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SHUGHART THOMSON & KILROYíS TELECOMMUNICATIONS AND NEW TECHNOLOGIES PRACTICE GROUP TELECOM REPORT

Shughart Thomson & Kilroy, P.C.ís Telecommunications and New Technologies Practice Group has substantial experience in regulatory and enforcement proceedings before the Federal Communications Commission (ì FCCî) 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.

Whatís in this edition:

FCC Adopts New Rules Setting The Number Of Subscribers A Cable Operator May Serve Nationwide At 30%........ 1

U.S. Court Of Appeals For The D.C. Circuit Reverses FCCís Prepaid Calling Card Order........ 2

D.C. Circuit Dismisses Two Petitions For Review Of The FCCís Final Rule Implementing The Junk Fax Protection Act........ 3

Colorado Supreme Court Holds That Individual Who Uses Home Telephone For Business Purposes Is Covered By The Colorado No-Call List........ 4

FCC ADOPTS NEW RULES SETTING THE NUMBER OF SUBSCRIBERS A CABLE OPERATOR MAY SERVE NATIONWIDE AT 30%

On December 18, 2007, the FCC adopted new rules which limit the number of subscribers a cable operator may serve at 30% nationwide. The FCC also issued Further Notice of Proposed Rulemaking (ìFNPRMî) in Docket No. MB 92-264 and CS 98-82, requesting public comment on vertical ownership limits, and cable and broadcasts ownership attribution rules.

The 1992 Cable Act mandated that the FCC conduct proceedings to establish reasonable limits on the number of subscribers a cable operator may serve, known as the horizontal limit, and the number of channels a cable operator may devote to its affiliated program networks, referred to as the vertical or channel occupancy limit.

In 1993, the FCC set a 30% limit on the number of subscribers a cable operator may serve. The FCC later modified the limit in 1999, and Time Warner challenged that ratification in 2001. As a result of this challenge, the U.S. Court of Appeals for the DC Circuit remanded the FCCís Order establishing the 30% limit back to the FCC for further justification. The December 18th decision by the FCC is a result of the Court remand, which has taken six years.

The FCC determined that the 30% cable horizontal ownership limit is appropriate, and that this limit would ensure that no single cable operator could create a barrier to a video programming networks entry into the video programming market, or cause a video programming network to leave the market by declining to carry the network. To reach this goal, the FCC first analyzed the market for video programming, and determined the number of subscribers a network needed to have in order to survive in the marketplace. The FCC then estimated the percentage of subscribers a video network is likely to serve once it secures a contract for carriage on the cable network. The FCC took this action to spur competitors in the video distribution marketplace.

The FCC also requested further comment on the following issues:

- The appropriate methodology for determining the horizontal limit;
- How should the FCC define the relevant programming and distribution markets;
- What is the extent to which vertical integrating cable operators have an incentive to engage in anti-competitive behavior that could to lead to foreclosure of entry by unaffiliated programmers in the video market; and
- How valid are certain academic settings on this subject, and whether such studies establish that vertical foreclosure is occurring despite changes in the marketplace.

The FCC Order and FNPRM has not yet been released, but when it is made public, it will be titled ìFourth Report and Order and Further Notice of Proposed Rulemaking.î The Docket No. is MB 92-264 and CS 98-82.

Please let us know if you have any questions about this FCC decision. We will report further on this matter after the Fourth Report and Order is released.

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U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT REVERSES FCCís PREPAID CALLING CARD ORDER

The U.S. Court of Appeals for the D.C. Circuit on December 4, 2007, reversed the Federal Communication Commissionís (ìFCCî) decision in, *In the Matter of Regulation of Prepaid Calling Card Services,* 21 FCC Rec. 7290 (2006) (ìPrepaid Calling Card Orderî or ìOrderî), because it foreclosed retroactive application of menu-driven prepaid calling cards. The D.C. Circuitís Opinion means that long distance carriers and providers of menu-driven prepaid calling cards (i.e. menu-driven interfaces through which users can either make a call or access several types of information) have liability for interstate access charges.

In 2006, in the *Prepaid Calling Card Order*, the FCC identified two kinds of prepaid calling cards subject to the FCCís jurisdiction. The first kind uses Internet Protocol (ìIPî) technology to transport part or all of a telephone call (ìIP-Transport Cardsî). The second type of card offers a menu driven interface through which you can make either a call or access several types of information and are referred to as ìmenu-driven cards.î In the *Prepaid Calling Card Order*, the FCC determined that both types of cards offer telecommunications services, and that providers of those cards are subject to access charges, universal service fund contributions, and other obligations under Title II the Communications Act. The FCC applied its *Prepaid Calling Card Order* retroactively to IP transport cards, making those providers who offer IP transport cards subject to access charges to local exchange carriers who allow their cardholders to originate and terminate long distance calls. The FCC, however, foreclosed retroactive application of its Order to menu-driven cards, on grounds that it would create a ìmanifest injusticeî to providers of menu-driven cards who are generally large long distance carriers like AT&T Corp. (now AT&T, Inc., after Southwestern Bell Communications acquired AT&T Corp.). Accordingly, the D.C. Circuitís opinion reversing the FCC will require both IP transport and menu-driven card providers to pay access charges for interstate calls.

Both types of calling cards offer the customer no capability to do anything other than make a telephone call, and therefore, they are like basic prepaid calling cards that the FCC has always treated as providing telecommunication services. Even though IP transport cards transport part of a long distance call over the Internet, the FCC decided in its *Prepaid Calling Card Order* that the IP transport of traditional long distance calls did not change the regulatory classification of prepaid calling service. Thus, when a provider converts a calling card call to an IP format and back to a regular call, it does not transform the service from a telecommunications service to an information service.

Menu-driven cards also offer telecommunication service for the same reasons, even though the call was not converted to an IP transport for part of the call.

The Court found that applying the FCCís *Prepaid Calling Card Services Order* to menu-driven calling cards would not work a manifest injustice, because the FCCís Order contained no explanation to support this finding.

Long distance telecommunications carriers can expect to receive back billed access charges from local exchange carriers for access charges for both types of calling cards as a result of the D.C. Circuitís opinion.

If anyone has any questions about the D.C. Circuitís decision, please contact us.

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D.C. CIRCUIT DISMISSES TWO PETITIONS FOR REVIEW OF THE FCCíS FINAL RULE IMPLEMENTING THE JUNK FAX PROTECTION ACT

The U.S. Court of Appeals to the D.C. Circuit issued an opinion on December 28, 2007, in *Biggerstaff v. FCC* (Nos. 06-1191 and 06-1251), in which the Court dismissed the Petitions filed by Robert Biggerstaff and Douglas McKenna for review of the FCCís Final Rule implementing the Junk Fax Protection Act of 2005. In this rule, the FCC adopted an established business relationship ìEBRî) exemption to the prohibition against unsolicited telephone facsimile advertisements for entities with whom the recipient has an established business relationship (ìEBRî). *Junk Fax Protection Act Order* of 2006, 21 F.C.C.R. 3787 (2006). Mr. Biggerstaff argued that a 1992 administratively created EBR exemption, which the FCC had previously rescinded , but then adopted in the *Order*, is contrary to the express text and legislative history of the Telephone Consumer Protection Act of 1991, found in Section 227 of the Communications of Act of 1934, as amended, 47 U.S.C. ß 227. Mr. McKenna claimed that the permissive wording in the FCCís *Junk Fax Protection Order* wrongly implied that the Junk Fax Protection Act granted statutory authority to send unsolicited faxes when an EBR only granted an exemption from federal liability.

The Court dismissed Biggerstaffís petition on grounds that his challenges were beyond the scope of the FCCís 2006 Rulemaking. The purpose of the rulemaking was to implement the Junk Fax Protection Act of 2005. The Court ruled that Biggerstaff actually was challenging the FCCís authority in 1992 to administratively create an EBR exemption, rather than the FCCís *Junk Fax Protection Order* which adopted an EBR exemption on a prospective basis.

The Court dismissed McKennaís petition because he lacked standing to challenge the *Junk Fax Protection Order*. McKenna asked the Court to require the FCC to revise its *Junk Fax Protection Order* to make changes in the EBR exemption. McKenna asserted that the rule creates a misunderstanding about the difference between an exemption from liability in a remedial consumer protection statute and a law that statutorily permits the sending of faxes where there is an EBR. The Court determined that McKennaís assertion was too tenuous and too speculative to require the Court to order the FCC to revise its final rule.

These two challenges are the last known challenges to the FCCís final rule implementing the Junk Fax Protection Act of 2005. The rule is found at 47 U.S.C. ß 65.1200. This rule is the FCC rule which is currently in effect with respect to the sending of unsolicited facsimiles.

Anyone who has a question about this court decision, please notify us.

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COLORADO SUPREME COURT HOLDS THAT INDIVIDUAL WHO USES HOME TELEPHONE FOR BUSINESS PURPOSES IS COVERED BY THE COLORADO NO-CALL LIST

The Colorado Supreme Court on December 17, 2007 held that a residential telephone subscriber who uses his telephone for business purposes is protected by the Colorado No-Call List. In *Holcomb v. Jan-Pro Cleaning Services of Southern Colorado*, (No. 06SC757) the Colorado Supreme Court found that Jan-Pro Cleaning Services of Southern Colorado (ì Jan-Proî) had committed deceptive trade practices, by contacting Holcomb even though his name appeared on the Colorado No-Call List. This list was established to allow consumers to be protected from unwanted telephone solicitations from telemarketers. Holcomb subscribed to residential telephone service with a local exchange provider, and registered under the Colorado No-Call List. Jan-Pro, however, solicited Holcomb regarding Jan-Pro cleaning services after obtaining Holcombís name from a calling list of business numbers obtained from Info USA and Dun and Bradstreet. Jan-Pro did not register with the Colorado Secretary of State as a telemarketing business, because it did not market to residential telephone subscribers.

After a trial, the lower court held that Holcomb, by using his telephone for business purposes, had removed himself the protected class of residential subscribers resulting from the Colorado No-Call List, and therefore was not entitled to protections from the Colorado No-Call List Act. Furthermore, the lower court held that Jan-Pro had an appropriate defense for callers who established procedures to prevent solicitations in violation of the Colorado No-List List Act. As noted above, Persons who register under this Act are protected from receiving solicitation by telephone.

The Colorado Supreme Court, however, held that the unambiguous language of the Colorado No-Call List Act did include Holcomb within a class of residential subscribers protect by the No-Call List and therefore reversed the lower courtís decision. In its decision, the Colorado Supreme Court determined that the No-Call List Act provides for creation of a list or database, of residential subscribers and wireless telephone service subscribers who object to receiving telephone solicitations. This Act bars as a deceptive trade practice any telephone solicitation to the telephone of a residential subscribers or wireless service subscriber in Colorado who added his number and zip code to the Colorado No-Call List. Residential subscriber is a statutorily defined term that expressly includes any person who has subscribed to residential telephone service with a local exchange provider. The Supreme Court that nothing in the Colorado No-Call List Act suggests that using a No-Call listed telephone for business purposes or permitting the number to appear on a commercial telephone listing causes a residential subscriber whose name is on the list to lose protection of the Act. Thus, even though Holcomb had listed his telephone number both as a residential telephone, and as a business telephone, his actions did not remove him from the protections of the Act.

In Colorado, as may be the case in other states, if a person uses his telephone for both residential and business purposes, lists his telephone number with a business organization, and his telephone appears on the statutory No-Call List, he is nonetheless entitled to receive protections of a stateís No-Call List Act. Telemarketers should be vigilant to make sure listings of business telephone do not also appear on a residential No-Call List. Otherwise, they may run the risk of violating a particular states No-Call List Act, which would subject them to liability for a deceptive trade practice. * * * * * *

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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 donít hesitate to contact us.

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