the airport Wi-Fi backbone free from interference from other Part 15 devices, including Continental's Wi-Fi device. Likewise, Continental has no right to operate its Wi-Fi device without interference from the airport Wi-Fi backbone. Moreover, this holds true for any other Part 15 device users in the airport. Although Logan airport may desire to use the airport Wi-Fi backbone for public safety communications at some future time, this fact has no bearing on our present inquiry. The type of traffic carried by the backbone does not change the application of Part 15 of our rules. Users who believe they must have interference-free communication should pursue the exclusive-use options under our licensed service models instead of relying on Part 15 devices.

5. Special Exemption

31. Massport notes that the Commission has never enforced the OTARD rules in a government building and questions the applicability of competitive access requirements, such as the OTARD rules, to airports.[90] Even if the Commission believes that the OTARD rules would otherwise apply in this situation, Massport asks that the Commission include airports in an exemption of special-use facilities from the OTARD rules.

32. The OTARD rules have no express exception for governmental entities, and we find no reason to withhold application of the OTARD rules, as a general matter, to state and local government entities that are acting in a proprietary capacity as landlords. Massport relies on safety concerns and its overall management responsibilities to support its contention that is should be exempted fails to demonstrate that it should be exempted in this case.[91] However, as noted above, the safety exception is inapplicable here, and it has made no showing that its management responsibilities relating to antenna

[87] Communications Act of 1934, 47 U.S.C. § 151 *et. seq*. (2004). In particular, *see, e.g*., 47 U.S.C. §§ 301, 302(a)(1), 303(f) (2004). Both the Commission and federal courts have overturned attempts by third parties to regulate RF interference in light of the FCC's exclusive authority in this area. *See generally* Freeman v. Burlington Broadcasters Inc., 204 F.3d 311, 319-22 (2nd Cir. 2000); Southwestern Bell Wireless Inc. v. Johnson County Board of County Commissioners, 199 F.3d 1185, 1189-93 (10th Cir 1999); In re 960 Radio, Inc*., Memorandum Opinion and Declaratory Ruling*, FCC 85-578, 1985 WL 193883 (Nov. 4, 1985); In re Petition of Cingular Wireless L.L.C. for a Declaratory Ruling*, Memorandum Opinion and Order*, 18 F.C.C.R. 13126, DA 03-2196 (rel. July 7, 2003); In re Mobilecomm of New York Inc., *Memorandum Opinion and Declaratory Ruling*, 2 FCC Rcd 5519 (CCB 1987).

[88] Continental's Wi-Fi is a Cisco Model 1200 Wireless Access Point with a 802.11b radio. It operates at a power of 20 mW in the 2.462 GHz band. *Reply Comments of Continental Airlines, Inc*, ET Docket No. 05-247, filed at October 13, 2005, Exhibit B ¶¶ 2, 4. Such a radio operates pursuant to section 15.247 of our Rules. 47 C.F.R. § 15.247.

[89] "This part sets out the regulations under which an intentional, unintentional, or incidental radiator may be operated without an individual license." 47 C.F.R. § 15.1.

[90] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 64.

[91] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 65.

siting differ materially from those of any other landlord. Massport makes much of the fact that the Commission has not applied OTARD to college dormitories and argues that airports share similar characteristics. However, the exclusion of college dormitories was based on the fact that a college dormitory residence is not a leasehold and that the relationship of a university to a student is not the same as the relationship between a landlord and a tenant.[92]

C. Legal Issues

33. Massport has raised two legal issues regarding the application of the OTARD rules to the present situation. Massport has challenged the Commission's statutory authority to apply the OTARD rules to antennas that transmit and receive fixed wireless signals. Massport also claims that applying the OTARD rules in this situation would result in an unconstitutional taking of property.

1. Statutory Authority

34. Massport argues that the Commission did not have the statutory authority to extend OTARD to fixed wireless signals.[93] According to Massport, the Commission's authority to regulate restrictions on OTARD devices is limited to the authority specified in Section 207 of the 1996 Telecommunications Act, the Commission has no other express statutory authority to regulate the siting of antennas, and it has no ancillary jurisdiction over the siting of Wi-Fi antennas used for wireless Internet access.[94] Although the Commission previously determined that it has such jurisdiction in the *Competitive Networks Report and Order*, we nevertheless address Massport's arguments below.

35. The Commission specifically addressed and rejected Massport's first argument – that in promulgating Section 207 of the 1996 Telecommunications Act, Congress limited the Commission's authority to preempt state and local restrictions on the siting of wireless antennas to the promulgation of rules that would enable viewers to receive certain video programming services.[95] Section 207 provides that, "[w]ithin 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive" certain video programming services.[96] In the *Competitive Networks Report and Order*, the Commission concluded that this "statutory language reflects Congress' recognition that, pursuant to Section 303, the Commission has always possessed authority to promulgate rules addressing OTARDs."[97] Massport argues, however, that if the Commission is correct in asserting that it already had the authority under Section 303 to promulgate such regulations (and extend them to services other than those listed in Section 207), then all of Section 207, except for the introductory clause regarding timing, would constitute extraneous language.[98] Citing the principle of

[92] Implementation of Section 207 of the Telecommunications Act of 1996, *Second Report and Order*, CS Docket No. 96-83, 13 FCC Rcd 23874, 23889 ¶ 29 n.73 (1998).

[93] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 67-72; *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 2-10.

[94] *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 2-10.

[95] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 67.

[96] 47 U.S.C. § 303 nt. (1994).

[97] *Competitive Networks Report and Order*, 15 FCC Rcd at 23031 ¶ 106 (2000).

[98] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 68; *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 4. We note that Massport apparently assumes – erroneously – that the Commission had based its substantive authority to promulgate OTARD regulations exclusively on Section 303(r). As demonstrated in the *Competitive Networks Report and Order* and in the decision today, the Commission is also drawing upon a number of other sources of its authority (predating (continued....)

statutory construction that would reject such an interpretation if another construction would give effect to all of the provision's language, Massport therefore concludes that Section 303 cannot be the source of substantive authority for the OTARD rules.[99] Consequently, Massport's reading of Section 207 is that the provision constitutes the Commission's sole source of substantive authority to promulgate OTARD regulations, and that the Commission is limited to the provisions' four corners.[100]

36. Massport's argument fails at the outset because it relies on an erroneous characterization of Section 207. Rather than limiting the meaning of the provision to a timing instruction, we made it clear in the *Competitive Networks Report and Order* that Section 207 places *two* distinct obligations on the Commission that qualify our general authority over antenna siting.[101] Specifically, Section 207 creates (1) a requirement to promulgate the specified preemption regulation, and (2) a deadline for taking this action. However, contrary to Massport's argument, a requirement that an agency *must* promulgate a specified regulation within a particular time frame in no way implies that the agency previously did not possess the discretionary authority to implement the specified regulation in question. As a result, Section 207 was in no way superfluous merely because the Commission already possessed the authority to implement OTARD rules.

37. Moreover, there is no indication that Congress intended to limit the Commission's discretionary preemptive authority over antenna siting to the strict parameters of Section 207. Although Section 207 required the Commission to promulgate rules protecting certain devices within a certain period, nothing in Section 207 prohibits the Commission from exercising its authority pursuant to Section 303 and other provisions to protect the siting of other antennas that receive or transmit other types of signals.[102] To the contrary, Congress enacted Section 207 against a backdrop of prior Commission antenna siting regulation,[103] yet Section 207 contains no language reflecting Massport's view that Congress intended the provision to supplant the bases for such regulation and become the exclusive source of the Commission's authority to engage in antenna siting regulation and preemption. And as we observed in the *Competitive Networks Report and Order*, the Commission not only exercised this type of authority before Congress promulgated Section 207, but has also exercised it since.[104]

38. Furthermore, the Commission's authority under Section 303 to regulate antenna siting has an express basis. While Massport stresses our reliance on Section 303(r), we observe that Congress did not direct the Commission in Section 207 to promulgate regulations specifically pursuant to that subsection. Rather, Congress directed the Commission to promulgate regulations pursuant to Section 303 without limitation. Although the Commission relied upon both Sections 303(r) and 4(i) of the Act as bases for exercise of its ancillary jurisdiction in the *Competitive Networks Report and Order*,[105]

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the enactment of Section 207) to establish OTARD rules in the fixed wireless context (*i.e.,* Section 303(d) and, in conjunction with the principles of ancillary jurisdiction, Sections 1, 201(b), 202(a), and 205(a) of the Communications Act, and the Preamble to and Section 706 of the 1996 Telecommunications Act).

[99] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 68; *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 4.

[100] *Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed September 28, 2005, 67-68.

[101] *See Competitive Networks Report and Order*, 15 FCC Rcd at 23031 ¶ 106 (2000) (stating that Section 207 removed the Commission's "discretion on both the timing *and* the determination of the need for such regulation") (emphasis added).

[102] *Id.*

[103] See text in note 113, *infra*.

[104] *See Competitive Networks Report and Order*, 15 FCC Rcd at 23031 ¶ 106 n.272 (2000).

[105] *Competitive Networks Report and Order*, 15 FCC Rcd at 23030-31 ¶ 105 (2000).

Section 303(d) provides the Commission with express statutory authority to regulate antenna siting. Specifically, Section 303(d) states that "the Commission from time to time, as public convenience, interest or necessity requires shall . . . [d]etermine the location of classes of stations or individual stations."[106] The Act defines the terms "radio station" or "station" as "a station equipped to engage in radio communication or radio transmission of energy."[107] "Radio communication" is in turn defined as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."[108] These broad definitions of radio stations and radio communications encompass the antennas subject to the Commission's OTARD rules, and the Commission's authority to determine the locations of radio stations pursuant to Section 303(d) includes the authority to preempt restrictions that interfere with that authority.[109]

39. In addition to challenging the Commission's express authority to regulate antenna siting, Massport argues that the statutory provisions the Commission used to support extension of the OTARD rules to fixed wireless signals in the *Competitive Networks Report and Order* "are inadequate bases for its attempt to regulate antenna siting, especially the siting of Wi-Fi antennas."[110] Although we believe the Commission has express authority to regulate such antenna siting pursuant to Section 303(d), as discussed above, the Commission's exercise of its ancillary jurisdiction in the *Competitive Networks Report and Order* also provides an independent basis for the Commission's OTARD rules. When the Commission extended the OTARD rules to include antennas used to transmit or receive fixed wireless signals, it relied upon the statutory goals in Sections 1, 201(b), 202(a), and 205(a) of the Communications Act, as well as the Preamble to and Section 706 of the 1996 Telecommunications Act.[111] The Commission concluded that extension of its OTARD rules to antennas used for fixed wireless signals was necessary to realize the statutory goals embodied within these sections, and that Sections 303(r) and 4(i) of the Act provide the bases for exercise of the Commission's ancillary jurisdiction.[112] Furthermore, the *Order on Reconsideration* reaffirmed these bases for statutory

[106] 47 U.S.C. § 303(d) (2004).

[107] 47 U.S.C. § 153(35) (2004).

[108] 47 U.S.C. § 153(33) (2004).

[109] *See Amendment of Parts 1, 17, and 73 to Provide for the Establishment and Use of Antenna Farm Are*as, 8 F.C.C.2d 559, 563 ¶ 9 (1967) (citing Section 303 for the proposition that "[t]he Federal Communications Commission has consistently maintained that it has the ultimate responsibility to determine whether the public interest would be served by construction of any specific antenna tower.").

[110] *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 4-5.

[111] *Competitive Networks Report and Order*, 19 FCC Rcd at 23028-35 ¶¶ 101-116.

[112] Federal Courts have consistently recognized that these provisions give the Commission broad authority to take actions that are not specifically encompassed within any statutory provisions but that are reasonably necessary to advance the purposes of the Act. *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (J. Scalia, writing for the majority, upholding Commission's exercise of ancillary jurisdiction pursuant to Section 201(b)); *United States v. Southwestern Cable,* 392 U.S. 157 (1968) (S*outhwestern Cable*) (upholding the Commission's authority to regulate cable television); *National Broadcasting Comm'n v. United States*, 319 U.S. 190, 219 (1943) (Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency"); *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (a "congressional prohibition of a particular conduct may actually support the view that the administrative entity can exercise its authority to eliminate a similar danger"); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (upholding Commission's authority to reinstate syndicated exclusivity rules for cable television companies as ancillary to the Commission's authority to regulate television broadcasting); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988) (upholding Commission's pre-statutory version of the universal service fund as ancillary to its responsibilities under Sections 1 and 4(i) of the Communications Act, stating that "[a]s the (continued....)

authority.[113]

40. Massport relies on *American Library Association v. FCC*, 406 F.3d 689 (2005), for the assertion that the Commission only has ancillary authority over devices for radio communications while the device is engaged in communication.[114] According to Massport, under the court's holding, the act of installing an antenna, which does not occur while the radio device is actually engaged in communications, does not constitute "communication by wire or radio" under Section 1 of the Communications Act.[115] Consequently, Massport concludes that the Commission's ancillary jurisdiction does not extend to the installation of OTARD-covered antennas.[116] Massport misreads the

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Universal Service Fund was proposed in order to further the objective of making communications service available to all Americans at reasonable charges, the proposal was within the Commission's statutory authority"); *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1281, 1292-93 (7th Cir. 1985) ("Section 4(i) empowers the Commission to deal with the unforeseen – even if [] that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to regulate effectively those matters already within the boundaries") (citations omitted); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1109 (D.C. Cir. 1981) ("The instant case was an appropriate one for the Commission to exercise the residual authority contained in Section 154(i) to require a tariff filing. . . . The Commission properly perceived the need for close supervision and took the necessary course of action: it required LT&T to file an interstate tariff setting forth the charges and regulations for interconnection."); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1974) (holding that "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service").

[113] Promotion of Competitive Networks in Local Telecommunications Markets, *Order on Reconsideration*, WT Docket No. 99-217, 19 FCC Rcd 5637, 5640-41 ¶ 8 (2004). The Commission's interpretation of Section 207 in the *Competitive Networks Report and Order* and the scope of its ancillary jurisdiction are supported by the Commission's history of relying on ancillary jurisdiction to preempt state and local regulation of antennas before adoption of Section 207, of which Congress was presumably aware at the time of adoption. We note that the Commission first exercised its preemption authority in this area long before Section 207 was passed. In addition, even shortly after Section 207 was adopted, the Commission included additional services within the scope of its OTARD rules and, moreover, allowed preemption for antennas that both received and transmitted, for certain limited purposes. In 1986, the Commission first preempted state and local regulation of antennas used to receive commercial satellite services. Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, *Report and Order*, 59 Rad. Reg. 2d (P&F) 1073 (1986). Again in 1996, the Commission revisited these satellite earth station rules to provide increased protection to smaller satellite antennas used by consumers. Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order and Notice of Proposed Rulemaking*, IB Docket No. 95-59, 11 FCC Rcd 5809 (Adopted February 29, 1996). Also, in 1996, the Commission promulgated the original OTARD rules and these rules included a number of services, such as MDS, LMDS, and ITFS, which were not enumerated explicitly in Section 207. *Id.* The Commission included these services because it believed that Congress did not intend to exclude services that were functionally equivalent to the services explicitly listed in Section 207. As a result, long before the *Competitive Networks* proceeding, the Commission concluded that it had the necessary statutory authority to adopt OTARD rules for services not explicitly enumerated in Section 207 and for antennas used to transmit, for their use in connection with video programming. Many of these decisions relied on, *inter alia*, the Commission's statutory authority pursuant to Sections 1 and 303 of the Communications Act.

[114] *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 5-7 (citing *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005)).

[115] 47 U.S.C. § 151 (2004).

[116] Massport's theory would apparently allow the Commission to authorize Continental's receipt and transmission of radio signals, but not permit the Commission to require Massport to allow Continental to install the necessary antenna.

court's holding in *American Library*, which does not apply to antenna siting. In *American Library*, the court reviewed the Commission's authority to adopt requirements that television receivers recognize an indicator within the television signal (called a "broadcast flag") that would prohibit the receiver from redistributing the received television signal.[117] The court concluded that the Commission's "general jurisdictional grant does not encompass the regulation of consumer electronics products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission."[118] The court reasoned that the television receivers were not engaged in the process of radio or wire transmission when processing the broadcast flag because the Commission's order did "not require demodulator products to give effect to the broadcast flag until *after* the DTV broadcast has been completed."[119] In contrast, regulation specifying the required or permitted physical characteristics of antennas, including their location, is an integral and necessary part of any communication by radio – without a properly sited antenna, radio communication is not possible. Thus, when the Commission prescribes the physical attributes of an antenna, such as its installation, maintenance, and use, the purpose and effect of the restriction is to act directly on the transmission and reception of the signals during the course of communication. Accordingly, the regulation of antenna installation, maintenance, and use is reasonably ancillary to the authority delegated to the Commission by Section 1 and is therefore within the scope of the Commission's ancillary jurisdiction.

41. Massport also argues that Sections 201(b), 202(a), and 205(a) of the Act do not provide the Commission with bases for ancillary jurisdiction over Wi-Fi antennas used to provide information services because these provisions are limited to common carrier services.[120] The Commission did not, however, limit the bases for its exercise of ancillary jurisdiction to these provisions. The Commission's analysis relied on various provisions (*e.g.*, Section 1 of the Communications Act) that are applicable to a variety of services, including telecommunications services and information services, and found "that the same types of restrictions on the same types of antennas unreasonably restrict deployment regardless of the services provided."[121] The Commission's jurisdictional analysis is therefore sufficient to encompass Wi-Fi antennas providing information services, even if Massport's assertion regarding the scope of Sections 201(b), 202(a), and 205(a) is correct.

42. Finally, Massport asserts that the Commission has no authority to preempt its restrictions on Continental's Wi-Fi antenna use. In terms of the rules themselves, Massport suggests that the Commission did not intend to preempt such restrictions in private lease agreements when it extended the OTARD rules to fixed wireless signals.[122] The Commission did not, however, intend to restrict the OTARD rules in this manner; they clearly apply to private lease agreements. The OTARD rules expressly apply to "contract provision[s]" and "lease provision[s],"[123] including leases relating to fixed wireless antennas.

43. Massport also contends that the Commission lacks preemptive authority over a state or local government acting in its proprietary capacity.[124] Given that the Commission intended to preempt

[117] *American Library Ass'n*, 406 F.3d at 691.

[118] *American Library Ass'n*, 406 F.3d at 700.

[119] *American Library Ass'n*, 406 F.3d at 700 (emphasis in original).

[120] *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 7.

[121] *Competitive Networks Report and Order*, 19 FCC Rcd at 23027 ¶¶ 97.

[122] *See Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 18-19.

[123] 47 C.F.R. § 1.4000(a)(1).

[124] *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005 at 11-14.

restrictions in private lease agreements, however, Massport would be preempted even if it is acting in a private capacity with regard to its lease agreement with Continental. When a governmental entity acts in a private capacity, the authority of a federal agency like the Commission to regulate such action will turn on whether the agency has lawfully exercised its authority in the same manner over similarly situated non-governmental regulatees. The Supreme Court recognized this principle in *Building and Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993) (commonly referred to as "*Boston Harbor*"), when it held that a state agency, acting in a private capacity as the owner of a construction project, was entitled to the same regulatory treatment as a purely private company:

> In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, *and where analogous private conduct would be permitted*, this Court will not infer such a restriction.[125]

44. In *Boston Harbor*, the Court was faced with the converse of what we are considering here today. There, the federal agency (the National Labor Relations Board) had attempted to restrict a state agency's actions under a labor agreement that the state agency had entered into in a private capacity, where there would have been no such restrictions if the state agency had been a private company. The Court resolved the case by holding that the state agency was entitled to the same treatment as a private concern. Here, the treatment at issue is a restriction rather than a benefit – that is, whether Massport, if acting in a private capacity, should be bound by the same restrictions that would apply to a private firm. While the specific treatment may differ, *Boston Harbor* provides no basis for distinguishing the approach toward Massport; to the extent Massport is acting in a private capacity, it should be bound by the same restrictions that would apply to a private company.

45. Similarly, Massport's reliance on *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 (2d Cir. 2002), is misplaced to the extent that Massport asserts that that its lease agreement is not subject to FCC regulation merely "because it is a voluntary lease agreement between private parties."[126] The court in *Sprint* held that a school district could enforce stricter-than-FCC radio frequency ("RF") emissions limits against a wireless telecommunications provider, when the school district had bargained for those limits – memorialized in a lease regarding the use of a specific high school's rooftop – in its private capacity as a lessor. The court ruled that the school district's lease was enforceable not simply because the district was acting in a private capacity, but because the court could discern no restrictions under the law on the right of private individuals to agree in a lease to the stricter RF limits:

> Since, so far as we are aware, nothing in the law requires a communications company to operate at the FCC Guidelines maximum permissible radiation exposure levels, the private owner could elect to not to grant a communications company a lease for the construction and operation of a cellular tower unless the company agreed to limit its RF emissions to a lower level. To the same extent, the School District as a public entity, sought out by the company only in the District's capacity as property owner, is permitted to do the same."[127]

46. While the court in *Sprint Spectrum* did conduct a preemption analysis, that analysis focused on whether Congress had preempted governmental action when conducted in a private capacity. Once the court found that there had been no such preemption, the question turned to whether such conduct was generally prohibited or regulated. In *Sprint Spectrum*, it was not. In contrast, here, the Commission's regulations prohibiting the antenna restrictions in Massport's lease with Continental

[125] *Boston Harbor*, 507 U.S. at 213-32 (emphasis added).

[126] *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, at 12.

[127] *Sprint Spectrum*, 283 F.3d at 421.

apply to all lease agreements, whether involving a governmental entity or purely private parties. Accordingly, Massport's characterization of its relationship with Continental as a private contractual matter does not absolve Massport from compliance with the OTARD regulations, provided the Commission has the authority to regulate private individuals in this manner. As discussed below, the Commission does indeed have this authority.

47. The Commission has already specifically addressed and rejected Massport's argument that the Commission lacks authority to extend the OTARD rules to leased property.[128] In the *Competitive Networks Order on Reconsideration*, the Commission relied on the court's decision in *Building Owners and Managers Association International* v. *Federal Communications Commission*, 254 F.3d 89 (D.C. Cir. 2001) ("*BOMA*"), in which the D.C. Circuit held that the Commission possessed the authority to prohibit private leasing restrictions that impair a viewer's ability to receive video programming services through antennas designed for over-the-air reception of signals from television broadcasting, direct broadcast satellite, and wireless cable services. Citing Sections 303(v) and 207 of the 1996 Telecommunications Act, the court concluded that Congress had vested the Commission with exclusive jurisdiction and authority to ensure that all viewers can access direct-to-home satellite services and to prohibit restrictions that would impair such access, and that, in asserting jurisdiction over parties who might directly impose such restrictions, the Commission may alter property rights created under State law.[129] In providing the Commission with this mandate, Congress did not strip the agency of the broader authority to regulate antenna installation that it has been given in the Communications Act and related statutes. Thus, the D.C. Circuit observed that "[t]he 1996 Act left undisturbed the broad statutory directives contained in the Communications Act of 1934, including the Commission's mandate to 'make [communications services] available . . . to all the people of the United States,' 47 U.S.C. § 151, and the Commission's authority to 'perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its function.' *Id.* § 154(i)."[130]

48. In extending the OTARD rules to the wireless context, the Commission relied upon the same policies underpinning the video-based OTARD rules upheld by the D.C. Circuit.[131] As we observed in the *Competitive Networks Order on Reconsideration*, the statutory underpinnings of the OTARD rules for fixed wireless services reflect a clear congressional intent that the Commission "have jurisdiction over any party imposing restrictions that the Act sought to eliminate," such as restrictions on the siting of consumer-end fixed wireless antennas.[132] Congress has vested the Commission with express jurisdiction to determine the locations of antenna installations, including fixed wireless antennas, pursuant to Section 303(d), as well as ancillary authority pursuant to Sections 1, 201(b), 202(a) and 205(a) of the Communications Act, and both the Preamble to and Section 706 of the 1996 Telecommunications Act. Private lease agreements that impair a user's ability to install an antenna falling within the scope of the Commission's OTARD rules conflict with the Commission's authority over such antenna siting as well as the policies embodied in these sections. In addition, such a lease agreement stands as an obstacle to the accomplishment and full objectives of federal law to facilitate the availability of advanced communications services and to foster competition. Accordingly, we conclude, consistent with the D.C. Circuit's decision in *BOMA*, that the Commission has ample

[128] *Competitive Networks Order on Reconsideration*, 19 FCC Rcd at 5639-40 ¶¶ 5-7. *See also* Implementation of Section 207 of the Telecommunications Act of 1996, *Second Report and Order*, CS Docket No. 96-83, 13 FCC Rcd 23874, 23878-81 ¶¶ 10-15 (1998).

[129] *BOMA*, 254 F.3d at 96.

[130] *Id.* at 92.

[131] *Competitive Networks Order on Reconsideration*, 19 FCC Rcd at 5640 ¶ 7.

[132] *Id.*

authority to prohibit private leasing restrictions that would impair installation of fixed wireless OTARD antennas like Continental's.

49. In sum, no arguments that Massport has made give us reason to change our earlier conclusions that the Commission has statutory authority in these circumstances.

2. Takings

50. Massport asserts that the application of OTARD to Continental's Wi-Fi antenna would be an impermissible taking of private property in violation of the Fifth Amendment of the United States Constitution.[133] According to Massport, the use of the Wi-Fi antenna would necessarily require the connection of the antenna to an Internet service provider via wire or cable through common and restricted areas of the airport. Consequently, Massport argues that allowing Continental to place wires or cables in common areas would result in a taking of Massport's property.

51. As the Commission explained when expanding the OTARD rules to leased property, the placement of antennas within a leased area that is within the exclusive use and control of a tenant is not a physical taking,[134] and the U.S. Court of Appeals for the D.C. Circuit has affirmed this conclusion in the face of *per se* takings challenges.[135] The application of the OTARD rules to areas not within the tenant's exclusive use and control is not at issue here because Continental has only petitioned us to allow placement of a Wi-Fi antenna within the President's Club lounge, and the cabling Continental uses to connect its Wi-Fi system to an Internet service provider was installed prior to Continental's installation of the Wi-Fi system at issue.[136] Accordingly, we need not address the placement of wiring or cables in areas outside the exclusive use and control of the tenant.

52. Massport also claims that allowing Continental to place a Wi-Fi antenna in the President's Club lounge would be an impermissible regulatory taking of its property rights. Specifically, Massport notes that granting Continental's petition would not advance the goals of the 1996 Act; would cause it economic harm by requiring Massport to devote substantial resources to monitor the installation of tenant's antennas and decrease the revenue of the airport Wi-Fi backbone; and would interfere with the expectation that Massport would generate sufficient revenue to offset operating cost of the airport.[137]

53. Courts determine whether a government entity has engaged in a regulatory taking by examining three factors: (1) the character of the government action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectations.[138] In this instance, the character of the

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[133] *Reply Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed October 13, 2005, 13-15; *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 20-23.

[134] Implementation of Section 207 of the Telecommunications Act of 1996, *Second Report and Order*, CS Docket No. 96-83, 13 FCC Rcd 23874, 23882-89 ¶¶ 17-29 (1998).

[135] *Bldg. Owners and Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 97-100 (D.C. Cir. 2001) (rejecting a *per se* taking claim while leaving open the possibility that the OTARD rule could result in a regulatory taking).

[136] *Reply Comments of Continental Airlines, Inc*., ET Docket No. 05-247, filed October 13, 2005, Exhibit B ¶ 4.

[137] According to Massport, the application of the 1996 Act's goals of encouraging telecommunication competition and the commercial deployment of new technologies is not furthered because Internet service is an information service as opposed to a telecommunications service, and because Continental's service is offered for free instead of on a commercial basis. *Ex parte Comments of the Massachusetts Port Authority*, ET Docket No. 05-247, filed December 16, 2005, 22. As discussed above, Massport is mistaken because Continental's Wi-Fi antenna does transmit commercial signals and competition in and deployment of advanced telecommunications technology is furthered by Continental's Wi-Fi antenna.

[138] *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

government action is strongly in favor of finding that there is no regulatory taking because, as explained above, applying the OTARD rules in this situation will promote the important government interest of increasing competition and encouraging the deployment of advanced communication technology. As noted above, Wi-Fi devices such as those used by the airport Wi-Fi backbone are Part 15 devices that have no expectation or right to interference-free operation. Similarly, a party can hold no right or expectation that it will be able to operate its Part 15 devices without economic competition from other Part 15 devices. Hence, any economic harm resulting from interference to the airport Wi-Fi backbone or from Continental's passengers and employees using Continental's Wi-Fi instead of the airport Wi-Fi backbone need not be considered. Furthermore, neither Massport nor AWG have any reasonable expectation or right to generate revenue from the use of unlicensed spectrum. Therefore we conclude that granting Continental's petition will not result in a regulatory taking of Massport's property rights.

IV. ORDERING CLAUSES

54. Accordingly, IT IS ORDERED that, pursuant to Section 1.4000(d) of the Over-the-Air Reception Devices Rule, 47 C.F.R. § 1.4000(d), and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the Petition for Declaratory Ruling filed by Continental Airlines, Inc. on July 8, 2005 is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: Continental Airlines; Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules, *Memorandum Opinion & Order.*

Today's declaratory ruling reaffirms the Commission's dedication to promoting the widespread deployment of unlicensed Wi-Fi devices. It clarifies that American consumers and businesses are free to install Wi-Fi antennas under our OTARD rules – meaning without seeking approval from their landlords – just as they are free to install antennas for video programming and other fixed wireless applications.

Wi-Fi is one of the Commission's greatest wireless success stories. The genius of this unlicensed technology is that no central authority controls or manages how and where these networks spring up. Instead, any private or commercial operator who sees a need for a local Wi-Fi network may build and operate one. The price that Wi-Fi users pay for this freedom is that they, like all Part 15 users, must accept interference from other devices in the unlicensed bands. But the nation's half-decade of experience with this new technology has made it quite plain that this trade-off is more than worth it. When it comes to providing broadband over the unlicensed bands, the airwaves are truly the ***people's airwaves***. So while I certainly support strong licensing regulation in some contexts, I think it is equally important that we leave other portions of the spectrum open to unlicensed uses.

Today's decision ensures that the Wi-Fi bands remain free and open to travelers, who can make productive use of their time while waiting to catch their next flight in an airport. They will be able to choose from among multiple providers, including members-only airport lounges as well as coffee shops or businesses that may choose to attract customers by offering Wi-Fi service at lower prices than the airport authority offers.

I do want to note that I approve of today's decision only because the record is clear – in fact, uncontested – that allowing multiple Wi-Fi operators in the airport will cause no interference to the safety-of-life communications that the airport authority conducts on its dedicated, separate, and licensed public safety channels. In the unlikely event that technical developments change this balance, I would of course support swift and forceful remedial action from this Commission.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: Continental Airlines; Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, Memorandum Opinion and Order*

Today we strike a victory for the WiFi revolution in the cradle of the American Revolution. The WiFi movement embodies the spirit of American freedom, and in our action we say "don't tread on me." The movement has been one of the great telecommunications success stories because it enables American consumers and businesses to offer and receive broadband services at the most local levels – at any time, in any place.

In this vein, I support the application of our OTARD rules to unlicensed devices under Part 15 of our rules because these devices transmit and receive fixed wireless signals as is required by OTARD. That Part 15 services are "unlicensed" does not mean that they should be treated differently than "licensed" ones for purposes of our OTARD rules.

Of course, I am sensitive to the operational challenges presented by airport environments. And the Commission has in place numerous services and rules that allow for licensed communications by public safety and commercial entities alike in these locales. To the extent there is an interference problem with these licensed operations, particularly those involving public safety services, we should quickly step in.

But these same protections can not and should not extend to WiFi use. While unlicensed services are ubiquitous, WiFi users are not able to claim the same interference protection typically afforded licensed operators. It's an important tradeoff, and a critical one. As we affirm today, WiFi users can freely deploy their networks in areas under their control, but, in return, must accept interference from other WiFi operators.