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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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U.S. Supreme Court Agrees to Decide Whether Section 201(b) of the Communications Act Affords a Private Right of Action to a Pay Phone Provider to Sue a Long Distance Carrier to Recover Compensation

On February 21, 2006, the U.S. Supreme Court granted a petition for certiorari filed by Global Crossing Telecommunications, Inc. ("Global Crossing") on the issue of whether it can be sued by a provider of pay phone service for non-payment of compensation as an unjust practice under Section 201(b) of the Communications Act. Global Crossing's certiorari petition raises the issue of what §201(b) grants is a private right of action to a provider or consumer to bring a complaint against a carrier for alleged violations of that section of the Communications Act.

The petition for stems from a decision of the U.S. Court of Appeals for the 9th Circuit in *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.* decided September 8, 2005, in which the 9th Circuit held that Metrophones Telecommunications, Inc. ("Metrophones"), a pay-service provider, could go forward with its claim under Section 201(b) of the Communications Act against Global Crossing, a long distance carrier, to recover compensation under federal regulations 47 C.F.R.§64.1300-1340 that obligate Global Crossing to pay compensation to pay-phone providers for dial-around service (e.g., 1010325). Section 201(b) of the Communications Act provides, in substance, that all charges, practices, classifications and regulations in connection with communications services shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is declared to be unlawful. The issue before the 9th Circuit was whether §201(b) affords a plaintiff a private right of action against the carrier for a practice alleged to be unjust and unreasonable.

The 9th Circuit held that §201(b) does afford such a right, particularly where the FCC has declared that a practice is reasonably related to rates and services and is substantively unjust or unreasonable. Accordingly, a plaintiff may bring an action in a complaint before the FCC or in federal court for an unjust practice under §201(b) for damages if the practice meets these conditions.

The 9th Circuit responded to this issue affirmatively because the FCC had declared such a practice to be unlawful. One question the Supreme Court review hopefully will answer in this case is whether §201(b) of the Act affords a private right of action for a carrier's particular practice that a complainant believes is unjust, where the FCC has not ruled on or declared the practice to be unlawful.

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Fifth Circuit Holds that Section 207 of the Communications Act is an Election of Remedies Provision

The U.S. Court of Appeals for the 5th Circuit has held in *Premier Network Services, Inc. v. SBC Communications, Inc., et al*, Case No. 04-41574, that §207 of the Communications Act, which provides that any person claiming to be damaged by a common carrier subject to the Communications Act, may either make a complaint to the FCC or bring suit for recovery of damages in any district court of competent jurisdiction in the U.S., but cannot pursue both remedies.

In this case, Premier filed a complaint against SBC and the FCC, later withdrew the complaint without prejudice to refiling it before the FCC or the federal courts, and then filed a withdrawn complaint in the federal court, asserting substantially the same allegations as in the FCC complaint against SBC. The 5th Circuit held that once an election by either filing a complaint with the FCC or filing a complaint in federal court, the complainant may not thereafter file a complaint on the same issues in the alternative form, regardless of the status of the complaint, whether it has been dismissed without prejudice. Thus, if a complainant files a complaint with the FCC against a carrier, and then decided to dismiss it voluntarily without prejudice, the complainant cannot later file a complaint in federal court raising the same violations of the Communications Act.

The purpose of §207 is prevent duplicative adjudications and inconsistent results between the federal court and the FCC, and the court will not give a complaining party several bites at the apple through a dismissal and refiling of complaints, thereby upholding judicial efficiency and fairness to responding parties.

This is the first time the federal court has ever interpreted §207 of the Communications Act as baring the refiling of a complaint in federal court, if the same complaint was previously filed before the FCC and was voluntarily dismissed by the complainant.

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FCC Issues Notice of Proposed Rulemaking to Establish Strong Privacy of Customer Information Collected and Held by Telecommunications Carriers

Citing the need for tougher privacy rules, the FCC has issued a notice of proposed rulemaking ("NPRM") in Docket No. CC 96-115; RM-1127 seeking comment on a variety of issues related to customer privacy, including what security measures telecommunications carriers currently have in place, what inadequacies exist in those security measures, and what kinds of measures may be warranted to better protect consumers' privacy from disclosure of sensitive customer information collected and held by telecommunications carriers.

Customer proprietary network information ("CPNI") is defined as: (a) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of telecommunication service subscribed to by any customer of a telecommunications carrier, and is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (b) information contained in the bills pertaining to a telephone exchange service or telephone toll service received by a customer from a carrier. Thus, CPNI includes information such as the telephone numbers called by a customer, the frequency, duration, and timing of such calls, and each service purchased by the customer, such as call waiting, call forwarding, three-way calling, and the like.

More specifically, the NPRM seeks comment on the following issues:

- Passwords set by consumers;
- Audit trails that record all instances when a customer's records have been accessed, whether information was disclosed, and to whom;
- Encryption by telecommunications carriers of CPNI data;
- Limits on data retention that require deletion of call records when they are no longer needed; and
- The notice provided by telecommunications carriers to customers when the security of their CPNI may have been breached.

Section 222 of the Communications Act currently requires carriers to take specific steps to ensure that CPNI is adequately protected from unauthorized disclosure. Under FCC rules, carriers are required to show their compliance with the FCC's customer proprietary network rules, and to make that certification available to the public. The FCC's current rules are not stringent enough. Thus, the FCC seeks comment on its tentative conclusion in the NPRM that the FCC should amend its rule to require telecommunications carriers to file annual compliance certificates with the FCC, along with a summary of all consumer complaints received in the past year concerning unauthorized release of CPNI, a summary of any actions taken against data brokers (those entities that collect CPNI and sell it to the public) during the preceding year. As most of you know, wireless carriers, including Verizon, have recently filed legal action against data brokers who sell consumers' cellular telephone numbers.

The FCC also requests comment in the NPRM on other ways to protect consumer privacy, including whether telecommunications carriers should be required to take the additional step of calling a customer's registered telephone number before releasing the customer's proprietary network information in order to verify that the caller requesting information is actually the subscriber.

Please let me know if you are interested in this NPRM.

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FCC Proposes Modifying Its "Designated Entity" and Auction Rules

On February 3, 2006, the FCC released a Further Notice of Proposed Rule Making ("FNPRM") that tentatively concluded that the FCC will modify certain rules governing benefits reserved for businesses that qualify as "designated entities" in FCC auctions for radio frequency spectrum. The FCC intends to complete this FNPRM in advance of the June 29, 2006, Advance Wireless Services ("AWS") auction for the radio frequencies in the 1710-1755 and 2110-2155 mHz bands so that an modification of the FCC rules pertaining to "designated entities" will apply to that auction and subsequent auctions.

The history of designated entities began in 1994 when the FCC sought to facilitate the participation of small businesses in competitive bidding for radio frequencies. To achieve this objective, the FCC created benefits such as bidding credits and spectrum blocks reserved for small businesses. Under the FCC's rules, a designated entity ("DE") must meet certain specified financial criteria, based on its revenues, assets, affiliates and controlling interests, in order to qualify for such benefits. The FCC's DE rules are designed to ensure that only legitimate small businesses can obtain the benefits of the DE program. The FNPRM proposes rules to establish further safeguards to preserve the award of benefits.

One of the issues that has continually confronted the FCC concerns situations where a DE has a "material relationship" with a large in-region, incumbent wireless service provider. In such a case, the question is whether the DE is really a "sham" arrangement that allows the large in-region wireless incumbent to obtain more radio spectrum when they would otherwise not be qualified to purchase the spectrum. The FCC has requested comment on whether it should restrict the award of designated entity benefits in situations where an otherwise qualified designated entity has such a material relationship.

The FCC has already received initial comments on the issues in the FNPRM; reply comments are due soon. Many initial comments support the FCC's tentative conclusion that where a material relationship exists between a designated entity and a large, in-region wireless service provider, that the designated entity benefits should not apply. On the other hand, other comments support a continuation of the benefits where such a material relationship exists.

We will keep you posted as to the results of this FNPRM. If anyone has any questions about it, please give us a call.

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Eighth Circuit Affirms Judgment of U.S. District Court for the Western District of Missouri in Favor of Southwestern Bell Telephone, LP Against City of St. Joseph, Missouri

The City of St. Joseph, Missouri (the "City") sued Southwestern Bell Telephone, LP ("SWBT") claiming that the City incurred additional contractor costs because SWBT failed to move its underground telephone lines for a Project on FARAON Street in the City (the "Project"). SWBT moved for summary judgment on the City's claims and asked the federal District Court to strike the affidavit of the City's engineer relating facts that SWBT had promised the City to move its telephone

lines for the Project, contrary to his prior deposition testimony. The District Court granted summary judgment to SWBT and struck the City engineer's affidavit, concluding that it was a sham. The City appealed to the 8th Circuit, arguing that the District Court erred in striking the City engineer's affidavit, determining that the City failed to establish a claim for promissory estoppel against SWBT, and determining the City failed to establish a claim for negligent misrepresentation.

The 8th Circuit affirmed the District Court's actions. In doing so, the 8th Circuit found that the City engineer's subsequent affidavit directly contradicted his previous deposition testimony. Thus, the District Court had found that the City engaged in a last minute effort to create a genuine issue of material fact to prevent the District Court's entry of summary judgment in favor of SWBT. The 8th Circuit agreed.

The City also argued that the District Court had erred in granting summary judgment to SWBT on the City's claim for promissory estoppel. Promissory estoppel allows courts to enforce a promise on equitable grounds, even where the parties do not enter into a contract. The doctrine of promissory estoppel, however, is applied sparingly with caution, and only in extreme cases to avoid unjust results. To prevail on a promissory estoppel claim, a party must establish the following four elements:

1. a promise;

2. the promisee detrimentally relies on the promise;

3. the promisor could reasonably foresee the precise action that the promisee took in reliance; and

4. an injustice that can only be avoided by enforcement of the promise.

If a party is unable to establish any one of the previous four elements, the claim must fail.

In this case, the 8th Circuit held that the evidence showed that SWBT made no promise to the City to have the telephone lines moved so that they would not interfere with the Project.

The City also argued that SWBT made a negligent representation by stating that SWBT had planned to complete the relocation work ahead of the Project. Negligent misrepresentation requires that a defendant fail to exercise reasonable care or competence to obtain or communicate true information. There are five elements to a claim of negligent misrepresentation. These are:

1. the speaker supplied information in the course of his or her business because of some pecuniary interest;

2. due to the speaker's failure to exercise reasonable care or competence in obtaining or communicating the information, the information was false;

3. the speaker intentionally provided the information for the guidance of a limited group of persons in a particular business transaction;

4. the listener justifiably relied on the information; and

5. as a result of the listener's reliance on the statement, the listener suffered pecuniary loss.

The failure to prove any of these five elements results in a failure to prove the claim of negligent misrepresentation.

Here, the Court held that there was no evidence in the record showing that SWBT failed to exercise reasonable care before making any statement to the City concerning SWBT's performance. Moreover, the Court found that the evidence did not support the City's claim that it justifiably relied on information supplied by SWBT concerning its intent to move the telephone lines in such a way as to not interfere with the City's Project. While SWBT had provided some information to the City claiming that SWBT had "planned" to do a future act, the Court held that "planning" to do such an act indicates a future intent to act, which is not sufficient to support a claim of negligent misrepresentation. Thus, the 8th Circuit held the City's claim for negligent misrepresentation failed.

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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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