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

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.

What's in this edition:

FCC VACATES ITS ORDER THAT CERTAIN BELL OPERATING COMPANIES' DARK FIBER OFFERINGS CONSTITUTE COMMON CARRIER OFFERINGS SUBJECT TO TARIFF AND LICENSING REQUIREMENTS

The Federal Communications Commission ("FCC"), in response to a 1994 Order from the U.S. Court of Appeals for the D.C. Circuit in *Southwestern Bell v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) ("Dark Fiber Remand Order"), has determined that it does not have sufficient evidence to conclude that, at the present time based on the record before the FCC, the Bell Operating Companies ("BOCs") are offering dark fiber on a common carrier basis, or that the FCC should require dark fiber arrangements to be offered on a common carrier basis. Thus, the FCC has ruled that, on a going-forward basis (from January 2008) it has no basis to conclude that the public interest requires the BOCs to offer dark fiber on a common carrier basis. Dark fiber is optical fiber infrastructure that is in place but is not being used.

This FCC decision puts an end to the FCC's original decision issued in 1989 in *Local Exchange Carriers' Individual Case Basis DS3 Service Offerings; GTE Telephone Operating Company's Revisions to Tariff,* F.C.C. No. 1, 4 F.C.C. Rec. 8634 (1989) ("ICB Order"), in which the FCC found that BOCs had sufficient experience providing DS3 service to file general tariff rates for such services. DS3 services are high speed digital communication services equivalent to 672 voice grade circuits. In the *ICB Order*, the FCC indicated its uncertainty, however, as to whether dark fiber was subject to FCC's regulation under Title II of the Communications Act of 1934 (the "Act"). Thus, the FCC concluded in 1989 that the BOCs' limited experience in offering dark fiber on an individual case basis was not sufficient to allow the BOCs to develop dark fiber tariffs. But in 1990 the FCC considered new evidence showing that the BOCs had sufficient experience providing dark fiber, resulting in the FCC's *ICB Reconsideration Order*, F.C.C. Rec. 4842 (1990). In that *Order* the FCC required BOCs to amend their dark fiber ICBs and offer to tariff dark fiber as a generally-available service at average rates. The FCC stated in its *ICB Reconsideration Order* that the BOCs offerings of dark fiber on an individual case basis had demonstrated that the BOCs offered dark fiber on a common carrier basis subject to Title II of the Act. Subsequent to the FCC's *Reconsideration Order,* the BOCs requested that the FCC waive the tariff filing requirement for dark fiber. The FCC denied this request. In 1993, the FCC found more explicitly that dark fiber clearly fell within the Act's definition of "wire communication." This definition includes "all instrumentalities, facilities, apparatus and services incidental" to the transmission of information "between two or more points by means of electronic communications." *Southwestern Bell Tel. Co., et al.,* 8 F.C.C. Rec. 2589 (1993). On Southwestern Bell's appeal, the D.C. Circuit issued the *Dark Fiber Remand Orde,r* holding that the BOCs' offer of dark fiber on an individual case basis did not, in itself, adequately support the FCC's findings that the BOCs were offering dark fiber on a common-carrier basis subject to Title II of the Act. The D.C. Circuit also concluded that the FCC had not properly analyzed dark fiber offerings under common carrier law. *Dark Fiber Remand Order*, 19 F.3d 1484. Accordingly, the D.C. Circuit suspended the FCC's decisions requiring the BOCs to file tariffs for dark fiber offerings, and remanded the issue to the FCC for its reconsideration of the basis for its authority to regulate dark fiber services.

Now, after 14 years, the FCC finally responds to the D.C. Circuit's *Dark Fiber Remand Order*. Although the FCC raised the issue of dark fiber services classification in one of its *Universal Service Funding* proceedings in the late 1990s and early 2000s, the FCC never resolved this question. The BOCs, which are now reduced to three telecommunications companies (Verizon Communications, Inc., AT&T, Inc. and Qwest Communications International, Inc.), and any other telecommunications company that had offered dark fiber service to anyone, are not required to file tariffs for such service offerings. Before this 2008 FCC decision doubt existed in the telecommunications industry whether the FCC had a basis to regulate dark fiber offered by telecommunications carriers. The FCC's decision removes this doubt.

If you have any questions about the FCC response to the *Dark Fiber Remand Order*, please let us know.

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FCC PROHIBITS TELECOMMUNICATIONS CARRIERS SUBJECT TO ITS JURISDICTION FROM ENTERING INTO EXCLUSIVE CONTRACTS FOR TELECOMMUNICATION SERVICES IN RESIDENTIAL APARTMENT BUILDINGS

The FCC adopted a Report and Order ("R&O") on March 19, 2008 banning telecommunications carriers subject to its jurisdiction from entering into exclusive agreements to provide telecommunications services in residential apartment buildings. The FCC's R&O also prohibits the enforcement of existing contracts that contain such exclusivity provisions.

In its R&O, the FCC determined that exclusive agreements between telecommunications carriers and residential apartment building owners harm consumers and injure competition, with little evidence of consequent benefits to the public. The FCC found that such agreements block consumers from obtaining competitive offerings of voice, video, and broadband services. The FCC therefore concluded that the prohibition of these exclusive agreements will increase competition in the market for voice, video and broadband services.

The FCC's R&O is consistent with its previous decisions to expand competition for telecommunication services in apartment buildings and in other Multiple Tenant Environments ("MTEs"). In 2000 the FCC prohibited exclusive agreements between telecommunications carriers and commercial MTEs. (We discussed this FCC ruling on our Web site, under the Articles Tab, at www.telecomattorneys.com.) In late 2007 the FCC banned exclusive agreements for video services provided by cable companies to residential apartment buildings.

The FCC also has a rulemaking proceeding underway that proposes to ban exclusive agreements between video providers that are not subject to the Cable Policy Act of 1992 ("Cable Policy Act"), such as satellite video providers and private cable systems, from entering into exclusive agreements for the provision of video services to residential apartment buildings.

The FCC's ruling was based on a unanimous vote by its five commissioners. If you have any questions about this R&O, please let us know.

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THE CONNECTICUT DEPARTMENT OF PUBLIC UTILITIES ("DPUC") GRANTS SOUTHERN NEW ENGLAND TELEPHONE COMPANY D/B/A AT&T CONNECTICUT ("AT&T") A CERTIFICATE OF VIDEO FRANCHISE AUTHORITY PURSUANT TO THE CONNECTICUT COMPETITIVE VIDEO SERVICE POLICY ACT

In our November 2007 newsletter we reported that the United States District Court for the District of Connecticut ("District Court") held that AT&T's "U-Verse" service was a cable service offered over a cable system by a cable operator under the federal Cable Policy Act of 1992 ("Cable Policy Act"). The District Court's decision was issued in response to the DPUC's June 7, 2006 Order, which found that AT&T's "U-Verse" service was not a cable service offered over a cable system by a cable operator, and therefore AT&T was not subject to Connecticut's franchising and other regulatory requirements pursuant to the Cable Policy Act. The DPUC specifically decided that AT&T's "U-Verse" service, which uses Internet Protocol ("IP"), is fundamentally a two-way service in nature, and accordingly does not meet the federal or state definition of cable service despite apparent similarities in images that appear on the screen of an end user who subscribes to AT&T's "U-Verse" service. The DPUC's June 7 Order also determined that AT&T's IPTV service had an ever-present two-way capability and always requires a dynamic interaction between the customer and AT&T's network. Thus, the DPUC held that AT&T's "U-Verse" service is really another form of information transmitted like any other data over the Internet, and therefore is not subject to Connecticut's legacy cable television franchising requirements.

The Connecticut Office of Consumer Counsel ("OCC"), the New England Cable Television Association ("NECTA") and Connecticut Cablevision, L.P., Cablevision of Southern Connecticut, L.P. and Cablevision of Litchfield, Inc. (collectively "Cablevision") challenged the DPUC in the District Court on the basis that the DPUC's June 7, 2006 decision was preempted by the Cable Policy Act.

On July 26, 2007, the District Court granted summary judgment in favor of the OCC, NECTA, and Cablevision, and against AT&T and the DPUC. The District Court concluded that the language in Section 522 of the federal Cable Policy Act and its legislative history showed that AT&T's "U-Verse" service did not have a level of interactivity that exempted it from the definition of cable services in the federal Cable Policy Act. Moreover, the District Court found that AT&T's "U-Verse" service was not an information service because it did not facilitate a two-way exchange of information, content or ideas on the public Internet. The District Court therefore concluded that AT&T's "U-Verse" service is a cable service offered over a cable system by a cable operator as under the Cable Policy Act. Accordingly, the District Court decided that the DPUC's ruling was preempted by the Cable Policy Act. The District Court entered the judgment in this case on October 9, 2007.

On October 1, 2007, Connecticut's governor signed into law the Connecticut Video Franchise Policy Act (the "Video Act"), which (1) creates a new, comprehensive regulatory framework governing video franchising in Connecticut, and (2) enables new video entrants like AT&T to obtain franchises to provide video services in competition with incumbent cable providers in Connecticut. AT&T filed an application for a video franchise under this law. The DPUC initially rejected AT&T's application. After AT&T filed a lawsuit for declaratory ruling in the Connecticut Superior Court the DPUC granted the application. The Connecticut Superior Court at Hartford issued a Memorandum Decision on October 31, 2007, granting AT&T's claim for declaratory ruling, holding that the Video Act afforded AT&T the right to obtain a video franchise. The Court declared that AT&T was eligible for a video franchise pursuant to the Video Act. Accordingly, on November 1, 2007, the DPUC issued AT&T a Certificate of Video Franchise Authority.

As stated above, the District Court entered final judgment against AT&T in connection with its July 26, 2007 decision on October 9, 2007. AT&T immediately moved to amend the entry of final judgment, arguing that the District Court's July 26, 2007 decision that AT&T was a cable operator lost all legal significance on October 1, because the DPUC's June 7, 2006 decision was replaced and supplanted by the new Connecticut Video Act. AT&T thus argued that the District Court's decision was moot.

The OCC and Cablevision filed an Opposition to AT&T's motion to amend the entry of final judgment, and AT&T filed a Reply. In November 2007, the District Court heard oral argument on AT&T's motion. The District Court, however, has not ruled on AT&T's motion as of the date of the preparation of this newsletter.

AT&T's motive in filing the motion to amend the judgment is clear. AT&T wants to have the District Court's decision declared moot, resulting in dismissal of the OCC and Cablevision's claims that AT&T's "U-Verse" service is a cable service. If the District Court were to grant AT&T's motion, the Court's decision that AT&T was a cable operator would no longer stand, and would not serve as a precedent in any subsequent IPTV service offering by AT&T in other states or by other providers of IPTV whose services are challenged as constituting a cable service offered over a cable system by a cable operator under the federal Cable Policy Act.

We will continue to follow this matter and will let you know the outcome of AT&T's motion.

If you have any questions about whether IPTV service constitutes a cable service over a cable system by a cable operator, please let us know.

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FCC ISSUES THIRD REPORT AND ORDER MODIFYING RULES GOVERNING BROADBAND PERSONAL COMMUNICATION SERVICES AND ADVANCED WIRELESS SERVICES

The FCC has issued its Third Report and Order ("Order") modifying its rules governing broadband Personal Communication Services ("PCS") and Advanced Wireless Services ("AWS-1") to permit the use of a Power Spectral Density model ("PSD") when measuring and calculating emissions and power limits.

The FCC's existing PCS and AWS-1 rules measure radiated power in terms of watts per emission and limit power outputs regardless of bandwidth size. In the PSD model under the newly modified rules, radiated power levels will be calculated on a watts-per-megahertz basis when operating with greater than 1 megahertz of bandwidth.

Additionally, the FCC's existing rules require the measurement of power levels using peak values. Under the newly modified rules, power levels may now be measured using average values.

Finally, in order to prevent interference that may occur for measuring average power levels, the FCC adopted a peak-to-average ratio limit of 13 dB.

The FCC's rule changes allow greater flexibility to telecommunications companies utilizing PCS and AWS-1 frequencies to offer wireless broadband services. The PSD model also has the potential to reduce network infrastructure costs, thereby enabling telecommunication providers to offer enhanced wireless broadband services to consumers in the rural areas of the United States.

Please let us know if you have any questions about the FCC's Order.

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

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