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SHUGHART THOMSON & KILROY'S TELECOMMUNICATIONS AND NEW TECHNOLOGIES PRACTICE GROUP TELECOM REPORT

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Shughart Thomson & Kilroy, P.C.'s Telecommunications and New Technologies Practice Group has substantial experience in regulatory and enforcement proceedings before the Federal Communications Commission ("FCC") and state regulatory agencies, and in litigation involving telecommunications matters in the federal and state Courts. We present below for your information various recent regulatory and court rulings affecting the telecommunications industry. We are available to assist you in such matters.

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FCC Rules that AT&T Unlawfully Avoided Paying Universal Service Charges and Access Fees on Pre-Paid Calling Cards

In late February 2005, the Federal Communications Commission ("FCC") determined that AT&T had unlawfully avoided making universal service contributions and paying access charges on its calling cards. AT&T had adopted a practice of inserting advertisements in its calling card service which AT&T contended transformed the calling card service into an unregulated "information service", not subject to the universal service assessments pursuant to Section 254 of the Communications Act. AT&T also claimed that calls made within a state by its subscribers using its calling card service were not subject to intrastate access charges, because they were routed through AT&T's out-of-state switching platform, thereby making these calls interstate.

The FCC rejected AT&T's claim that its practice of inserting advertisements into its calling card service made it an unregulated information service. The FCC ruled that the advertisements were incidental to the underlying telecommunications services offered to the cardholder, and therefore did not change the regulatory status of the calling card service as a common carrier service under the Communications Act. Although AT&T required customers to hear a recorded message when they made a calling card call, regardless of whether they wanted to hear it or not, this fact did not change the principle that AT&T's customers purchased the calling card to make telephone calls, not to hear recorded messages. Accordingly, the FCC ordered AT&T to file revised universal service contribution forms (FCC Form 499-A) for the entire period that AT&T provided its calling card service and withheld payment of universal service charges to the Universal Service Administration Co. ("USAC"). AT&T publicly reported to USAC that it had avoided paying $160 million in universal service contributions related to the calling card since 1999.

The FCC also rejected AT&T's contention that calls made within the state but routed through AT&T's out-of-state switching platform were not subject to intrastate charges. The FCC usually determines the jurisdiction of a call by its end points. Thus, calls that originate and terminate in the same state are considered jurisdictionally intrastate, even if they are switched out-of-state. AT&T had reported publicly that it had avoided paying $340 million in intrastate access charges owed to various carriers that assist AT&T in either originating or terminating an AT&T customer's long distance calling card calls. Several local exchange carriers have already initiated legal action against AT&T to collect the amount of money AT&T had avoided paying in intrastate access charges.

Apart from its ruling above, the FCC initiated rule-making to address the appropriate regulatory regime for calling cards. In November 2004, AT&T asked the FCC to rule that certain calling cards are information service and are not interstate telecommunications services, subject to

the FCC's jurisdiction. Rather than rule on AT&T's request, the FCC initiated rule-making to determine the proper regulatory treatment for all calling cards.

This is an issue that may ultimately cost AT&T $340 million. AT&T has appealed this FCC decision to the D.C. Circuit Court of Appeals.

If any of you want further information about the rule-making or other ways to avoid similar liability, please let us know.

FCC Opens Access to New Radio Frequency Spectrum for Wireless Broadband

The FCC adopted rules on March 10, 2005, to allow access to new radio frequency spectrum for wireless broadband services in 3650-3700 MHz frequency band (the "3650 MHz band"). In doing so, the FCC adopted an approach that utilizes regulatory models for both licensed and unlicensed radio frequencies, and provides for nationwide, non-exclusive licensing of terrestrial operations in the 3650 MHz band with technologies employing certain protocols. Under these new rules, the FCC will apply a streamlined licensing mechanism with minimal regulatory entry requirements in order to encourage new interest and stimulate a more rapid expansion of wireless broadband services, particularly in rural areas of the United States. The FCC also provided an opportunity for the introduction at 3650 MHz of a variety of new wireless broadband technologies, such as Wi-Max into this frequency band.

Specifically, there will be no limit on the number of licenses that can be obtained in the 3650 MHz band. Each licensee will be authorized to operate on a shared basis with other licensees on all 50 MHz radio frequencies included within the 3650 MHz band, subject to restrictions in geographic areas occupied by existing licensees who are grandfathered in the fixed-satellite services and federal government stations. Licensees will be required to register all system base stations electronically with the FCC. Base station registration will permit licensees to locate each other's operations and

will facilitate protection of grandfathered stations from harmful electrical interference. In addition, this type of licensing and registration format will enable the FCC to monitor the use of the 3650 MHz band as new telecommunications technologies and services develop.

New and fixed mobile stations in the 3650 MHz band will be required to use contention-based protocols, which will reduce the possibility of harmful interference from co-frequency operation by managing each station's access to radio frequency spectrum. Contention-based protocols are characterized by protocols which have the following properties:

- Procedures for initiating new transmissions,
- Procedures for determining the state of the channel, whether available or unavailable, and
- Procedures for managing re-transmissions in the event of a busy channel.

Telecommunication systems using such protocols have been common in licensed and unlicensed systems. For example, licensees operating in the private land mobile radio service ("PLMRS") bands under Part 90 of the FCC's rules, have employed contention-based systems for some time. Thus, prior to transmitting, an operator in PLMRS will listen to the traffic on the radio and wait until the channel is free before transmitting. In addition, there are more complex contention-based protocol schemes, such as those used in the unlicensed Wi-Fi devices operating in the 802.11 MHz band. In Wi-Fi systems, a station wishing to transmit must first sense the radio channel to determine if another station is transmitting. If the channel is not busy, the transmission may proceed. This avoids collisions among stations sharing the frequency by utilizing a back-off time if the stations sense a busy channel.

The FCC gave all licenses the mutual obligation to cooperate and avoid harmful interference to one another, by requiring mobile stations to positively receive and decode an enabling signal transmitter by a base station.

The FCC concluded that there should be no eligibility restrictions other than statutory foreign ownership restrictions, and no in-band or out-of-band spectrum aggregation limits. Licenses for spectrum in the new 3650 MHz band will have a ten-year license, with the right to renew, and licensees will be free to assign and transfer their non-exclusive nationwide licenses, and to assign, transfer or share base stations. The FCC has not yet announced an official date for filing applications for new frequencies in the 3650 band, but will do so in the near future. The new rules will be included in Part 90 of the FCC's rules.

If any of you want further information with respect to the new frequency spectrum, and the technical requirements or where to apply, please don't hesitate to contact us.

FCC Extends Truth-in-Billing Rules to Wireless Telephones

The FCC has expanded the federal consumer protection rules that apply to consumers' wireless telephone bills. In addition, the FCC has initiated rule-making proceedings seeking public comment on additional measures to facilitate the ability of telephone consumers to make informed choices among competitive telecommunications service offerings.

Specifically, the FCC took the following action:

- Removed the existing exemption for commercial mobile radio service ("CMRS") carriers from the FCC's rules requiring that billing descriptions be brief, clear and non-misleading, and in plain language;
- Held that it is misleading to represent discretionary line-item charges on a bill in any manner that suggests such line items are taxes or government-mandated charges;

- Clarified that the burden rests upon the wireless carrier to show that any line-item that purports to recover a specific governmental or regulatory program fee conforms to the amount authorized by the government to be collected; and
- Clarified that state regulations requiring or prohibiting the use of line items or CMRS constitute rater regulations and are preempted by the FCC.

In its notice of proposed rule-making, the FCC requested comment on the following subject matters:

- The distinction between governmental-mandated and other charges;
- Whether wireless carriers who choose to list charges in separate line items on their customers' bills, must place government-mandated charges in a section of the bill separate from other charges;
- Whether it is unreasonable to combine federal regulatory charges into a single item;
- Whether carriers must disclose the full rate , including any non-mandated line items and a reasonable estimate of government-mandated surcharges to the consumer at the point of sale; and
- Whether the FCC should preempt inconsistent state regulation of telecommunications carrier-specific true in rules.

Please don't hesitate to contact us if anyone has any questions about the FCC's new Truth in Billing Rules applicable to wireless services, or the FCC's requests for comments described above.

The FCC Determines Bell South Not Required to Offer "Naked" Digital Subscriber Line Service ("DSL") Services

On March 25, 2005, the FCC issued its Memorandum, Opinion and Order and Notice of Inquiry on Bell South Telecommunications, Inc.'s request for a declaratory ruling that state public

utility commissions may not regulate broadband internet access services by requiring Bell South to provide wholesale or retail broadband services to customers of competitive local exchange carriers ("CLEC") who use unbundled network elements to provided service voice service to their customers. In other words, the FCC ruled that state commissions may not require Bell South to provide "naked" DSL services to end users over the same unbundled network element loop facility that a CLEC uses to provide voice services to that end-user. For example, if an end-user subscribes to a local exchange service from MCI, and MCI utilizes unbundled network elements obtained from Bell South to serve that customer, Bell South is not required to provide that end-user with DSL. Bell South has a policy in its service region of not selling DSL services to end-user customers who purchase voice services from CLEC utilizing unbundled network element loops. The state public utilities commissions in Florida, Kentucky, Louisiana and Georgia, however, have ordered Bell South to provide such service, at varying times in 2003. Accordingly, in late 2003, Bell South challenged a request for a declaratory ruling asking the FCC to preempt state utility commission decisions by asserting that the state commissions' decisions conflicted with and substantially prevented the implementation of the FCC's unbundling rules which have promulgated in its triannial review order ("TRO"). The FCC agreed with Bell South.

Thus, Bell South is not required to provide DSL services to end users which obtained voice services from a competing local exchange carrier utilizing unbundled network elements to provide the user voice services.

The Bell South policy of refusing to sell "naked" DSL service to end users who obtain voice service from a CLEC utilizing Bell South's UNEs appears anti-competitive even though it has the FCC's blessing. We expect a court appeal of this FCC decision.

The FCC Maintains Its Ban on Cable Operator Deployment of Integrated Set Top Boxes

In order to promote competition and assure commercial availability of cable-ready digital television equipment, the FCC adopted a Second Report and Order concerning availability of navigation devices, which maintains the ban on cable operator deployment of integrated set-top boxes, but defers the effective date of the prohibition from July 2006 to July 2007. This one year deferral is intended to give cable operators additional time to investigate and develop a downloadable security solution that will allow calmer alliance by cable operators and consumer electronic manufacturers on an identical cell or security function, thereby reducing certain costs.

Under the FCC's Second Report and Order, by December 1, 2005, the cable television industry must report to the FCC the following:

- Whether development and deployment in downloadable security is feasible;
- If it is feasible, a timeline for deployment and a commitment to use downloadable security in its own devices; and
- A graph of licensing terms for downloadable cell solutions.

In addition, the cable industry must report to the FCC by August 1, 2005, and every 60 days thereafter, the following:

- Status reports of the results of joint meetings which the industry must hold the FCC on progress on the negotiation of by-directional plug and play agreements, and cell phone security agreements.

Further, by August 1, 2005, and every 90 days thereafter, the six largest cable operators which include Comcast, Times-Warner, Cox, Charter, Adelphia and Cablevision Systems, must file status reports on their development of cable card deployment, including the following:

- The number of cable cards in service;

- Whether service calls are required for installation;
- The monthly price for cable cards;
- Problems encountered with cable cards and how they have been resolved; and
- The progress on development and a timetable for deployment of multistreamed cable cards.

Section 629 of the Communications Act directs the FCC to adopt regulations to assure the commercial availability of navigation device equipment used by consumers to access cable or satellite telecommunication services. In 1998, the FCC adopted a First Report and Order setting a deadline of January 2005 for cable system operators to cease deploying set-top boxes with integrated security. In April 2003, the FCC extended the deadline to July 2006, because of on-going marketplace developments. The FCC's action in the Second Report and Order, as stated above, maintains the prohibition on cable operator deployment of integrated set-top boxes, but gives the cable industry until July 2007 to cease such deployment altogether.

Supreme Court Rules that an Individual May Not Enforce Limitations in Section 332(c)(7) of the Communications Act on Local Zoning Authorities by an Action Brought Pursuant to Section 1983 of the Civil Rights Act

In City of Rancho Palos Verdes, et al., v. Abrams, on March 22, 2005, the United States Supreme Court held that an individual may not enforce the limitations in Section 332(c)(7) of the Communications Act on local zoning authorities through an action brought pursuant to Section 1983 of the Civil Rights Act 42 U.S.C. Section 1983 . Section 1983 allows a person who has been deprived of a constitutional right to bring a civil action in federal court. The Supreme Court held that because the Communications Act provided a judicial remedy different from that in Section 1983, Section 332(c)(7) itself precludes resort to a Section 1983 claim. In this case, the City of Ranchos Palos Verdes, California denied Respondent Mark Abrams permission to construct a radio

tower on his property within the city limits. Abrams then filed a Complaint in U.S. District Court for the Central District of California seeking, among other things, injunctive relief under Section 332(c)(7) of the Communications Act, and monetary damages under Section 1983 of the Civil Rights Act, 42 U.S.C. Section 1983.

Section 332(c)(7) of the Communications Act imposes specific limitations on the traditional authority of state and local governments to regulate: (1) the location, (2) construction, and (3) modification of wireless communication facilities, and provides that a person adversely affected by a final action by such a local government may begin an action for redress in any court of competent jurisdiction. The federal District Court in California held that Section 332(c)(7) provides the exclusive remedy for Palos Verdes' actions and, accordingly, ordered Palos Verdes to grant Abrams' application for a conditional use permit, but refused Abrams' request for damages and attorneys' fees under Section 1983. Subsequently, the U.S. Court of Appeals for the 9th Circuit reversed the federal District Court on the latter point.

In this case, the Supreme Court held that even after a Plaintiff demonstrates that a federal statute creates an individually enforceable right in a class of beneficiaries to which he belongs, the Defendant may rebut the presumption that the right is enforceable under Section 1983 by, among other things, showing a contrary congressional intent from the statute's creation of a comprehensive remedial scheme that is inconsistent with individual enforcement of individual rights under Section 1983. The Supreme Court had determined in its prior decisions that the provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a remedy under Section 1983.

In addition, the Supreme Court held that Congress could not have meant that the judicial remedy expressly authorized in Section 332(c)(7) would co-exist with an alternative remedy under

Section 1983, since enforcement of the remedy under Section 332(c)(7) of the Telecommunications Act pursuant to Section 1983 would distort the scheme of quick judiciary review and unlimited remedies created in Section 332(c)(7). The Supreme Court reasoned that the Communications Act has no remedies available under Section 1983, and limits judicial relief in ways that Section 1983 does not. Moreover, judiciary review under Section 332(c)(7) must be sought within thirty (30) days after the governmental entity has taken final action with respect to location, construction and modification of wireless communications facilities, and once review is sought, the appropriate Court must hear and decide the review on an expedited basis. Under Section 1983, the statute of limitations for legal actions brought under that section are governed by state law, which is generally longer than thirty (30) days. Unlike the remedies provided for under Section 1983, the remedies provided under the Communications Act in Section 332(c)(7) do not include compensatory damages or attorneys' fees and costs.

The importance of this case is that a person may not enforce the limitations on local zoning authorities representing wireless facilities set forth in Section 332(c)(7) of the Communications Act through an action brought pursuant to 42 U.S.C. Section 1983 of the Civil Rights Act and seek damages and attorneys' fees. This case has significance to wireless communication providers, whose applications for location, construction and modification of wireless facilities are denied by local zoning authorities. In such cases, wireless providers must seek action from an adverse final zoning decision by as state or local government within thirty (30) days under the Communications Act, and cannot bring an action under Section 1983.

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If you have any questions about this Report, or recent FCC or state regulatory actions, or federal or state court rulings affecting telecommunications, or any of our services, please don't hesitate to contact us.

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