

MINTZ LEVIN

When You Need More...

REAL ESTATE
&
COMMUNICATIONS AND IT

ALERT

JANUARY 25, 2007

Boston

Washington

New York

Stamford

Los Angeles

Palo Alto

San Diego

London

www.mintz.com

One Financial Center
Boston, Massachusetts 02111
617 542 6000
617 542 2241 fax

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202 434 7300
202 434 7400 fax

666 Third Avenue
New York, New York 10017
212 935 3000
212 983 3115 fax

707 Summer Street
Stamford, Connecticut 06901
203 658 1700
203 658 1701 fax

Federal Communications Commission Strikes Down Lease Restrictions on Wi-Fi Antennas

By Russell H. Fox and Jeffrey A. Moerdler

The Federal Communications Commission (“FCC”) recently issued a Memorandum Opinion and Order (“Order”) that strikes down an attempt by the Massachusetts Port Authority (“Massport”), which operates Logan Airport in Boston, to limit a tenant’s ability to operate a Wi-Fi antenna to provide free wireless Internet access service to the tenant’s customers and employees. The case has important implications for landlord-tenant relations with regard to Wi-Fi and other small antennas referred to as over-the-air reception devices (“OTARDs”), which are regulated by the FCC.

Background

In July, 2004, Continental Airlines (“Continental”) installed a wireless Wi-Fi system antenna in its President’s Club in Logan Airport. The Wi-Fi system is similar to those used by consumers to create wireless networks in their homes. Continental’s system was designed to provide free wireless Internet access to passengers and Continental employees inside its President’s Club. In June, 2005, Massport demanded that Continental remove the Wi-Fi system from the President’s Club.

Massport argued that the Wi-Fi system violated Continental’s lease. It also pointed out that if airline passengers and Continental employees wanted Internet access, they could access the system provided by Advanced Wireless Group, the exclusive airport Wi-Fi provider engaged by Massport, which was available for \$7.95 per day (or by other commercial arrangements—through Continental or directly with Advanced Wireless Group). Massport also argued that the Wi-Fi system was a potential source of interference to public safety operations on airport grounds.

It is possible that Massport also shared in the revenue generated from

1620 26th Street
Santa Monica, California 90404
310 586 3200
310 586 3202 fax

1400 Page Mill Road
Palo Alto, California 94304
650 251 7700
650 251 7739 fax

9255 Towne Centre Drive
San Diego, California 92121
858 320 3000
858 320 3001 fax

The Rectory
9 Ironmonger Lane
London EC2V 8EY England
+44 (0) 20 7726 4000
+44 (0) 20 7726 0055 fax

usage of the Wi-Fi service provided by Advanced Wireless Group and, therefore, Continental's system would have reduced the revenue not only to Advanced Wireless directly but also to Massport indirectly.

Continental countered by filing a petition under the FCC's OTARD rules, arguing that, under those rules, the Massport lease restrictions on Continental's Wi-Fi system were invalid. Generally, the OTARD rules prohibit restrictions that impair the use of certain antennas, including antennas one meter or less in diagonal measurement that are used to receive and transmit wireless signals, such as the Wi-Fi antennas used by both Advanced Wireless Group and Continental at Logan Airport.

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" on which the antenna is located. Restrictions prohibited by the OTARD rules include lease provisions, state or local laws or regulations, private covenants, contract provisions, or homeowner's association rules. The OTARD rules prohibit rules that:

- 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.

The OTARD rules make no distinction between commercial or residential settings.

The FCC's Decision

Massport conceded that the Wi-Fi antenna installed in the Continental President's Club met the criteria established in the OTARD rules. In addressing Massport's other arguments, the FCC found that:

- the antenna was located on property where the user had a direct or indirect ownership or leasehold interest;
- the antenna was used to receive or transmit fixed wireless signals;
- the restrictions in the Massport lease unreasonably impaired the use of Continental's antenna; and
- Massport did not demonstrate that any exemption from the OTARD rules applied.

The FCC also rejected the various other legal issues that Massport raised.

Exclusive Use and Control

The OTARD rules apply to antennas installed in an area within “the exclusive use and control” of the party installing the antenna. This includes the premises exclusively demised to a tenant under a lease or owned by a condominium unit owner, but not the common areas outside the leased or owned premises such as the exterior of a building, a public hallway or a roof. However, if a tenant or condominium owner has exclusive use of a balcony, terrace, garden or roof area then such area would also be subject to the OTARD rules.

There was no dispute that Continental’s lease gave it the requisite leasehold interest under the OTARD rules. However, Massport noted that the terms of the lease allowed it access to Continental’s leased premises for maintenance, security, construction work, or to place utilities in, over or through the premises. The FCC found that such access did not defeat the leasehold interests under OTARD. Massport also argued that Continental was not the “user” as contemplated by the OTARD rules but that the President’s Club members were the users of the antenna and that they did not have a leasehold interest at Logan Airport. The FCC disagreed, deciding that the party that installs and operates the antenna—in this case Continental—must have the leasehold interest for OTARD to apply and that Continental was the user of the antenna that it installed and operated by sending and receiving signals to its customers and employees.

Reception and Transmission of Fixed Wireless Signals

To be covered by the OTARD rules, communications signals sent over an antenna must be:

- commercial;
- nonbroadcast; and
- transmitted via wireless technology to and/or from a fixed customer location.

Massport did not argue that the signals sent over Continental’s Wi-Fi system are nonbroadcast. However, it asserted that because Continental passengers enjoyed *free* Wi-Fi service, no commercial service was involved. The FCC disagreed, finding that the “signal” was commercial because it carried commercial Internet services, regardless of whether the “service” was free.

Massport also argued that the Continental antenna was not covered because it did not receive signals from outside the leased premises;

the Continental device, like a consumer wireless router, received a signal from a broadband connection within the Continental premises. The FCC found that the OTARD rules do not require that antennas transmit or receive signals from outside the user's premises. The FCC said that Continental's "internal" antenna was precisely the type OTARD is designed to cover because it provides a wireless alternative to Massport's network, it enhances the quality of the Internet services received by Continental, and it promotes the availability of enhanced telecommunication services.

The FCC also rejected Massport's argument that the Continental antenna acts as a "hub"—which is not protected by the OTARD rules—because the antenna distributes services to other receiving antennas housed within, for example, laptop computers. The FCC said that 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, even if invitees such as houseguests or business customers receive the signals.

The Restrictions Unreasonably Impaired Installation, Maintenance or Use

The FCC noted that not all restrictions on OTARD antennas are impermissible—only those that unreasonably delay, prevent or increase the cost of the installation, maintenance or use of an antenna, or preclude reception or transmission of an acceptable quality signal. The FCC found that Massport restrictions were prohibited under this test for several reasons. The Massport lease includes provisions:

- limiting the use of the facilities to those specified; and
- prohibiting interference with the effectiveness of any communications system.

The FCC found that these lease provisions:

- could require Continental to discontinue use of or remove its Wi-Fi antenna;
- would prevent the installation and use of an OTARD covered antenna; and
- should be preempted by the OTARD rules absent some exception.

Continental's lease also prohibited making alterations to the leased premises without submitting an application to, and receiving the permission of, Massport as landlord. Massport argued that Continental did not submit the required request for permission to make an

alteration in connection with installation of the Wi-Fi antenna. The FCC found that such prior approval provisions with respect to OTARD antennas—which unreasonably delay antenna installation and discourage people from attempting to use such antennas due to the added inconvenience and uncertainty they create—are prohibited.

The FCC did not address whether the scope of work required to install Continental's Wi-Fi system was an invasive or structural alteration to the premises, which under the lease required Massport's approval, although it seems unlikely that such an alteration was involved. More likely, the lease alteration provisions did not even apply to the installation of Continental's Wi-Fi antenna system which was likely not invasive and merely involved connecting wires to a preexisting communications line (fiber optic, telephone or cable) and plugging the antenna into an electrical outlet.

Exceptions

Massport argued that one of several exceptions to the OTARD rules allow enforcement of the Continental lease. First, it argued that a "central antenna" exception (in which a landlord makes available a master antenna to all tenants) should apply. However, the FCC found that if Continental were required to use Massport's "central antenna" facilities, it would be denied the opportunity to use its own service provider and would be limited to whatever type of services, level of network security, quality of service, and signal strength Massport's contractor provided and to the cost and timeframe at which the contractor was able to offer the service. Therefore, the FCC found that Continental would be impermissibly impaired in its attempts to secure the terms and quality of service it desired.

Massport also argued that the restrictions in its lease qualify under the safety exception to the OTARD rules because:

- the Massachusetts State Police plan on using the Wi-Fi system, and the Transportation Safety Administration ("TSA") conducted a trial using the Wi-Fi system; and
- the Continental system could cause interference to those public safety users of the Massport Wi-Fi system or users of other public safety systems.

The FCC rejected this argument. It said that the spectrum that the Wi-Fi system would use is unlicensed and not subject to protection from harmful interference. It also found that the safety exception relates to the physical antenna installation and not to the nature of the communications being received or transmitted over frequency bands used by the antenna.

Finally, Massport argued that the FCC has never enforced the

OTARD rules in a government building and questioned the applicability of competitive telecommunications access requirements, such as the OTARD rules, to airports. In response, the FCC said that the OTARD rules have no express exemption for government entities and that there is no reason to withhold application of the OTARD rules, as a general matter, to state and local governments that act as landlords. The FCC distinguished college dormitories (to which the OTARD rules do not apply) because a college dormitory is not a leasehold interest and the relationship between a college and a student is not the same as between a landlord and a tenant.

Conclusion

The Massport decision is likely to have a major impact on the real estate industry and on the nascent industry of for-profit providers of Wi-Fi services. Property owners will have little control, if any, over Wi-Fi use by tenants within their properties and may be caught in the middle as issues of interference or ability to access services arise. At the same time, Wi-Fi providers will no longer be assured of a captive audience when they enter into agreements with property owners allowing them to install service at a property.

Landlords and tenants need to be aware of the FCC's OTARD rules and the Massport case. Any restrictions on the installation or use of Wi-Fi or other small antennas within a tenant's leased premises may be unenforceable unless they comply with the OTARD rules and the Massport decision. For example, reasonable safety rules regarding the manner of installation of an antenna affixed to a terrace or building setback, or a requirement to paint an exterior antenna the color of the building, may be enforceable, but a requirement to obtain a landlord's prior approval or to pay a fee to the Landlord are likely not enforceable.

Some of the questions that may arise are:

- Can property owners restrict tenants from installing multiple satellite dish or other small antennas on terraces, balconies and other external building areas under the control of the tenant, or will tenants have the unfettered ability to install antennas?
- May property owners require proof of insurance from tenants or their contractors before antennas are installed?
- Can property owners impose what otherwise would be customary alteration approval and construction-method restrictions on antenna installations?
- Will property owners be liable if antennas are improperly

installed and fall causing injury to persons or property?

These questions, and others raised by the intersection of communications regulation and real estate, will be answered over time as technology and law evolves. At least for now, technology users have the upper hand and real estate interests must be aware of the boundaries of their rights.

* * * * *

If you have any questions regarding the subject covered in this Alert, or any related issue, please feel free to contact Russell H. Fox (RFox@mintz.com, 202.434.7483) or Jeffrey A. Moerdler (JAMoerdler@mintz.com, 212.692.6700) or the Mintz Levin attorney who ordinarily handles your legal affairs.

Copyright © 2007 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

The above has been sent as a service by the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. and may be considered an advertisement or solicitation under federal law. The distribution list is maintained at Mintz Levin's main office, located at One Financial Center, Boston, Massachusetts 02111. If you no longer wish to receive electronic mailings from the firm, please notify our marketing department by going to www.mintz.com/unsubscribe.cfm.