

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
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Petition by Continental Airlines, Inc. For)
a Declaratory Ruling Regarding Whether) ET Docket No. 05-247
Certain Restrictions on Antenna Installation)
Are Permissible Under the Commission's)
Over-the-Air Reception Devices (OTARD))
Rules)
)
)

**EX PARTE COMMENTS OF
NEW AMERICA FOUNDATION, CHAMPAIGN URBANA WIRELESS NETWORK,
ACORN ACTIVE MEDIA FOUNDATION, MARCUS SPECTRUM SOLUTIONS, FREE
PRESS, NATIONAL HISPANIC MEDIA COALITION, MASSPIRG,
FREENETWORKS.ORG, HAWAII CONSUMERS,
AND
U.S. PIRG**

This proceeding marks a watershed in the history of unlicensed spectrum. Never before in an FCC proceeding have business users of unlicensed spectrum (as opposed to vendors of unlicensed devices and related products) stepped forward and so forcefully endorsed both the need for unlicensed spectrum and the underlying principles that justify that need. The public interest and the overwhelming majority of private interests are in complete harmony. The Commission should grant the Continental *Petition* and deny the Massport the ability to leverage its status as landlord to exact anticompetitive concessions from its tenants.

NAF, *et al.* endorse the principles of open access and the key legal arguments articulated by Continental Airlines, American Airlines, the Air Transport Association of America, T-Mobile, Partners Healthcare System, Inc., and the Enterprise Wireless Alliance. NAF, *et al.* further note that the position of CTIA, which has often sought to limit the availability of unlicensed spectrum, underscores the importance and far reaching consequences of the Commission's decision in this case. Should the Commission grant landlords the ability to control access of consumer to over the air receiver devices, it will have profound anti-competitive consequences for deployment of both unlicensed *and* licensed spectrum services.

Continental Airlines characterizes the essence of its Petition for Declaratory Ruling as "the promotion at Boston's Logan International Airport of: (1) competition in the provision of unlicensed wireless services; (ii) the availability of advanced wireless services; and (iii) consumer choice." NAF, *et al.* agree that these are the underlying principles at stake in this proceeding.

Further, as Continental and others have shown, the landlords in this case have not proven that the public safety and central antenna exceptions to the OTARD rules apply here. Nor have they demonstrated that a waiver of the OTARD rules in this case would serve the public interest. Furthermore, contrary to the assertions of Massport and its supporters, extension of the OTARD rules to transceivers is consistent with both the purpose and administration of the OTARD rules and the Commission's general principles of spectrum management under Part 15. Finally, as others have demonstrated, the arguments that the FCC exceeded its authority when it extended the OTARD rule to fixed wireless antennas or that the FCC lacks exclusive authority to regulate the installation and

use of antennas to provide WiFi and other unlicensed wireless services have no merit. Nothing in Massport's status as an instrumentality of a state government in any way conflicts with the exclusive jurisdiction over wireless services Congress granted the FCC.

NAF, *et al.* file these additional comments to highlight the massive harm that would result if the Commission rejected Continental's *Petition*. As suggested in the comments of T-Mobile, Enterprise Wireless Alliance, and Partners Healthcare System, the implications of this proceeding go far beyond airport applications and could affect literally millions of business users of unlicensed spectrum. Moreover, the implications extend far beyond the applications that are the focus of this proceeding. Last year alone more than 1 billion RFID devices and 100 million Bluetooth devices were sold in the U.S.; these and many other unlicensed devices, such as cordless telephones – some of which operate in the same band as WiFi - could all be affected by this proceeding and the dangerous precedent it could set.

A. Denying The Continental *Petition* Will Have Detrimental Impacts On Wireless Broadband, With Potentially Devastating Impacts on WISPs and CWNs.

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In particular, however, NAF, *et al.* wish to stress to the Commission the damage to broadband deployment should the Commission deny the *Continental Petition*. In particular, the impact will prove devastating to Community Wireless Networks (CWNs). Because WISPs and CWNs provide connectivity in rural areas and to urban and suburban communities least likely to be served by traditional wireline providers (or least likely to be able to afford such offerings). The Commission has a requirement to remove the barriers to small business entry in telecommunications, *see* 47 USC

§257, and to ensure timely deployment of advanced telecommunications services to *all* Americans, Telecommunications Act of 1996 §706. The Commission also has a general responsibility to promote competition and the general, more effective use of wireless spectrum. 47 USC §301; *United States v. FCC*, 652 F.2d 72 (DC Cir. 1980)(en banc). It should therefore weigh the impact on deployment of wireless broadband generally, and WISPs and CWNs specifically, with great care.

As Massport’s behavior demonstrates, landlords may seek additional revenues from auctioning “exclusive” rights to their tenants. In addition, incumbent broadband providers will seek exclusive contracts with landlords to prevent competitors from challenging their dominance. In either case, the cost of broadband deployment will rise as a consequence and the availability of competitive choices to consumers – the purpose of the OTARD rules – will vanish.

WISPs and CWNs will suffer the greatest harm in such situations. As small businesses, WISPs cannot hope to win a “bidding war” against a local wireline incumbent for access to commercial customers leasing space in a shopping mall or office building, or residential customers renting apartments or living in condominiums. Even absent the need to bid for exclusive access against well funded rivals, WISPs cannot afford the extra cost of paying to reach willing customers.

For CWNs, the situation would be even more dire. CWNs are often volunteer operations using donated equipment. Often they provide connectivity to poor residents in MDUs who could not otherwise afford access. For example, the Wireless Community Networks, a project of the Chicago Neighborhood Technology Center and its partners, provides connectivity in the North Lawndale neighborhood of Chicago.¹ These volunteer, community-based efforts cannot possibly afford to pay

¹ <http://wcn.cnt.org/>

any kind of “access fee” to a landlord in order to provide service to communities – let alone win a “bidding war” with an incumbent wireline or fixed wireless provider.

B. To the Extent The Commission Gives Credence to Massport’s Public Safety Arguments, It Should Establish Only the Most Narrow Exception to the OTARD Rules.

Massport has also alleged that there is some public safety interest at stake here that can be met by allowing them exclusive control of Wi-Fi in the airport. In addition to the rebuttals provided by others, NAF, *et al.* observe that none of the public safety entities that operate in Massport have filed any comments in support of Massport. The Massachusetts state police that provide security at the airport and have been silent. The Department of Homeland Security, which operates at the airport through its Transportation Security Administration and Customs and Border Protection, has also declined to support Massport.

To the extent this raised a genuine concern with regard to airport safety or the safety of air travel, the Federal Aviation Administration could act independently. Under the Airways Facilities Act, the FAA it has independent authority to make “electromagnetic compatibility hazard determinations.” While not legally binding, such a determination would put great pressure on Continental, as a regulated air carrier, to cease providing an independent wifi hotspot. But the FAA has taken no such action. Indeed, it has not even troubled to comment in this proceeding.

To the extent Massport expresses concern with the proliferation of Part 15 transmitters, the OTARD rules do not allow lessees to place transmitters in “common areas” not under the exclusive control of the lessee. Massport can require Continental, or any other lessee, to confine its equipment

to its own premises. Given the limited power available to Part 15 devices, this restriction should more than adequately address any legitimate safety concerns.

The Commission must not allow the important public interest in public safety to become the pretext of landlords seeking to auction their own airwaves or incumbents seeking to create barriers to competitors. Any landlord can claim that in the “interest of public safety,” the landlord should have exclusive control over use of radio spectrum. For example, a landlord might claim that tenant use of Part 15 devices for broadband might interfere with the operation of security systems, fire detection systems, or even baby monitors and cordless phones. If the Commission permits landlords to make “public safety” claims on the basis of the speculative and unsupported claims set forth by Massport, it will vitiate the protections of the OTARD rules and deny consumers their intended benefits.

Accordingly, if the Commission *does* deny the Continental *Petition* – a result in no way supported by the record – the Commission should take great pains to limit the scope of its decision to the facts before it. The Commission should affirm the general applicability of the OTARD rules to Part 15 transmitters, and carve out a narrow exception limited exclusively to Massport (or, at most, airports generally) on the basis of the facts in evidence. The Commission should clarify that landlord’s must seek a waiver of the OTARD rules before attempting to act against lessees, in contrast to the actions of Massport in the instant case. Finally, the Commission should make clear that landlords demanding exclusive control of public spectrum in the name of “public safety” will face a high burden and searching inquiry before receiving any waiver to the OTARD rules.

CONCLUSION

The Commission is charged under Section 1 of the Communications Act of 1934, as amended “to make available, so far as is possible, to all the people of the United States ...a rapid, efficient, Nation-wide ... radio communications service with adequate facilities at reasonable charges”, For more than two decades the Commission has been making the presumption that reasonable competition was the best way to further this goal and the burden has been on those opposed to competition to show why monopolies are in the public interest. Massport has failed to do so.

As a consequence of the Commission’s pro-competitive policies in management of Part 15 devices, the unlicensed spectrum market is witnessing explosive growth and innovation. It would be a tragedy for the Commission to undercut the very principles on which this success has been based by excluding Part 15 transceivers from the protection of the OTARD rules.

WHEREFORE, NAF, *et al.* request the Commission grant the Continental Airlines *Petition for Declaratory Ruling*.

Respectfully submitted,

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COMMENTING PARTIES

New America Foundation is a nonpartisan, non-profit public policy institute based in Washington, D.C., which, through its Spectrum Policy Program, studies and advocates reforms to improve our nation's management of publicly-owned assets, particularly the electromagnetic spectrum. <http://www.newamerica.net>.

The Champaign Urbana Wireless Network (CUWN) operates and administers a municipal wireless network for the City of Champaign, IL using open source mesh technology that it has developed and released to the public. Thousand of people from around the world have downloaded this software to implement commercial and noncommercial mesh networks in environments from the largest American cities to isolated villages in developing nations. CUWN is a recognized leader in the open source community for the development of wireless mesh solutions and provides advice to community wireless networks both in the United States and abroad.

Acorn Active Media is a consulting firm that engages in software, website and technical development in service of the global justice movement.

Marcus Spectrum Solutions is a private consulting firm specializing in spectrum issues.

Free Press is a national nonpartisan organization working to increase informed public participation in crucial media policy debates, and to generate policies that will produce a more competitive and public interest-oriented media system with a strong nonprofit and noncommercial sector. <http://www.freepress.net/>

National Hispanic Media Coalition is based in Los Angeles with chapters in New York, Dallas, Albuquerque, Phoenix, San Diego, Detroit, Sacramento/San Jose, Chicago, Indiana, New Jersey, Philadelphia, Houston, Puerto Rico and Miami. NHMC is a non-profit, Latino Civil Rights and media advocacy organization working to improve the image of Hispanic-Americans as portrayed by the media and to increase the number of Hispanic-Americans employed in all facets of the media industry.

MASSPIRG is a statewide non-profit, non-partisan public interest advocacy organization with 50,000 members in Massachusetts (many of whom travel through Logan Airport). MASSPIRG works to promote environmental preservation, consumer protection and good government.

FreeNetworks.org is a volunteer cooperative association dedicated to education, collaboration, and advocacy for the creation of networks providing free local transit of bit-traffic following guidelines promulgated by FreeNetworks.Org. FreeNetworks.org membership includes more than 50 community wireless networks, as well as community advocates, system administrators,

RF engineers, writers, lawyers, programmers, business owners, and many others who want to help build FreeNetworks in their local communities.

Hawaii Consumers is a research and advocacy group addressing consumer concerns in the State of Hawaii.

U.S. PIRG was founded in 1983 as the association of all state public interest research groups (PIRGs). U.S. PIRG works to promote the public interest and consumer protection in the nation's capital in the same way its member organizations work to promote these goals in state capitals.