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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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Supreme Court *Brand X* Decision

On June 27, 2005, the United States Supreme Court decided the case of *National Cable and Telecommunications Association, et al. v. Brand X, et al.*, a decision which has wide ranging impact on the provision of broadband services. In its *Brand X* decision, the Supreme Court held that the Federal Communications Commission ("FCC") lawfully concluded in its *2002 Declaratory Ruling* that cable companies that sell broadband Internet service do not provide "telecommunications service" as defined under the Communications Act of 1934, as amended, ("Act"), and hence, are exempt from mandatory common-carrier regulation under Title II of the Act.

In upholding the FCC's *Declaratory Ruling*, the Supreme Court observed that the Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public... regardless of the facilities use." "Telecommunications," in turn, is defined under the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." By contrast, the Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications...." "Telecommunications carrier[s]," unlike "information service" providers, are subject to mandatory Title II common carrier regulation.

With the foregoing definitions in mind, the Supreme Court noted that the FCC, in its *Declaratory Ruling*, relied heavily on its 1998 *Universal Service Report*, which classified "non-facilities-based" Internet service providers ("ISP") as information-service providers. In its *Declaratory Ruling*, the FCC found no basis in the statutory definitions for treating cable companies

differently from non-facilities-based ISPs -- both offer "a single, integrated service that enables the subscriber to utilize Internet access service... and to realize the benefits of a comprehensive service offering." The FCC concluded that Internet access is an information service because it provides a capability for manipulating and storing information. Moreover, the FCC concluded that cable companies providing Internet access are not telecommunications providers because of the integrated nature of Internet access and the high-speed wire used to provide Internet access. Put simply, the FCC reasoned that consumers use their cable modems not to transmit information "transparently," such as by using a telephone, but instead to obtain Internet access. The FCC, however, invited comment on whether it should require, under its Title I jurisdiction, cable companies to offer other ISPs access to their facilities on common-carrier terms.

The Supreme Court ruled that the FCC's *Declaratory Ruling* was entitled to deference by the courts because the Act's plain terms did not directly address the precise questions at issue *viz.* whether cable companies providing cable modem service are providing a "telecommunications service" in addition to an "information service." The Supreme Court noted that the term "offer" contained in the definition of the term "telecommunications service" can sometimes refer to a single, finished product and sometimes to the "individual components in a package being offered" (depending on whether the components "still possess sufficient identity to be described as separate objects"). The Supreme Court observed that the FCC concluded in its *Declaratory Ruling* that the transmission component of cable modem service was sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering. They are sufficiently integrated because "a consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access."

Thus, the Supreme Court found that in the telecommunications context, it is at least reasonable to describe companies as not "offering" to consumers each discrete input that is necessary to providing, and is always used in connection with, the finished service. Because the statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering, the Supreme Court held that it would defer to the FCC's interpretation in this technical and complex area so long as the construction was "a reasonable policy choice for the agency to make."

The Supreme Court also found that the FCC's traditional distinction between basic and enhanced service in its *Computer II order* also supports the conclusion that the Act is ambiguous with respect to whether cable companies "offer" telecommunications with cable modem service. Specifically, the FCC defined those terms functionally, based on how the consumer interacts with the provided information, just as the FCC did in its *Declaratory Ruling*.

The Supreme Court recognized that although the FCC, under its *Computer II* rules, subjected facilities-based information providers to common-carrier duties, it did so not because of the nature of the "offering" made by those carriers and not because of the definitions of "enhanced service" and "basic service," but rather because of the concern that local telephone companies would abuse the monopoly power they possessed by virtue of the "bottleneck" local telephone facilities they owned. Notably, the Supreme Court recognized that the FCC remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction, observing that the FCC has invited comment on whether it can and should do so.

The Supreme Court next held that the FCC's interpretation was a reasonable policy choice for the FCC to make, rejecting the argument that the FCC's construction is unreasonable because it allows any communications provider to "evade" common-carrier regulation by simply bundling information service with telecommunications. The Supreme Court noted that the FCC never stated that any telecommunications service bundled with an information service is automatically unregulated under Title II. Instead, the FCC simply stated that a telecommunications input used to provide an information service that is not "separable from the data-processing capabilities of the service" and is instead "part and parcel of [the information service] and is integral to [the information service's] other capabilities" is not a telecommunications offering. Thus, telecommunications services, *i.e.*, services provided over a transparent transmission path that are trivially affected by an information service, such as voice-mail, are still regulated under Title II.

Finally, the Supreme Court found that the FCC provided a reasoned explanation for treating cable modem service differently from Digital Subscriber Line("DSL") service, which presently is subject to the FCC's *Computer II* facilities-based classification and Title II regulation. The Supreme Court held that the FCC is free within the limits of reasoned interpretation to change the classification of DSL if it adequately justifies the change. The Supreme Court observed that the FCC, in its *Declaratory Ruling*, reasonably concluded that changed market conditions warrant different treatment of facilities-based cable companies providing Internet access. Hence, the Supreme Court found that the FCC's decision appears to be a first step in an effort to reshape the way the FCC regulates information-service providers, noting that an FCC rulemaking is presently underway in which the FCC is reconsidering its treatment of DSL service and has tentatively concluded that DSL service provided by a facilities-based telephone company should be classified solely as an information service.

As we anticipated, shortly after this decision, the FCC issued a ruling treating DSL service as an information service, as opposed to a telecommunications service, and finding that the telecommunications component of DSL service is an integral part of the information service provided by DSL, just as the telecommunications component of cable modem service is an integral part of the information service provided by cable modem service. We discuss the FCC decision below.

If you have any questions about the foregoing, please let us know.

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FCC Rules that Incumbents No Longer Have to Share DSL

On August 5, 2005, the Federal Communications Commission ("FCC") issued new rules placing telephone and cable companies on an equal, regular footing by releasing incumbent local exchange carriers ("ILEC") from their obligation to share DSL lines with rival internet access service providers. The FCC ruled that Wireline broadband internet services are information services functionally integrated with a telecommunications component. Hence, ILECs are not required to offer such services separately on a common carrier basis.

The FCC's ruling is consistent with the recent United States Supreme Court's decision in *Brand X* upholding the FCC's earlier determination that cable modem service is not a telecommunications service, but instead is an information service and, thus, exempt from regulation as a common carrier under Title II of the Communications Act.

Under the FCC's new rules, ILECs must continue offering DSC to unaffiliated ISPs on a grandfathered basis for one year. Also, ILECs must continue contributing to existing universal service fund mechanisms based on current levels of reporting revenues for DSL for a 270 day period or until the FCC adopts new contribution rules, whichever occurs first. Moreover, under the FCC's rules, ILECs may, if they choose, offer DSL to affiliated or unaffiliated ISPs on a common-carrier or non-common carrier basis, or a combination thereof.

The FCC issued a Notice of Proposed Rulemaking ("NPRM") seeking comment on whether it should develop a framework to ensure that consumer protection needs are met by all providers of internet access service, whether such service is provided over DSL, cable modem or other technology.

The FCC has not yet released a copy of its new rules and NPRM, but is expected to do so shortly. Upon such release, we will provide you with a more through analysis of the FCC's new rules and NPRM.

In the meantime, if you any questions regarding the foregoing, or are interested in submitting comments to the FCC , in connection with its NPRM, please contact us.

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FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE REQUESTS COMMENTS ON PROPOSALS RELATED TO UNIVERSAL SERVICE FOR RURAL CARRIERS AND THE BASIS FOR SUPPORT FOR COMPETITIVE ELIGIBLE TELECOMMUNICATION CARRIERS

The Federal-State Joint Board has requested comments on various proposals to modify the FCC's rules relating to high cost universal service support.

These proposals relate to: (1) whether the FCC should adopt the universal service support mechanism for rural carriers based on forward-looking economic cost estimates or imbedded costs; (2) whether the FCC should amend the "rural telephone company" definition for high-cost universal service support to consider consolidating multiple study areas within a state; and (3) whether the FCC should retain or modify Section 54.305 of its rules 47 C.F.R. §54.305, regarding the amount of universal service support for transferred telephone exchanges.

Please contact us if you wish to obtain copies of the proposed modification upon which the Federal-State Joint Board is seeking comment.

The comments from these proposals are due September 16, 2005, with reply comments due October 3, 2005.

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FCC INITIATES PROCEEDING TO REEXAMINE ROAMING OBLIGATIONS OF COMMERCIAL MOBILE RADIO SERVICE PROVIDERS

The FCC has issued a Notice of Proposed Rulemaking ("NPRM") to reexamine whether the FCC's roaming requirements applicable to commercial mobile radio services ("CMRS") providers should be modified, expanded or eliminated based upon the current state of the CMRS market. The FCC also terminated an existing proceeding that had addressed similar issues because the record in that case had become stale. Roaming means a mobile radio station receiving service from a mobile radio station or system in public mobile services other than one to which it is a subscriber.

Since 1996, the FCC has required that cellular, broadband personal communication service ("PCS") providers and certain specialized mobile radio ("SMR") providers allow customers of other carriers to roam manually on their networks provided that the roamers' mobile telephone handsets are technically capable of accessing the roam-on network. There is no rule requiring CMRS providers to allow automatic roaming, which allows roaming customers to place calls as they do in their home coverage area, by simply entering a telephone number and pressing the "send" button on a mobile telephone handset. Nonetheless, voluntary agreements to permit automatic roaming are common and widespread in the CMRS industry.

In the NPRM, the FCC is seeking to develop a record with up-to-date information on the current status of roaming in the CMRS marketplace in order to decide what regulatory regime is appropriate for roaming services. More specifically, the FCC seeks comments in this NPRM on the following issues, among others:

- What is the current state of manual roaming and is there a continuing need for a manual roaming rule?
- What effect does a roaming environment have on the availability, quality and price of services to consumers?
- Should CMRS carriers be required to enter into agreements to allow automatic roaming on their networks and, if so, how should such an FCC rule requiring such agreements be designed, to whom should it apply, and for what periods of time?
- Is there evidence that national CMRS providers are negotiating roaming agreements with small or rural carriers in an anti-competitive manner and, if so, should the FCC promulgate an automatic roaming rule that applies to specific markets or types of carriers?
- Is digital network and mobile telephone handset sufficiently advanced that technical limitations no longer effect roaming?

In a NPRM early in 2000, the FCC had requested comments on various issues related to roaming obligations for CMRS providers. Since that time, however, there have been a number of mergers between CMRS providers that may affect the future development and the provision of roaming services. Moreover, there have also been a number of advancements in wireless network and mobile telephone handset technology that could effect the nature of roaming services. Further, small and rural wireless service providers have claimed that recent industry developments have significantly reduced their nationwide roaming options. Thus, the FCC has issued the NPRM in WT Docket No. 05-265. Comments will be due within sixty (60) days after the Notice of Proposed Rulemaking is published in the *Federal Register*. Reply comments will be due thirty (30) days after the initial comments are filed.

As many of you know, we have assisted clients in the negotiation and preparation of automatic roaming agreements, and are knowledgeable concerning appropriate terms and conditions of such agreements. Thus, we are available to assist any of you if you wish to file comments in this NPRM, which will likely result in the promulgation by the FCC of new rules regarding roaming.

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FCC DECIDES TO EXTEND ENFORCEMENT DATE REGARDING E911 SERVICE BY VoIP PROVIDER

As we advised you in our July 2005, newsletter, the FCC's Enforcement Bureau announced in July 2005, that it would refrain from enforcing the requirement that VoIP Providers obtain affirmative acknowledgments from 100% of their subscribers that they had read and understood an advisory sent by the VoIP provider concerning the limitations of the E911 service, provided VoIP providers filed a request for an extension with the FCC to file a report concerning their efforts to obtain such acknowledgments from their subscribers. On August 26, 2005, the FCC's Enforcement Bureau announced that it would continue to refrain for an additional thirty (30) days or until September 28, 2005, from enforcing this requirement. To be eligible for this further extension, VoIP Providers must have filed a report on or before August 10, 2005, detailing their efforts to obtain acknowledgements from their subscribers.

The FCC's Enforcement Bureau also determined that it would not initiate enforcement action until September 28, 2005, regarding the affirmation acknowledgement requirement against those VoIP Providers that filed separate, updated reports with the FCC on September 1, 2005, and on September 22, 2005, containing the following:

- a detailed explanation regarding current compliance with the notice warning sticker requirements set forth in the FCC's VoIP E911 Order, issued June 3, 2005, if the VoIP provider did not notify and issued warning stickers or labels to 100% of its subscribers by the original July 29, 2005, deadline;

- a quantification of the percentage of the provider subscribers that have submitted affirmative acknowledgements as of the date of September 1 and September 22, 2005, reports, and an estimation of the percentage of subscribers from whom the provider does not expect to receive an acknowledgement by September 28, 2005;

- a detailed description of any and all actions the provider plans to take towards any of its subscribers that do not affirmatively acknowledge having received and understood the advisory required under the VoIP E911 Order; and

- a description of any and all plans to use any disconnect procedures for subscribers who fail to provide an affirmative acknowledgement by September 28, 2005.

Until September 28, 2005, the FCC expects that all interconnect VoIP providers that qualify for the extension of the Bureau's enforcement deadline of September 28, 2005, will continue to use all means available to obtain affirmative acknowledgements from all of their subscribers.

Interconnect to VoIP service means an interconnected voice over internet protocol service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; requires internet protocol-compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switch network and to terminate calls to the public switch network and to terminate calls to the public switch telephone network.

Please let us know if you have any questions either as a VoIP Provider or VoIP customer regarding the FCC's enforcement policies concerning E911 service by VoIP Providers.

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FCC ISSUES POLICY STATEMENT CONCERNING THE OPEN AND INTERCONNECTED NATURE OF PUBLIC INTERNET

The FCC has adopted a policy statement that outlines four principles to encourage broadband deployment and preserve and promote the open and interconnected nature of the public internet. These principles are:

1. Consumers are entitled to access the lawful internet content of their choice;

2. Consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement;

3. Consumers are entitled to connect of legal devices to the internet that do not harm the network used by the network; and

4. Consumers are entitled to competition among internet network providers, application and service providers and content providers.

The FCC will adopt these four principles in its ongoing policy-making decisions concerning broadband deployment and the public internet.

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For more information about Shughart, Thomson & Kilroy, P.C. and its Telecommunications Practice, please consult our websites at www.stklaw.com and www.telecomattorneys.com.

If you have any questions about this Report, 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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