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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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Shughart Thomson & Kilroy, P.C.'s Telecommunications and New Technologies Practice Group's Telecom Report is intended to provide general information about regulatory and legal developments in the telecommunications industry, and does not constitute legal advice. Our distribution of this Telecom Report does not create an attorney-client relationship between any recipient and Shughart Thomson & Kilroy, P.C.

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FCC Announces Electronic Posting of FCC Form 477 Due March 1, 2006

All facility-based providers of wired or wireless broadband connections to end user locations, all local exchange carriers, and all non-reseller commercial mobile radio service ("CMRS") providers offering mobile telephony are required to file FCC Form 477 twice each year. The filing dates are March 1 and September 1. In the filing due on or before March 1, 2006, those entities required to file the report must report information about broadband connections and local telephone service as of December 31, 2005.

For purposes of FCC Form 477, a broadband connection is one that enables the end user to receive information from and/or send information to the internet at information transfer rates exceeding 200 kilobytes per second. The facilities-based provider of a broadband connection is the entity that owns the portion of the wired broadband connection that terminates at the end user location, that provision/equips licensed or unlicensed spectrum of the broadband wireless channel that terminates at the end user location, or obtains an unbundled network element, special access lines, or other leased facility to the end user location and provision/equips it as broadband.

FCC Form 477 contains a new term entitled "Presubscribed Interstate Long Distance Carrier". This term replaces the term "default interstate long-distance carrier", wherever that term

previously appeared in FCC Form 477 and in the detailed reporting instructions. The new term has the same definition as the old term, and requires the same information as the old term.

Filers may obtain the FCC Form 477 and the accompanying detailed reporting instructions from the FCC at http.//www.fcc.gov/formpage.html477

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Business and Billing Practices and Billing Errors of Local Exchange and Interexchange Carriers

We have been asked and continue to be requested to review a number of business and billing practices of incumbent local exchange carriers ("ILECs") and interexchange carriers (IXCs") with respect to dealing with wholesale and retail customers, including CLECs, and large business end users. In our review, we have found a number of billing errors made by both ILEC and IXCs, for local exchange and interexchange services, respectively.

Some of these carrier errors are inadvertent, but others are questionable, and even unlawful. In any event, all such practices and errors we have reviewed constitute overcharges or injury to users, whether end users or a carrier purchasing wholesale services. Some examples of the errors we have found include billing excessive (or non-applicable) charges for both interstate and state taxes, unjust network charges for CENTREX and other access services, failure to apply or improper calculation of liquidated damages or performance assurance refunds, and failure to apply discounts and waivers of charges pursuant to contracts for telecommunication services.

We would be pleased to review any such business or billing practices you may have encountered, or answer any questions you may have about billing errors or billing practices of both ILECs or IXCs, or about unwarranted charges or overcharges for telecommunication services. As you know, we have substantial experience in litigating the issue of carrier billing and other practices on behalf of user and wholesale purchasers in federal and state courts.

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FCC Issues Citations to Two Entities Which Allegedly Obtained Call Detail Records and Other Customer Proprietary Network ("CPNI") from Telecommunications Providers in Violation of §222 of the Communications Act of 1934, as Amended, 47 U.S.C. §222, and §64.2009 of the Commission's Rules, 47 C.F.R. §64.2009

FCC has issued citations have to LocateCell.com, c/o First Source Information Specialists, Inc., Tamarac, Florida, and datafind.org, c/o DataFind Solutions, Inc., Knoxville, Tennessee. The citations assert that these entities have failed to comply with an FCC order requiring production of documents and information, which subjects the companies to monetary forfeitures. The citations show that FCC issued subpoenas to these two entities concerning call detail records and other CPNI that these entities allegedly obtained from telecommunications providers. The subpoena required the entities to produce information and documents responsive to 12 specific requests in the subpoena within 10 days of service of the subpoena.

In the case of locatecell.com, it provided information in response to the subpoena for only part of the 12 specific requests.

In the case of datafind.org, it requested additional time until December 23, 2005, to respond to the subpoena, but had not done so by the date of the citation, January 20, 2006.

Accordingly, the FCC issued citations to these two organizations informing them that they have failed to comply with an order of the FCC, and are subject to monetary forfeitures not to exceed $11,000 for each such violation or each day of a continuing violation, up to the maximum of $97,500 for continuing violations. In addition, the citations explain that a failure to comply with the subpoena may lead to a contempt citation by a relevant U.S. district court and subject the organizations who have failed to comply with the subpoena to a misdemeanor charge, which, on conviction, may subject the organizations or their officers to a fine or imprisonment or both. The FCC ordered both of these entities to respond to the citation by January 27, 2006. It is unclear whether these entities have responded to the FCC citations, or if they did respond, whether their responses were full and complete.

These citations concern the theft of telephone records of end user customers, which invades the right of privacy of wireless and wireline end users. The FCC is also launching an inquiry into theft of phone records, including issues concerning reports that private wireless and wireline phone records, including phone numbers dialed, calls received, and the location of wireless callers are available for sale. The citations referred to above relate to this issue.

If anyone has any questions about the citations, or the FCC's inquiry into the theft of phone records, please let us know.

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U.S. Court of Appeals for the Ninth Circuit Holds That the City of La Cañada Flintridge, California, Improperly Denied Sprint PCS a Permit to Construct and to Install a Wireless Antenna Based on Aesthetic Considerations

The Ninth Circuit has ruled in favor of Sprint PCS ("Sprint") with respect to the installation of wireless facilities in the City La Cañada Flintridge, California that denied Sprint a permit to construct wireless facilities in two locations because of aesthetic concerns. The Telecommunications Act of 1996 requires permit denials for wireless facilities be supported by substantial evidence, 47 U.S.C. §332(c)(7)(B)(iii). The Ninth Circuit held that the City of La Cañada ("City") overstepped its regulatory authority in denying Sprint's applications to install wireless facilities by finding that they would obstruct the rights-of-way and would have a deleterious aesthetic impact on the neighborhood in which they were to be installed. Furthermore, the Ninth Circuit evaluated a city Ordinance, which authorized the City to deny permit applications, among other reasons, on aesthetic grounds because it regulated telecommunications companies rather than managed public rights-of-way.

Sprint originally filed five applications for wireless facilities, and the City denied two of these applications. In the two applications which were denied, Sprint sought permits to construct wireless facilities towers and antennas along two separate streets in the City. Sprint then brought actions against the City in U.S. District Court for the Central District of California alleging that the City violated §332 of the Telecom Act in denying Sprint's applications. The federal District Court

determined that there was not substantial evidence supporting the City's findings that Sprint's facilities would obstruct the rights-of-way, but did find there was substantial evidence supporting the City's aesthetic rationale for denying the permits. Sprint then appealed to the Ninth Circuit the District Court's decision granting summary judgment in favor of the City, upholding the permit denials based on aesthetic impact. Sprint specifically argued that the City's denials of Sprint's applications violated state law.

In October 2001, the City enacted an Ordinance setting forth four criteria that applicants for a public right-of-way above ground that the construction permit must satisfy. Under the Ordinance, the criteria included: (1) the proposed above-ground structure does not obstruct access for pedestrians nor block views of vehicles, pedestrians or bicyclists; (2) the structure is compatible with existing above-ground structures along the public right-of-way and does not result in an over-concentration of above-ground structures along the public right-of-way; (3) the proposed structure preserves the existing character of the surrounding neighborhood and minimizes public views of the above-ground structure; and (4) the proposed above-ground structure does not result in a negative aesthetic impact on the public right of way or the surrounding neighborhood.

Of these four criteria, criteria 2, 3 and 4 are aesthetic, or non-functional.

The City denied two of Sprint's five applications. With respect to the first application, the City denied Sprint's application on aesthetic grounds and the fact that Sprint's proposed facility would obstruct access to public rights-of-way. The District Court found that this ground was not supported by substantial evidence.

With respect to the second application, the City found that Sprint's proposed facility did not satisfy criteria 2, 3 and 4. The District Court found that the City's findings under criteria 3 and 4 were supported by substantial evidence, and granted the City's Motion for Summary judgment against Sprint with respect to the two applications.

On appeal, the Ninth Circuit found that the City's Ordinance conflicted with California state law that granted telephone companies broad authority to install necessary facilities in such a manner and at such points as not to interfere with public use of roads or highways, or interrupt the navigation of waters. The Ninth Circuit held that permit denials on grounds of aesthetics, without an independent justification rooted in interference with a function of the road, conflicted with California law, and that the City overstepped its regulatory authority under California law, making its wireless Ordinance invalid, and there was no evidence to support the City's denial of Sprint's permits. Therefore, the Court reversed the District Court's holding that granted summary judgment in favor of the City.

The foregoing case is one more federal court decision which interprets properly §332 of the Telecommunications Act which requires any decision by a state or local government or instrumentality thereof denying a request to place or construct or modify personal wireless service facilities be in writing and supported by substantial evidence contained in a written record. In California, aesthetics could not overrule a state law which granted telephone corporations the authority to construct facilities as long as they do not obstruct public use of rights-of-way.

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U.S. Court of Appeals for the Ninth Circuit Rules that the City of Berkeley, California's Interim Telecommunications Carriers' Ordinance is Preempted by the Telecommunications Act of 1996

In *Qwest Communications, Inc. v. City of Berkeley, et al.*, the City of Berkeley ("Berkeley") appealed a federal District Court's summary judgment ruling that the City's interim Telecommunications Carrier's Ordinance ("Ordinance") is preempted by §253 of the 1996 Telecommunications Act, 47 U.S.C. §253. The District Court ruled that the Ordinance was preempted because it imposed an onerous burden on telecommunications providers seeking entry into the telecommunications market in Berkeley. The District Court also determined that the Ordinance was not saved by the Telecommunications Act's "safe harbor" clause because the regulations that create the prohibiting effect did not merely regulate Berkeley's rights-of-way but regulated telecommunications companies themselves. The Ninth Circuit came to the same conclusions and affirmed the District Court's judgment.

In 1996, Congress passed the Telecommunications Act to promote competition and reduce regulation in order to secure lower prices and higher quality telecommunications services, and to encourage the rapid deployment of new telecommunications technologies. The purpose of the Act was to reduce regulation of telecommunication providers by creating a pro-competitive deregulatory national policy framework. Section 253 of the Act furthers this deregulatory purpose by precluding states and municipalities from passing laws that "prohibit or have the effect of prohibiting the ability of any entity" from providing telecommunications services. 47 U.S.C. §253(a). This preemption is not absolute, however, because §253 includes a "safe harbor" clause that allows a state or local government to manage public rights-of-way or to require fair and reasonable compensation from telecommunications providers so long as the management and compensation are done on a competitively neutral and non-discriminatory basis.

This case arose when in, December 1999, Qwest won a competitive bid to provide faster and expanded telecommunications capacity to the Lawrence Berkeley National Laboratory ("LBNL") located in Berkeley. In order to provide such capacity, Qwest needed to install a local loop between LBNL and Qwest's central system. This involved letting a conduit through the City's public rights-of-way. Qwest then negotiated with Berkeley for an acceptable construction plan for the conduit, and then presented an application to Berkeley for the permit. However, Berkeley's city council adopted a resolution declaring a moratorium on telecommunications infrastructure work with exceptions for emergencies and hardship cases. As a result, Berkeley stopped issuing construction permits for telecommunications infrastructure work, and Qwest was unable to obtain the necessary permits to install the local loop.

Subsequently, Berkeley enacted an Ordinance to regulate telecommunication companies and their use of public rights-of-way. Qwest then filed suit against Berkeley arguing that the Ordinance was pre-empted under federal and state law. Qwest also sought a temporary injunction against Berkeley from enforcing the Ordinance. The federal District Court, acting on Qwest's application, enjoined Berkeley from enforcing the Ordinance. Following the Court's ruling, Berkeley passed another Ordinance to replace the first Ordinance and, in response, Qwest amended its complaint to challenge the second Ordinance. The federal District Court ruled that both Ordinances were preempted by § 253 of the Telecommunications Act. Berkeley then appealed the District Court

decision with respect to only the second Ordinance. The second Ordinance is the one at issue in this case.

The Ninth Circuit held that Berkeley's Ordinance had the effect of prohibiting the provision of telecommunications services, and therefore was preempted by Section 253 of the Telecommunications Act. More specifically, the Ordinance required telecommunications companies using public rights-of-way to pay Berkeley a non cost-based compensation fee. In a previous decision, the Ninth Circuit had ruled that fees not based on costs of maintaining public rights-of-way, as required by the Telecommunications Act, contributed to a regulatory scheme that had the impermissible effect of precluding telecommunication companies from providing services. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001). This decision, however, did not mean that all non cost-based fees are automatically preempted, but rather than courts must consider the substance of a particular regulation to determine whether it has the effect of prohibiting the provision of telecommunications services. Berkeley's Ordinance contained in it an exclusion allowing telecommunication companies protected by §253(a) of the Telecommunications Act to be excluded from paying the non cost-based compensation fee by complying with an exemption procedure.

The Ninth Circuit found that the exemption procedure, however, was a very exhausting process requiring the applying telecommunications carrier to provide extensive information about the company and the specific project. In other words, the exemption process was onerous, and had a discouraging effect on carriers who sought the exemption. Thus, in the exemption process, the carrier was required to identify its qualifications to provide service and to certify its compliance with federal and state laws, including state environmental laws, as well as federal and state tariffing and de-tariffing requirements.

The exemption process also required the carrier's applicant to disclose to Berkeley and the public the material terms of any and all agreements, tariffs and other documents relating to telecommunications services provided by the applicant. In addition, the exemption process required the carrier's applicant to provide Berkeley with an annual written report that included extensive information about the carrier's rates, its tariffing and de-tariffing notices, responses to federal and state laws, copies of all negotiated contracts relating to telecommunications services, name, address and telephone number of each person or entity to whom the telecommunications carrier denied service, access to or capacity over its facilities during the preceding year, and the reasons for denial, and copies of contracts effecting the transfer of ownership, operation or control of the carrier's facilities or systems.

Finally, the exemption process required that the applicant carrier allow Berkeley, at any time and from time to time upon reasonable notice, to audit the applicant carrier's books and records, to determine whether the applicant is continuing to furnish requisite services in conformity with federal regulations, to qualify for exemptions from licensing or franchising the related provisions of the Ordinance, and whether the applicant is acting within the scope of its certification. The Ninth Circuit held that these requirements were onerous and had the effect of prohibiting Qwest and other telecommunications companies from providing telecommunications services.

The Ninth Circuit also determined there were other sections of the Ordinance that were equally as onerous, all of which contributed to a regulatory structure that may have had the effect of prohibiting telecommunications companies from providing service.

Finally, the Ninth Circuit held that Berkeley's Ordinance was not saved by §253 "safe harbor" clause, because the provisions of the Ordinance related to an applicant's technical and legal qualifications rather than the actual management of the public rights-of-way as required by §253(c) safe harbor clause. Accordingly, the Court ruled that §253(a) preempted Berkeley's Ordinance because it contained regulations and requirements that had the effect of prohibiting telecommunications companies from providing telecommunications services in Berkeley, that the Ordinance was not saved by the safe harbor clause found in §253(c) because it did not contain regulations that manage the public rights-of-way, but allowed Berkeley to manage the telecommunication companies themselves. Therefore, the Ninth Circuit affirmed the lower court's ruling that the Ordinance was illegal.

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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