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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.

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FCC Confirms Rules for Access Broadband Over Power Lines ("Access BPL")

On August 3, 2006, the FCC adopted a Memorandum, Opinion and Order on Broadband over Power Lines ("BPL"). In this Order, the FCC committed to address interference issues raised by BPL, and reemphasized that Part 15 of the FCC's rules was made to ensure that access BPL operations do not interfere with licensed radio services. Specifically, the FCC took the following action:

- Affirmed its rules regarding emission limits for BPL, including its determination that the reduction of emissions to 20db before the normal Part 15 emission limits will constitute adequate interference protection for mobile operations;

- Denied the request by the American Amateur Radio League ("AARL") to prohibit BPL operations pending further study and to exclude BPL from frequencies used for amateur radio operations;

- Denied the request by the television industry to exclude BPL from frequencies above 50 MHz;

- Affirmed the July 7, 2006, deadline for requiring certification for any equipment manufactured, imported or installed on BPL systems, with the provision that uncertified equipment already in inventory can be used for replacing defective units or to supplement equipment on existing systems for one year within areas already in operation;

- Affirmed the requirement that information regarding deployment of equipment on BPL be provided in a public data base at least thirty (30) days prior to the deployment of the equipment;

- Adopted changes regarding protection of radio astronomy stations by requiring new exclusion zones and amending consultation requirements for these stations;

- Adopted changes to provide for continuing protection of aeronautical stations that are relocated;

- Denied the request by the aeronautical industry to exclude BPL operating on low voltage lines from frequencies reserved for certain aeronautical operations; and

- Denied the request by the gas and petroleum industry to be considered as public safety entities in connection with BPL operations.

As we advised you in our October 2004, telecom newsletter, there are four (4) categories of facilities available to telecommunications service providers to deliver voice, video, and data services to consumers. These four types are:

1. **Wireline**. Wireline facilities consist of copper loops and fiber to the premises ("FTTP"), and/or to the home ("FTTH") to deliver voice, video, and data services.

2. **Wireless**. Wireless facilities include license frequencies such as terrestrial wireless consisting of cellular, PCS, and microwave frequencies, advanced wireless frequencies which the FCC recently allocated for use on an unlicensed and licensed basis. These include satellite radio frequencies, certain broadcast frequencies, or a combination of licensed and unlicensed frequencies in the microwave radio band and other frequency bands which can employ voice over internet protocol ("VoIP");

3. **Cable Modem Services**. Cable modem services consist of delivery of information services over broadband cable which is always used for delivery of video services; and

4. **BPL**. BPL consists of broadband over power line services offered by electric utilities or third parties in conjunction with electric utilities which utilize the electric power grid for broadband communication services offering devices that plug into electric outlets in businesses and residences to originate and terminate high speed telecommunications services.

If anyone has any questions about the FCC's ruling on BPL or access BPL, please don't hesitate to let us know.

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FCC Issues Declaratory Ruling That Telecommunications Carriers, Including Wireless Carriers, Have a Duty to Report Violations of Specific Federal Statutes Relating to Child Pornography

In Section 222 of the Communications Act of 1934, as amended, 47 U.S.C. §222, Congress created a framework to govern telecommunications carriers' use of information obtained through their provision of telecommunications services to the public. All telecommunications carriers, including wireless carriers, have a duty to protect the privacy of customer proprietary network information ("CPNI"). CPNI includes telephone numbers called by a consumer, the frequency, duration and timing of such calls, and any services purchased by the customer such as call waiting. Section 222(c)(1) of the Act provides that, except as required by law, a telecommunications carrier that receives or obtains CPNI in its provision of telecommunications services generally cannot disclose or permit access to individually-identified CPNI without customer approval. Congress, however, has enacted a law that requires providers of an "electronic communications service" or "remote computer service" to report apparent violations of certain federal statutes involving child pornography. The reporting provider must go to the Cyber Tip Line operated by the National Center for Missing and Exploited Children ("NCMEC"), pursuant to 42 U.F.C. §13032. A failure to report such information subjects the provider of the electronic communications services or remote computing services to a fine of up to $50,000 for an initial failure to make such a report and up to $100,000 for subsequent failures to make such reports.

The FCC has declared that 42 U.S.C. §13032 constitutes an exception to §222 of the Communications Act and, therefore, a telecommunications carrier, including a wireless carrier, will not violate §222 to the extent it is compelled by law to disclose customer CPNI in making a report to the NCMEC Cyber Tip Line. This exception only applies to the extent disclosure of CPNI is required and, therefore, would not cover voluntary disclosures. Accordingly, the obligation under §13032 of Title 42 and §222 only arises when a provider of electronic communications services or remote computing services is a telecommunications carrier, and is compelled to disclose CPNI. Telecommunications carriers must be aware of these sections of the U.S. Code, and of their legal obligation to make such reports.

If there are any questions concerning this issue, please let us know.

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Internal Revenue Service Announces a Standard Refund for Consumer Tax Returns for the Year Ending December 31, 2006

The IRS has announced that consumers can claim a standard $30-$60 refund for overpayment of taxes on long distance telephone calls not based on time and distance in their 2006 tax return filings. As we reported to you previously, telephone consumers, both residential and business, pay 3% federal excise tax on local and long distance service. As a result of a number of decisions by federal appellate courts, the 3% excise tax on long distance service not based on time and distance has been declared unlawful. Accordingly, the IRS announced in July it would stop collecting such a tax.

Next year, consumers can use their 2006 tax returns to claim a refund on long distance telephone taxes paid since March 2003. The standard refund starts at $30 and increases by $10 for each additional exemption claimed on a tax return, up to $60. For example, a married couple claiming two dependants could claim the $60. The IRS will add a line to the 2006 tax returns mailed next year to enable tax filers to claim the refund. The IRS will also create a special form for taxpayers not otherwise required to file tax returns so they can request a refund.

Business filers who have paid substantial amounts under the 3% excise tax on long distance service not based on time and distance can seek greater refunds provided they can substantiate the amount of tax they paid since March 2003. This will require businesses to review 41 months of telephone bills and analyze the bills to determine the taxes paid. Individuals also have the option of reviewing their old telephone bills to calculate the taxes they paid between March 2003 and July 2006, and apply for a refund.

If there are any questions on the foregoing tax refund issue, please let us know.

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D.C. Circuit Upholds FCC's Decision not to Require Bell Operating Companies to Provide Competitors with Unbundled Access to Certain Fiber-Based Network Facilities

On August 15, 2006, the U.S. Court of Appeals for the D.C. Circuit issued its opinion in *Earthlink, Inc. v. Federal Communications Commission, et al.,* Case No. 05-1087, upholding the FCC's decision not to require the Bell Operating Companies to provide their competitors with "unbundled" access to certain fiber-based network facilities under Section 271(c)(2)(B) of the Communications Act, 47 U.S.C. §271(c)(2)(B).

Earthlink, Inc. ("Earthlink"), an Internet service provider that benefits from unbundling, appealed the FCC's order that held that incumbent local exchange carriers did not have to unbundled fiber to the home ("FTTH") ruled loops in places where FTTH had not previously existed, that is, in residential areas where no lines had existed, and in locations where only copper-loop plant was in place. If the incumbent local exchange carrier decided to retire incumbent copper local loops, the FCC determined that the carrier had to make its fiber loops available only for narrowband, not broadband, uses. The FCC also decided not to require unbundling as to the next generation network packetized capabilities of the hybrid loops, that is, loops comprised only partially of fiber, and packet switching.

Subsequently, the FCC extended the unbundling relief of fiber to the curb ("FTTC") loops, that is, hybrid loops in which fiber nearly reaches, but does not so all the way to a customer's premises, and loops to multi-dwelling units. After the FCC issued this particular order, Verizon, AT&T, Inc. (formerly SBC Communications"), Qwest Communications and BellSouth Telecommunications filed petitions with the FCC seeking forbearance from additional unbundling requirements under Section 271 of the Communications Act.

You may recall that Section 271 of the Act sets forth the requirements for the Bell Operating Companies' entry into InterLata services, including unbundling of network elements. After review

of the petitions, the FCC agreed to forbear from applying Section 271's independent unbundling obligations to the particular broadband elements that the FCC had previously relieved from unbundling on a national basis, that is, FTTH loops, FTTC loops, packetized functionality of hybrid loops and packet switching. It is this latter decision in which the FCC agreed to forbear from applying the Section 271 independent unbundling obligations to Verizon, AT&T, BellSouth, and Qwest that Earthlink challenged in the D.C. Circuit.

The court gave deference to the FCC's analysis in its agreement to forbear, and held that the decision was not arbitrary or inconsistent with FCC precedent, and was supported by the record. Because the FCC reasonably weighed the present conditions and future developments in determining what is necessary for just and reasonable rates, what is necessary for protection for consumers, and the public interest, the FCC's decision supported forbearance.

You should note that the FCC's forbearance from applying Section 271's independent unbundling obligations to the broadband elements that the FCC had previously relieved from unbundling on the national basis – FTTH loops, FTTC loops, and the packetized functionality of hybrid loops and packet switching does not mean that the FCC agreed to forbear from applying the statutory requirements in Sections 201 and 202 of the Communications Act, concerning interconnection, unjust practices, and unlawful discrimination and services to Verizon, AT&T, Qwest and BellSouth.

If there are any questions about this court decision, please give us a call.

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Ninth Circuit Upholds FCC's "All or Nothing" Interpretation of Section 252(i) of the Communications Act

The U.S. Court of Appeals for the 9th Circuit on August 29, 2006, upheld the FCC's order changing its interpretation of Section 252(i) of the Communications Act, 47 U.S.C. §252(i), to an "all or nothing" interpretation from a "pick and choose" interpretation.

Section 252(i) of the Act provides for negotiation, arbitration and approval of interconnection agreements between incumbent local exchange carriers and competitive local exchange carriers ("CLEC"). Section 252(i) provides "a local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this Section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

(Section 252(i) refers to three different items ILEC must make available: (1) interconnections; (2) services; and (3) network elements.) Thus, a CLEC could obtain access to an ILEC network in three ways. The CLEC can purchase telephone services at wholesale rates for resale to end users; a CLEC can lease elements of the ILEC network on the non-bundled basis; and a CLEC can interconnect its own facilities with the ILEC network.

The meaning of Section 252(i) provides the basis for CLECs' appeal of the FCC's "all or nothing" interpretation. You may recall that in August 1996, the FCC interpreted Section 252(i) by adopting a pick and choose rule. Under this rule, a requesting CLEC could adopt individual provisions from any approved interconnection agreement to which ILEC was already a party. The U.S. Supreme Court upheld the FCC's interpretation of the "pick and choose" rule in *AT&T Corp. v. Iowa Utils.*, Bd. 525, U.S. 366 (1999).

For the "pick and choose" rule, individual provisions from existing interconnection agreements were not unrestricted. Thus, ILEC were only required to make individual provisions of an agreement available to CLEC for a reasonable period of time, and ILEC could avoid the rule where hardship would result. In addition, ILEC could request a CLEC to agree to terms and conditions that were legitimately related to the service or element requested.

After using the "pick and choose" rule for seven (7) years, the FCC decided to revisit its interpretation of Section 252(i). Thus, in 1993, the FCC sought comment on whether the FCC should change its interpretation of this section to promote more meaningful commercial negotiations. In July 2004, the FCC adopted an "all or nothing" rule under Section 252(i) instead of the "pick and choose" rule. Under the "all or nothing" rule, if a requesting CLEC was interested in a service or network element provided by an ILEC, it may adopt in entirety any interconnection agreement that includes that service or element to which the ILEC was already a party. Certain CLECs challenged this rule in this appeal before the 9th Circuit.

The court determined that the FCC's adoption of the "all or nothing" rule was not an abusive discretion. The court held that the FCC's interpretation of Section 252(i) is a permissible construction of that section of the Communications Act, because the phrase "the same terms and conditions as those provided in the agreement" in Section 252(i) is ambiguous, and can reasonably be read to refer to the terms and conditions of the entire interconnection agreement. Thus, the court concluded that the "all or nothing" interpretation of Section 252(i) by the FCC is a permissible interpretation.

In addition, the court held that the FCC's construction of Section 252(i) was a reasonable policy choice, because the initial "pick and choose" rule, in practice, had impeded negotiations between CLEC and ILEC. Finally, the court concluded that the FCC's adoption of the "all or nothing" rule was not an abuse of discretion because the record supported the FCC's adoption of this rule, in that the FCC had found that state commissions, in their experience arbitrating between ILEC and CLECs over interconnection agreements, had determined negotiation of such agreements had been and was severely hindered by the "pick and choose" rule.

Accordingly, the court held that since Section 252(i) was ambiguous, the FCC had authority to interpret it to adopt the "all or nothing" rule.

If there are any questions about the 9th Circuit's decision, please give us a call.

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

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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