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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.

U.S. District Court for the Western District of Missouri, Central Division, Denies Comcast's Motion for Injunction Against the Missouri Public Service Commission

The U.S. District Court for the Western District of Missouri, Central Division, denied Comcast's motion for permanent injunction on January 18, 2007 in connection with Comcast's Digital Voice Service. Comcast sought the current injunction against the Missouri Public Service Commission (the "Commission"), because the staff of the Commission sought to regulate Comcast's Digital Voice service, which is Comcast's VoIP service. The Commission's staff claims that Comcast is providing local exchange and inter-exchange telecommunications within the State of Missouri without the requisite certificate of service authority, in violation of the Missouri statutes. Comcast filed a Complaint in the federal district court seeking preliminary and permanent injunctive relief from the Commission's attempt to exercise jurisdiction over Comcast's Digital Voice offering, and to impose upon Comcast state regulatory requirements prior to the determination of the FCC of the appropriate regulatory framework for offering such a digital voice. Comcast argued that the Commission has no jurisdiction because the FCC preempted state regulations of VoIP. Since Comcast's Complaint raised only a question of law, the Court treated Comcast's Complaint as one for a permanent injunction.

In ruling on Comcast's complaint, the Court noted that the FCC described VoIP in terms of VoIP technologies. Then, VoIP technologies includes those used to facilitate IP telephony, enable real-time delivery of voice and voice-based applications. Thus, VoIP is used, a voice communication traverses at least a portion of its communications path in an IP packet format using IP technology and IP networks. VoIP can be provided through public internet, or private IP networks, and can be transmitted in a variety of media, including copper, cable, fiber and wireless facilities. Unlike traditional circuit switch telephony, which establishes a dedicated circuit between the parties to a voice transmission, VoIP relies on packet switching, which divides the voice transmission into packets and sends them over the fastest available route. VoIP uses available bandwidth more efficiently than circuit switch technology, and allows providers to maintain a single

IP network for both voice and data. *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, (AT&T Order), 19 FCCR 7457, ¶ 6 (2004).

The Court then observed that the FCC had opened a rule-making proceeding to comprehensively address the regulatory and policy issues related to VoIP, but has not yet adopted any VoIP rule. *In the Matter of IP-Enabled Services* ("IP-Enabled Proceedings"), 19 FCCR 4863 (2004).

Using the foregoing as a background, the Court determined that Comcast was not able to show actual success on the merits of its claim for a permanent injunction, that Comcast faces irreparable harm, that the harm to Comcast, outweighs any possible harm to others, and that an injunction against the Commission serves the public interest. Instead, the court found that the FCC has not yet preempted the entire field of VoIP regulation, in part, because it has not concluded its IP-enabled Proceedings, and that state agencies such as the Commission are capable of interpreting the federal statutes necessary to classify communications service as either telecommunications or information services where the FCC has not preempted the matter. Comcast did not ask the court to determine whether its Digital Voice was a telecommunications service or information service. Comcast only requested the Court find that state regulation of VoIP services is preempted by the FCC.

The Court also held that state regulation isn't that just preempted only when it is impossible to separate interstate from intrastate telecommunications, and that, here, Comcast had not asked the Court to determine whether its service could be separated into interstate and intrastate services. Moreover, Comcast did not ask the court to compare Comcast's Digital Voice to other VoIP services, such as those that were an issue in the *Vonage* case, where the FCC preempted the State of Minnesota from regulating Vonage's VoIP service because the services could not be separated into interstate and intrastate communications for compliance with Minnesota's requirements without negating valid federal policies and rules. *In the Matter of Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Comm'n* ("Vonage Order"), 19 FCCR 22404 at ¶ 1 (2004).

The Court also observed that the FCC has not preempted the entire field of VoIP services, because in at least one case, the FCC determined that a VoIP service was a telecommunications service. *AT&T Order*, 19 FCCR 7457. Accordingly, the court denied Comcast's motion for a permanent injunction.

This decision is not final, and we would expect Comcast to take an appeal to the United States Court of Appeals for the Eighth Circuit.

If there are any questions, please give us a call.

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Update on IPTV

In our December, 2006 newsletter, we informed you that the issue of whether IPTV requires a franchise is currently the subject of two lawsuits filed by a franchising authority against entities

that are currently providing IPTV. You will recall that we informed you that the City of Richmond, Virginia ("City"), sued Cavalier Telephone, LLC and related entities ("Cavalier") for providing IPTV service in Richmond, Virginia, without a franchise in the Circuit Court for the City of Richmond, Virginia. We also advised you that we anticipated that Cavalier would remove the suit to federal court, since its Complaint raised a federal question under Section 541(a)(1) of the Communications Act.

Cavalier did remove the case to the United States District Court for the Eastern District of Virginia, Richmond Division in early January 2007. Thereafter, the City of Richmond filed an Amended Complaint, and sought a preliminary injunction against Cavalier from providing IPTV in Richmond. Cavalier filed a motion to dismiss or in the alternative, a stay of the proceedings.

On January 25, 2007, the federal District Court issued an order denying the City of Richmond's motion for a preliminary injunction, and granting Cavalier's motion to dismiss or, in the alternative, stay the proceedings, and referred the issue to the Federal Communications Commission ("FCC") for clarification. The Court held that the issue of whether Cavalier was required by state and federal law to obtain a franchise from the City of Richmond prior to offering IPTV required careful analysis and a thorough understanding of the technologies involved. Thus, the Court determined that the FCC was better suited to resolve these issues. The Court stayed proceedings pending the FCC's review and clarification of this question.

The Court also denied the City's request for an injunction, finding that the City had not demonstrated the necessity for injunctive relief, because it could not show the likelihood of success on the merits of the underlying dispute or the possibility of irreparable harm to the City if the court denied the injunction.

We anticipate that, in the City of Milwaukee case which we also reported in our December 2006 Newsletter, the federal district court in Milwaukee will reach a similar result.

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U.S. District Court for the Southern District of New York Refers Complainant Telstar Resources Group, Inc., against MCI, Inc. To FCC

In an Opinion and Order issued January 17, 2007, U.S. District Court for the Southern District of New York referred the Complaint of Telstar Resources Group, Inc. ("Telstar"), against MCI, Inc. ("MCI") to the FCC for consideration of the relevance of the FCC's existing jurisdictional separation procedures to the assessment of federal and state Universal Service Fund ("USF") surcharges on mixed type and direct access lines. In this case, Telstar sued MCI, claiming that MCI violated Sections 201 and 202 of the Communications Act by including its bills with federal and state fees for USF. As you are aware, Section 254 of the Communications Act requires the federal government to create a Universal Service Fund ("USF") for the support necessary to provide affordable, modern telecommunications services for low income customers, and those persons in rural areas and to provide discounts on internet access to schools, libraries and rural healthcare providers. 47 U.S.C. § 254. The FCC implemented this section of the Communications Act by establishing regulations requiring interstate telecommunications providers to contribute to the USF.

47 C.F.R. Section 709. In addition, Communications Act allows states to require providers of intrastate telecommunications services to contribute to state USF, if the states chose to establish them, although state mechanisms for providing universal service must be consistent with federal regulations and must not burden the federal USF.

Telstar contracted with MCI for Frame Relay Service, a direct access service which allows high speed data transmission without relying on public telephone lines. Some mixed use direct use access lines carry both interstate and intrastate telecommunications traffic. Telstar alleges that the FCC had adopted regulations designed to separate the jurisdictions of federal and state regulatory bodies and these regulations prohibit a service provider from imposing both federal and state USF surcharges on mixed use direct access lines. Furthermore, Telstar contended that, in violation of the Communications Act and FCC's regulations, MCI imposed surcharges for both federal and state USFs on its direct access lines including both mixed use lines and lines that carry only interstate traffic.

MCI moved to dismiss the complaint, claiming that the FCC's jurisdictional separation regulations did not restrict USF charges at all, and requested that the Court refer the matter to the FCC under the document of primary jurisdiction.

In ruling on MCI's motion, the Court determined that MCI did bill Telstar for surcharges for both federal and state USF in the same billing period, and that the state surcharge consisted of a California end-user surcharge on Frame Relay services provided in California. MCI claimed that the California Public Utilities Commission required MCI to access, collect and remit surcharges to pay for the California USF, and that such surcharges had to be imposed on end-users of intrastate telecommunications services.

The basis for Telstar's claim that MCI was engaging in unreasonable practices under Section 201 of the Communications Act and FCC regulations was the assertion that an FCC regulation that classifies mixed use direct access lines as either state or interstate lines is a threshold requirement which makes it impossible to characterize a single direct access line as both intrastate and interstate. Telstar also argued that these regulations make it illegal to surcharge such lines for both state and federal USF. The FCC regulation at issue, is the so-called 10% Rule, which classifies mixed use private lines and wide area telephone service lines as state lines if the intrastate traffic on the lines constitutes 10% or less of the total traffic, and as interstate lines if the interstate traffic on the lines constitutes more than 10% of the total traffic. The FCC's 10% Rule comprises part of the FCC's jurisdictional separation procedures, which are designed primarily for the allocation of property costs, revenues, expenses, taxes and reserves between state and interstate jurisdictions. In response to this Telstar claim, MCI disagreed that the 10% Rule imposes any restrictions on a states ability to impose USF surcharges.

After review, the Court concluded that the FCC would be in the best position to determine the relevance of the existing jurisdictional separation procedures to the assessment of federal and state USF charges on mixed use direct access lines. Accordingly, the Court referred the matter to the FCC. The Court also stayed the Telstar complaint pending the determination by the FCC of this issue.

The Court noted that since the Communications Act does not provide a mechanism whereby the Court can directly refer a matter to the FCC, it was incumbent upon the parties filing an administrative complaint with the FCC to place the issue of the relevance of the 10% Rule to USF surcharges by state for the FCC.

If anyone has any questions about this Court ruling, please let us know.

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U.S. Court of Appeals for the 8th Circuit Affirms the Iowa Utilities Board Decision Regarding Wireless Telephone Calls Which Originate and Terminate Within the Same Major Trading Area, or Intra-Major Trading Area Wireless Calls

On January 8, 2007, the U.S. Court of Appeals for the 8th Circuit upheld a decision by the Iowa Utilities Board ("IUB"), that rural carriers in Iowa could not charge Qwest Corporation ("Qwest") long-distance access charges when Qwest bundled inbound Intra-Major Trading Area ("MTA") wireless traffic with long-distance traffic before delivering it to the rural carrier. The IUB further determined that the rural carriers could not force their customers to use Qwest as an Inter-Exchange Carrier ("IXC") for outbound intra-MTA wireless calls.

Affirms the IUB's decision, the Court agreed with IUB's analysis that Qwest merely acts as a conduit to facilitate what is essentially a transaction between a wireless carrier and a local exchange carrier. Accordingly, the IUB held that rural exchange carriers could enter into valid interconnection agreements between themselves and the original wireless carrier, instead of charging Qwest, as the intermediary transmission carrier, for long distance access charges. Thus, the Court held that the IUB acted within its authority in making its determination regarding whether rural carriers could charge Qwest a long-distance access charge on intra-MTA wireless calls.

The Court also upheld IUB's decision that the rural exchange carriers could not force their customers to use Qwest as an IXC for outbound intra-MTA traffic. The IUB had determined that allowing such a practice would enable the rural carriers to treat local wireless traffic as long-distance traffic subject to access charges. Thus, the IUB directed in local exchange carriers to allow their customers to dial intra-MTA calls as local calls. The Court held that, in reaching this conclusion, the IUB acted within its authority.

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Why do Telecommunication Service Contracts Have Early Termination Charges?

Telecommunications Services Contracts routinely contain early termination charges or penalties. Most telecommunications customers who enter into such contracts are unaware of the purpose of such charges or how to deal with them.

The purpose of early termination charges are two-fold. First, in the competitive telecommunications marketplace, carriers want to retain customers. Early termination charges act as a deterrent to a customer changing carriers before a Telecommunications Service Agreement is completed. Secondly, carriers want to provide a means through which they can recover setup costs

associated with telecommunication services for a new customer. Early termination charges allow a carrier to recover these charges if a customer terminates services before a Telecommunication Service Agreement is ended.

Early termination charges are generally described in a telecommunications service agreement as a fixed percentage of the outstanding balance for the remainder of the time left on a telecommunications services agreement, or as a flat fee. The percentages and flat fees incurred vary by the type of carrier. In addition, certain carriers may charge termination fees by product.

Termination charges usually do not include non-recurring charges or installation fees although some carriers may charge a pro-rated amount for non-recurring charges and installation fees as a part of their early termination charges. Early termination charges apply to both business and residential customers.

We have reviewed the early termination charges by types of carriers as follows:

IXC – IXC's usually charge a certain percentage of the total amount of the time left on the telecommunication services agreement. Percentage charge varies among carriers, but generally range from 75 to 100% of the total amount owed.

Incumbent Local Exchange Carriers ("ILECs") – ILECs generally charge the same as the IXC for early termination charges.

Competitive Local Exchange Carriers – ("CLECs") -- CLECs usually charges a certain percentage of the total amount owed for the time left on the telecommunications services agreement, but the charges vary. The charges are closer to 100% as opposed to 75 to 100% in the case of IXCs and ILECs.

Wireless Service Providers – Wireless service providers typically charge a flat fee as an early termination charge. The charges vary from as low as $150 per telephone number to $200 per telephone number.

VoIP Providers – VoIP providers generally charge a flat fee as an early termination charge, similar to wireless services providers.

In the competitive telecommunications market, telecommunications service providers routinely approach customers of other carriers in an attempt to win their business. If the customer accepts a service proposal from a new carrier, the customer is confronted with early termination charges. There are a number of ways that customers deal with these charges. First, some customers negotiate with their new carrier to pay the early termination charges. Other customers, when negotiating the original telecommunications services agreement with their original carrier, limit the service term of the original services agreement, to three years or less, so they maintain the flexibility to renegotiate their agreement at the end of the three years or lesser period. In this manner, they avoid termination charges, and are free to move to a new carrier as soon as their original services agreement is expires.

Telecommunications service carriers, on the other hand, place provisions in telecommunications services agreement with their customers calling for an automatic renewal of the

telecommunications service agreement for the length of the original agreement, if the customer fails to notify the carrier that the customer does not want to renew the services agreement. Since both carrier and customer negotiate telecommunications services agreements at arms length, in most cases, such provisions are generally enforceable. The only time such provisions may not be enforceable, is if the renewal period is unreasonably long.

If anyone has any questions concerning Early Termination Charges, 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.

For your convenience, we also have placed our Telecom Reports from 2004 to the present under the "Newsletters" tab on our www.telecomattorneys.com website.

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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