

channel bandwidth and is within the bands 18,820–18,870 MHz or 19,160–19,210 MHz:

A = 35 + .003 (F – 0.5B) dB

or,

80 dB (whichever is the lesser attenuation).

Where:

A = Attenuation (in decibels) below output power level contained within the channel for a given polarization.

B = Bandwidth of channel in kHz.

F = Absolute value of the difference between the center frequency of the 4 kHz band measured at the center frequency of the channel in kHz.

(B) In any 4 kHz band the center frequency of which is outside the bands 18.820–18.870 GHz: At least 43 + 10 log P (mean output power in watts) decibels.

(iv) Low power stations authorized in the band 18.8–19.3 GHz after June 8, 2000, are restricted to indoor use only. No new licenses will be authorized for applications received after April 1, 2002.

\* \* \* \* \*

■ 14. Section 101.603 is amended by revising paragraphs (a)(2) and (b)(3) to read as follows:

**§ 101.603 Permissible communications.**

(a) \* \* \*

(2) In the frequency bands 6425–6525 MHz, 17,700–18,580 MHz, and on frequencies above 21,200 MHz, licensees may deliver any of their own products and services to any receiving location;

\* \* \* \* \*

(b) \* \* \*

(3) Be used to provide the final RF link in the chain of transmission of program material to multichannel video programming distributors, except in the frequency bands 6425–6525 MHz and 17,700–18,580 MHz and on frequencies above 21,200 MHz.

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**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 15**

[ET Docket No. 05–247; FCC 06–157]

**Over the Air Reception Devices (Continental Airlines)**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document addresses a Petition for Declaratory Ruling filed by Continental Airlines, Inc. (Continental) pertaining to the installation and use of a Wi-Fi antenna within its lounge at Boston-Logan International Airport (Logan Airport). 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. The Commission finds that Massport’s restrictions on Continental’s use of its Wi-Fi antenna are pre-empted by the OTARD rules and it grants Continental’s petition.

**DATES:** Effective November 1, 2006.

**FOR FURTHER INFORMATION CONTACT:** Nicholas Oros, Policy and Rules Division, Office of Engineering and Technology, (202) 418–0636, e-mail *Nicholas.Oros@fcc.gov*.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission’s *Memorandum Opinion and Order*, ET Docket No. 05–247, FCC 06–157, adopted October 17, 2006 and released November 1, 2006. The full text of this document is available on the Commission’s Internet site at *www.fcc.gov*. It is also available for inspection and copying during regular business hours in the FCC Reference Center (Room CY–A257), 445 12th Street., SW., Washington, DC 20554. The full text of this document also may be purchased from the Commission’s duplication contractor, Best Copy and Printing Inc., Portals II, 445 12th St., SW., Room CY–B402, Washington, DC 20554; telephone (202) 488–5300; fax (202) 488–5563; e-mail *fcc@bcpiweb.com*.

**Summary of the Memorandum Opinion and Order**

1. The Commission’s OTARD rules prohibit restrictions on property that impair the use of certain antennas. 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. 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 the antenna; or preclude the reception of an acceptable quality signal via the antenna. 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.

2. 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. The 1996 Act 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. 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. In 2000 the Commission extended the OTARD rules to antennas that transmit or receive fixed wireless signals.

3. 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. Such a determination is highly dependent on the facts alleged by the parties involved. Continental has filed such a petition alleging that Massport has demanded that it remove a Wi-Fi antenna from its lounge at Logan Airport in contradiction of the OTARD rules.

4. 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. 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. Lastly, the antenna must be used to receive or transmit fixed wireless signals. Massport concedes that Continental’s Wi-Fi antenna satisfies the first condition, i.e., the antenna is less than one meter in diagonal measurement. The Commission finds that the second requirement is also satisfied. There is no dispute that Continental has a direct leasehold interest in the airport lounge where the

Wi-Fi antenna is located, nor is there any indication in the record that the lounge is not exclusively used and controlled by Continental. It is Continental 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 lounge and has exclusive use and control of the leased premises.

5. For purposes of the third condition, that the antenna receives or transmits fixed wireless signals, a signal is a fixed wireless signal if it is (1) commercial, (2) non-broadcast, and (3) transmitted via wireless technology to and/or from a fixed customer location. The Wi-Fi antenna transmits commercial signals because Continental accesses a commercial Internet service that it receives over a wireline connection and uses the antenna to transmit those same commercial signals within the lounge. There is no dispute that the Wi-Fi signals are non-broadcast. The application of OTARD is not limited to fixed antennas used for signals originating or terminating outside of the leased premises. Thus, Continental's Wi-Fi antenna transmits signals via wireless technology to and/or from a fixed customer location.

6. Continental's Wi-Fi antenna is not excluded from OTARD as a "hub" antenna used to deliver service to others. 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. The present case involves 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. Consequently, Continental's Wi-Fi antenna cannot be considered a hub antenna.

7. 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. The restrictions contained in Massport's lease with Continental for the airport lounge unreasonably impair the use of Continental's antenna because the lease provisions for the lounge allegedly require that Continental discontinue use of or remove its Wi-Fi antenna and because the lease allegedly prohibits making alterations to the premises without submitting an application to and receiving prior approval.

8. The presence of an airport Wi-Fi backbone that provides coverage throughout the airport does not provide an exception to the OTARD rule as a "central antenna." The Commission has explicitly declined to adopt a central antenna exception to the OTARD rule. 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. The restrictions constitute an impairment because of the time delay in which Massport offered allegedly comparable service, and because Continental would not be able choose its own service provider and would be limited to whatever type of services, level of network security, quality of service, and signal strength the airport Wi-Fi backbone provides.

9. Massport does not qualify for a safety exception to the OTARD rules because of potential interference to the airport Wi-Fi backbone because the OTARD safety exception addresses potential dangers to the physical safety and health of the public and not interference to other radio device users. The Commission further noted that because the Wi-Fi device that Continental is using in the lounge operates as permitted under Part 15 of the Commission's rules, Massport has no right to operate the airport Wi-Fi backbone free from interference from other Part 15 devices, and that the type of traffic carried by the airport Wi-Fi backbone does not change the application of Part 15 of the Commission's rules. Users who believe they must have interference-free communication should pursue the exclusive-use options under the licensed service models instead of relying on Part 15 devices. Massport also does not qualify for a special exemption from the OTARD rule because OTARD has no express exception for governmental entities and Massport has made no showing that its management responsibilities relating to antenna siting differ materially from those of any other landlords.

10. The Commission has the statutory authority to apply the OTARD rules to antennas used to receive and/or transmit fixed wireless signals. 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 of the 1996 Telecommunications Act. Nothing in Section 207 prohibits the Commission from exercising its authority pursuant to Section 303 and

other provisions of the Communications Act to protect the siting of other antennas that receive or transmit other types of signals. Furthermore, Section 303(d) of the Communications Act provides the Commission with express statutory authority to regulate antenna siting. Additionally, 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.

11. The Commission is able to apply OTARD to a state or local government acting in a proprietary capacity. 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 OTARD rules expressly apply to "contract provision[s]" and "lease provision[s]," of private parties. In *Building Owners and Managers Association International v. FCC*, 254 F.3d 89 (D.C. Cir. 2001) ("BOMA"), 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. 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. 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. 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.

12. The D.C. Circuit has affirmed in BOMA that application of the OTARD rules to leased property is not a per se taking of the landlord's property rights. Whether a regulatory taking has occurred is determined by considering: (1) The character of the government action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectations. No

regulatory taking has occurred because applying the OTARD rules in this situation will promote the important government interests of increasing competition and encouraging the deployment of advanced communication technology; economic harm need not be considered because no one has the right to operate part 15 devices such as Wi-Fi free of interference; and no one has a reasonable expectation to generate revenue from the use of unlicensed spectrum.

#### Ordering Clauses

13. Pursuant to section 1.4000(d) of the Over-the-Air Reception Devices Rule, 47 CFR 1.4000(d), and section 1.2 of the Commission's rules, 47 CFR 1.2, that the Petition for Declaratory Ruling filed by Continental Airlines, Inc. on July 8, 2005 is granted.

14. This Memorandum Opinion and Order does not change any rules, it grants a Petition for Declaratory Ruling, no Congressional Review requirements are necessary.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 226

[Docket No. 060228057-6283-02; I.D. 022206D]

RIN 0648-AU38

#### Endangered and Threatened Species; Designation of Critical Habitat for Southern Resident Killer Whale

**AGENCY:** National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

**ACTION:** Final rule.

**SUMMARY:** We, the National Marine Fisheries Service (NMFS), issue a final rule designating critical habitat for the Southern Resident killer whale (*Orcinus orca*) distinct population segment (DPS). Three specific areas are designated, (1) the Summer Core Area in Haro Strait and waters around the San Juan Islands; (2) Puget Sound; and (3) the Strait of Juan de Fuca, which comprise approximately 2,560 square miles (6,630 sq km) of marine habitat. We considered the economic impacts and impacts to

national security, and concluded the benefits of exclusion of 18 military sites, comprising approximately 112 square miles (291 sq km), outweighed the benefits of inclusion because of national security impacts.

We solicited comments from the public on all aspects of the proposed rule. An economic analysis, biological report, and Endangered Species Act (ESA) report were available for comment along with the proposed rule. The supporting documents have been finalized in support of the final critical habitat designation.

**DATES:** This rule becomes effective December 29, 2006.

**ADDRESSES:** The final rule, maps, and supporting documents used in preparation of this final rule, as well as comments and information received, are available on the NMFS Northwest Region website at <http://www.nwr.noaa.gov/>.

**FOR FURTHER INFORMATION CONTACT:**

Lynne Barre at (206) 526-4745, or Marta Nammack at (301) 713-1401.

**SUPPLEMENTARY INFORMATION:**

#### Background

Under the ESA, we are responsible for determining whether certain species, subspecies, or distinct population segments (DPS) are threatened or endangered, and designating critical habitat for them (16 U.S.C. 1533). In November 2005, we listed the Southern Resident killer whale DPS as endangered under the ESA (70 FR 69903; November 18, 2005). At the time of listing, we also announced our intention to propose critical habitat for the Southern Resident killer whale. Critical habitat for Southern Residents was proposed on June 15, 2006 (71 FR 34571).

#### Killer Whale Natural History

Three distinct forms of killer whales, termed residents, transients, and offshores, are recognized in the northeastern Pacific Ocean. Resident killer whales in U.S. waters are distributed from Alaska to California, with four distinct communities recognized: Southern, Northern, Southern Alaska, and Western Alaska (Krahn *et al.*, 2002; 2004). Resident killer whales are fish eaters and live in stable matrilineal pods. The Southern Resident DPS consists of three pods, identified as J, K, and L pods, that reside for part of the year in the inland waterways of Washington State and British Columbia (Strait of Georgia, Strait of Juan de Fuca, and Puget Sound), principally during the late spring, summer, and fall (Ford *et al.*,

2000; Krahn *et al.*, 2002). Pods visit coastal sites off Washington and Vancouver Island (Ford *et al.*, 2000), but travel as far south as central California and as far north as the Queen Charlotte Islands. Offshore movements and distribution are largely unknown for the Southern Resident DPS.

Detailed information on the natural history of Southern Residents is included in the Proposed Conservation Plan for Southern Resident Killer Whales (*Orcinus orca*) available at <http://www.nwr.noaa.gov/> and was summarized in the biological report and the proposed rule to designate critical habitat (71 FR 34571; June 15, 2006).

#### Summary of Comments and Responses

We requested comments on the proposed rule to designate critical habitat for Southern Resident killer whales (71 FR 34571; June 15, 2006). To facilitate public participation, the proposed rule was made available on our regional web page and comments were accepted via standard mail, e-mail, and through the Federal eRulemaking portal. In addition to the proposed rule, several draft documents supporting the proposal, including a biological report, an economic report, and a report supporting NMFS' conclusions under Section 4(b)(2) of the ESA, were posted. We obtained independent peer review of the draft biological report (NMFS, 2006a) and draft Economic Analysis (NMFS, 2006b) and incorporated the peer review comments into the documents prior to dissemination in support of the proposed rule. Two public hearings were held on July 12, 2006, in Seattle and July 13, 2006, in Friday Harbor, WA, and the public comment period closed on August 14, 2006.

We have considered all public comments, and they are addressed in the following summary. We have assigned comments to major issue categories and, where appropriate, have combined similar comments.

#### *Physical or Biological Features Essential for Conservation (Primary Constituent Elements)*

*Comment 1:* In our proposed listing determination for killer whales, we identified potential Primary Constituent Elements (PCEs) of critical habitat, including "Sound levels that do not exceed thresholds that inhibit communication or foraging activities or result in temporary or permanent hearing loss." Many commenters expressed concern that the proposed critical habitat designation did not include sound as a PCE. These commenters pointed out that killer