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TELECOM REPORT

LAW OFFICES OF MICHAEL L. GLASER, L.L.C. TELECOMMUNICATIONS AND NEW TECHNOLOGIES TELECOM REPORT

Michael L. Glaser, L.L.C. 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 ADOPTS RULES FOR UNLICENSED USE OF TELEVISION WHITE SPACES

The Federal Communications Commission ("FCC") adopted a Second Report and Order on November 4, 2008, that establishes rules to allow new, sophisticated wireless devices to operate in the broadcast television spectrum on a secondary basis at locations where that spectrum is available. This television spectrum is currently unused and is commonly referred to as television "white spaces". The FCC's new rule allows the use of new and innovative types of unlicensed devices in the unused television broadcast spectrum to provide broadband data and other services for consumers and businesses. The new rules allow the use of both fixed and personal/portable unlicensed devices. These devices, however, must include a geolocation capability and the ability to access over the Internet a database of incumbent services such as full power and low power television stations and cable system headends, in addition to spectrum sensing technology. The database will tell the white space device which spectrum can be employed at a specific location.

All white space devices are subject to equipment certification by the FCC's laboratory. The laboratory will request samples of the devices for testing before they are certified, to ensure that they meet all FCC requirements.

The FCC will also allow certification of devices that do not include geolocation and data base access capabilities, but which rely solely on spectrum sensing to avoid harmful interference, subject to much more rigorous FCC approval process.

Please let us know if you have any questions about the FCC's Second Report and Order and its new rule to allow wireless devices to operate in a broadcast television spectrum on a secondary basis.

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US COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ISSUES DECISION IN PAYPHONE DISPUTE

The U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") issued an opinion on November 7, 2008, in *Network IP, LLC and Network Enhanced Telecom, LLP v. FCC,* No. 06-1364 in which the D.C. Circuit upheld an order of the FCC in *APCC Services, Inc*., 21 FCCR 10488 (2006) ("*Liability Order*") and *APCC Services, Inc.*, 22 FCCR 4286 (2007) ("*Damages Order*"), in which the D.C. Circuit upheld the FCC's *Liability Order* but reversed the FCC's *Damages Order.* In this opinion, the Court of Appeals addressed a dispute involving the payphone industry. As most of you know, two types of calls may be placed from a payphone. The first and most common type of call is the "coin call" in which the caller inserts a coin directly into the payphone before making the call. The rates for coin calls are set by the state utilities commissions.

The second type of call is known as a "coinless call" in which a caller places a call by using a service such as directory assistance, operator service, an access code or a subscriber 800 number. Certain of these types of calls are known as "dial around calls." The rules governing coinless calls are the subject of the D.C. Circuit's November 7 2008 opinion.

Congress enacted Section 276 of the Telecommunications Act of 1996 to ensure payphone service providers ("PSP") are compensated for dial-around calls to 800 numbers or 01XXX numbers that the caller uses to reach the long distance carrier of his choice and to encourage the availability of payphones. In Section 276, Congress directed the FCC to establish a per-call compensation plan to ensure that all PSPs are fairly compensated for each and every completed intrastate and interstate call using their payphone. In implementing Section 276, the

FCC established a simple plan. Telecommunications carriers must compensate PSPs for calls made from payphones with calling cards. The application of the plan is complicated, however, because long distance calls often involve multiple carriers. For example, a local exchange carrier initially might receive a call, and then route it to a non-local exchange carrier, typically an interexchange carrier ("IXE") such as Sprint, AT&T or another long distance carrier, that then transmits the call to still another carrier. If the recipient of the call is the customer of the interexchange carrier, the interexchange carrier would simply transmit the call to the local exchange carrier that serves the customer. If the call recipient is not a customer of the interexchange carrier, the interexchange carrier transfers the call to a reseller of the interexchange carrier.

There are two types of resellers. The First type, known as "switchless resellers", do not possess their own switching facilities and must rely on IXEs to perform the switching and transmission functions that are required to complete a call.

The second type, known as "switchbased resellers," have their own switching capabilities. In some circumstances, a switchbased reseller transfers the call to another switchbased reseller, which, in turn, routes the call to a third switchbased reseller, and so on.

In 1996, the FCC ruled that facilities based carriers should pay their per call compensation for calls received by the reseller customers. Later that year, the FCC held that a facilities based carrier "maintains" its own switching capability, regardless if the switching equipment is owned or leased by the carrier. After two attempts to establish a per call "dialaround" rate, the FCC finally established a 24 cent per call as the applicable rate, which the D.C. Circuit upheld on review in 2000.

Network Enhanced Telecom, LLP, ("NET") located in Texas, is a telecommunications carrier that owns switches. It uses an innovative web interface, which empowers other carriers to

develop pre-paid calling cards. NET has a technology that allows customers to control switches as if they possess them, eliminating the technologically outdated link between switching and physical possession of switches.

In 2002, a group of PSPs, including APCC Services, Inc., a billing and clearing house for PSPs, filed a complaint against the FCC against NET alleging liability and damages because NET was failing to compensate PSPs. NET had instructed its customers that they alone were responsible for compensating PSPs and included language in contracts for their technology to this effect. Between October, 1999 and November, 2001, the relevant period involved in this case, more than 11 million calls were placed using calling cards distributed by NET's customers which used NET's switches.

Based upon the PSPs' complaints, the FCC ordered NET to pay $2,789,505.84, plus interest at 11.2%. In reaching this decision, the FCC found NET was liable for failing to compensation to PSPs under its pay telephone rules, and assessed the damages based upon its rules that require a carrier to pay compensation and provide per-call tracking for the calls originated by payphones if the carrier "maintains" its own switching capability, regardless if the switching equipment is owned or leased by the carrier. The D.C. Circuit Court found that the FCC's interpretation that its rules requiring a carrier to pay compensation and provide per-call tracking if the carrier "maintains" its own switching capability means that the carrier either owns or leases the equipment. In this case, NET owns the switching equipment. NET argued that the rule only requires a customer to have the ability to control switches which its customers did, as opposed to owning or leasing the equipment, and therefore, NET is not liable to pay PSPs for the amount the FCC ordered NET to pay. Accordingly, the Court upheld the FCC's decision that NET was liable for compensation to pay the PSPs.

NET also challenged the FCC's assessment of damages, contending that the FCC improperly ordered NET to pay interest at an annual rate of 11.25%, which the FCC determined is the appropriate cost of capital for payphone providers. NET contended that it should only have to pay the lower Internal Revenue Service ("IRS") rate of interest, as the FCC had applied in two payphone reconsideration orders the FCC had issued in 2002. The FCC countered this argument by claiming that its use of the IRS rate in the earlier payphone reconsideration orders was justified because those cases presented unusual circumstances. The Court, however, disagreed with NET, and determined that the FCC's use of the 11.25% interest rate was appropriate.

NET also contended that the FCC had allowed the PSPs to file a formal complaint, beyond the FCC's two year statute of limitations for all complaints against carriers for the recovery of damages not based on overcharges, as provided in Section 415(b) of the Communications Act. The PSPs had originally filed an informal complaint, and subsequently filed a formal complaint. The FCC's rules allow a formal complaint to relate back to an informal complaint, if it is filed within six months from the date of the carrier's report responding to an informal complaint and is barred from pursing the complaint. If no formal complaint is filed within the six month period, the complainant will be deemed to have abandoned the unsatisfied informal complaint. The FCC, however, may waive any of its rules, including the "relating back" rule, on its own motion if good cause is shown.

The PSPs filed an informal complaint with the FCC against NET in the fall of 2002. On the last day of the six month period, the PSPs unsuccessfully attempted to file a formal complaint. The filing, however, was deficient because the PSPs had submitted a single check to the FCC for the filing fee, rather than two separate checks for complaints against two of the defendants. The filing fee was $5.00 short. Two weeks later, the PSPs filed a formal complaint,

with the proper filing fee, and the FCC accepted the complaint stating that good cause had been shown even though the PSPs had made an error on the filing fee. If the FCC had enforced the six month deadline, much of the FCC's assessment of damages would be invalidated, because the relevant time period would be January 3, 2001 to November 23, 2001, instead of April 1, 2000 to November 23, 2001.

The Court found that the FCC decision to waive the 6 month rule for the PSPs' filing was arbitrary and capricious. Therefore, the FCC granted NET's petition and reversed the FCC as to its damages order. The upshot of this case is that the FCC must reassess the damages that NET must pay the PSPs in the relevant time period, from January 3, 2001 through November 23, 2001.

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

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TENTH CIRCUIT RULES IN FAVOR OF T-MOBILE, LLC IN APPEAL ON A SPECIAL USE PERMIT DENIAL FOR WIRELESS TELECOM FACILITY

T-Mobile, LLC ("T-Mobile") has prevailed in the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") in *T-Mobile Central, LLC v. Unified Government of Wyandotte County, Kansas City, Kansas*, which denied T-Mobile's application for a special use permit to construct a wireless telecom facility.

T-Mobile filed an application to construct a wireless telecom facility in Kansas City, Kansas. Pursuant to permitting procedures whereby individuals or entities may seek to have the local governing body authorize through the issuance of special use permits, certain uses in situations which characteristics may not blend or harmonize with uses in the standard zoning

districts. Telecommunications antennas and towers are specified as allowable for special uses qualifying for special use permits.

T-Mobile filed an application to build 120 foot tall tower to provide residential and vehicle cell phone coverage in the vicinity of a proposed site in Kansas City, Kansas ("Kansas City"). The application identified other structures within a mile of the proposed site that could be used as alternatives, but rejected each of them as inadequate. The application also included a drive study that showed existing and anticipated coverage with the new tower. When the Wyandotte County Unified Government staff reviewed the application, it issued a report stating, among other things, that there was doubt whether there was a deficiency in cell phone service as to require a new tower. Thereafter, T-Mobile submitted new engineering studies based on the drive test, which confirmed the existence of a significant gap in cell phone coverage, and therefore the need for the proposed tower. The staff, however, updated its report by stating that their owns tests showed adequate service. After a hearing, the Unified Government concluded that T-Mobile had failed to show that a denial of its application would prohibit the provision of personal wireless services, and that the T-Mobile's drop studies indicated that there were no dropped calls in the area surveyed in stark contrast to studies submitted for other applications for cellular towers. The Unified Government also found that the proposed tower was not the least intrusive means of fulfilling a gap in service, if any existed for T-Mobile services. Finally, the Unified Government stated that it had considered factors that Kansas courts had recommended that cities in Kansas review when deciding to grant special use permits, and had decided to reject T-Mobile's application and the basis of these factors. T-Mobile appealed the Unified Government's rejection of the application to the federal District Court in Kansas City.

The federal District Court held that the Unified Government's denial of T-Mobile's application violated the Telecommunications Act of 1996 because the denial was not supported

by substantial evidence and has the effect of prohibiting the provision of personal wireless services.

The Tenth Circuit affirmed the federal District Court's opinion on the basis that the Unified Government's decision was not supported by substantial evidence, and did not raise the issue of whether the decision had the effect of prohibiting the provision of personal wireless services. In reaching this conclusion, the Tenth Circuit determined that the Unified Government's decision that T-Mobile had failed to show a prohibition of personal wireless services was error, because this criterion does not appear in any of the ordinances allowing special use permits which existed at the time of T-Mobile's application. Thus, by applying a criterion for which the applicable local ordinance did not provide, the Unified Government failed to act on the basis of substantial evidence.

The Tenth Circuit also found that Unified Government's finding that T-Mobile had failed to show a prohibition of personal wireless services because its drive study indicated there were no dropped calls in the area surveyed in stark contrast to studies submitted for other applications for cellular towers, was erroneous. The Tenth Circuit stated that the record did not show that the Unified Government had substantial evidence to support this conclusion because the drive test was not designed to measure dropped calls, but was intended to measure the level of existing network coverage. Since the drive test was not supposed to show the existence of dropped calls, the Unified Government could not rely upon it to show the absence of dropped calls. Therefore, the drive test could not provide the substantial evidence necessary to support the Unified Government's decision denying T-Mobile's special use permit, and the Unified Government had no substantial evidence to determine that the amount of dropped calls T-Mobile's customers experienced was actually acceptable.

The Tenth Circuit also reversed the Unified Government's finding that T-Mobile's proposed tower was not the least intrusive means of filling in a service gap. The Tenth Circuit that the Unified Government erred in requiring T-Mobile to show that its proposal was the least intrusive means, because nothing in local law permitted the Unified Government to impose this requirement. Since there was no basis in local law for this criterion, the Unified Government erred in its decision to use the least intrusive means analysis as part of its decision making process in denying T-Mobile's application. Moreover, the Unified Government's argument that T-Mobile had to demonstrate that another site would be less intrusive was irrelevant to the Unified Government's consideration of T-Mobile's application. The Tenth Circuit also rejected the other basis in which the Unified Government rejected T-Mobile's application as the least intrusive means of filling a service gap.

Finally, the Tenth Circuit held that the Unified Government's application of the factors suggested by Kansas courts for use by municipalities during consideration of zoning changes for special use permits was not supported by substantial evidence. These factors include: (1) the character of the neighborhood; (2) the zoning and uses of nearby properties; (3) the suitability of property for the uses to which it is restricted; (4) the extent to which change will detrimentally affect nearby property; (5) length of time the property has been vacant as zoned; (6) the gain to the public health, safety and welfare by the possible diminution of value of the developer's property as compared to the hardship imposed on the individual landowners; (7) recommendations of a permit or professional planning staff; and (8) the conformance of their requested change to the City's master or comprehensive plan.

The Tenth Circuit noted that Unified Government referenced only three of these factors as evidence supporting the denial of T-Mobile's application: The character of the neighborhood, the aesthetic impact of the proposed tower, and the dropped call data. The Court noted that none

of these factors were supported by substantial evidence, because the neighborhood where T-Mobile proposed the tower was largely commercial, and the master plan contemplated commercial use, the generalized nature of the aesthetic concerns do not quality as substantial evidence, and finally, the Unified Government's position with regard to the absence of dropped calls flatly contradicts the existing evidence because the Unified Government cannot point to substantial evidence in opposition to T-Mobile's testimony regarding the existence of dropped calls and the substandard nature of the existing service.

The Tenth Circuit's decision is yet another decision in which the federal courts carefully review state and local government's decisions to deny zoning and special use permits for cellular towers to render cellular service.

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COLORADO PUBLIC UTILITIES COMMISSION ISSUES CERTIFICATE FOR PUBLIC CONVENIENCE AND NECESSITY TO COMPANY PROVIDING WHOLESALE SWITCHING AND INTERCONNECTIONS FOR VOICE OVER INTERNET PROTOCOLS (VoIP) SERVICES

The Colorado Public Utilities Commission ("CPUC") has issued a Certificate of Public Convenience and Necessity ("CPCN") to Momentum Telecom, Inc. ("Momentum") to provide local exchange telecommunication services and a letter of registration to provide emerging competitive telecommunication services, even though Momentum provides wholesale switching and interconnection VoIP services to cable providers and similarly situated wholesale customers through the use of its own softswitches and media gateways. Momentum's interconnecting VoIP offering is not considered traditional basic local exchange service. Instead, it is VoIP or Internet based services. In order to provide VoIP services, Momentum must obtain telephone numbers from the Number Pool Administrator ("NPA") which requires Momentum to interconnect with

the appropriate local exchange providers. Current telecommunications industry telephone number issuing standards, along with FCC rules, require that a provider requesting its initial block of telephone numbers in a particular state provide evidence to the NPA that the provider has either (1) a license or authority issued by the FCC; or (2) a CPCN issued by the appropriate state regulatory body. Momentum does not have authority from the FCC because, as stated below, it does not regulate VoIP at this time.

Momentum's application for a CPCN presented the CPUC with unusual circumstances. The FCC has not made a determination from the regulatory status of interconnected VoIP services, and it is unclear whether fixed location "non-nomadic" interconnected VoIP telecommunications offerings currently are properly classified as telecommunications services or information services under the definitions contained in the Communications Act of 1934, as amended by the Telecommunications Act of 1996. As a result, the FCC has preempted certain state actions attempting to regulate VoIP. If the FCC were to make a determination that non-nomadic VoIP is an information service, Momentum's VoIP offerings would be exempt from state regulation, and the CPUC would not have authority to issue a CPCN to a fixed location VoIP provider.

Notwithstanding these circumstances, the CPUC granted Momentum's application for a CPCN, even though the services it provides can legitimately be considered unregulated at this time, because Momentum's application promotes competition in the telecommunications marketplace in Colorado. If the CPUC were to deny Momentum's application, it would have the practical effect of denying entry into the Colorado telecommunications market, contrary to the legislatively expressed policy Colorado to promote competition in this marketplace. Without telephone numbers, Momentum could not provide its interconnected fixed VoIP service to Colorado customers.

Faced with this dilemma, the CPUC granted Momentum's application, without making any determination on the appropriate classification of interconnected VoIP services and without waiving the CPUC's right to apply its rules of the Colorado public utility statutes to intrastate telecommunications service providers. The CPUC held that Momentum did not have to file a tariff because the CPUC has recognized that offering and provision of VoIP services appears to be different from offerings from traditional location exchange services, and the CPUC has allowed other VoIP providers to offer their intrastate VoIP telecommunication services without having an effect of intrastate tariff on file with the CPUC. If Momentum proposes to offer intrastate local exchange telecommunication services through a means other than the use of its softswitches and VoIP offerings, Momentum must file an effective tariff where its services with the CPUC and comply with all statutory regulatory requirements applicable to telecommunications providers subject to the traditional jurisdiction of the CPUC.

The CPUC stated that if the FCC were to decide that non-nomadic VoIP is a telecommunications service with intrastate components, Momentum must file with the CPUC an intrastate tariff for the intrastate components of its VoIP service offerings within one year of the FCC's decision classifying non-nomadic VoIP as a telecom service.

The CPUC's grant of a CPCN to Momentum may be the first instance of a statue regulatory authority issuing a CPCN to a telecom company providing VoIP offerings an intrastate basis in the United States. We are not aware of any similar situation in which a state regulatory body has issued such an authorization because of the unclear regulatory status of non-nomadic VoIP offerings.

If anyone has any questions about these CPUC's actions, please let us know.

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For more information about Michael L. Glaser, L.L.C. and its Telecommunications Practice and New Technologies Practice, please consult our website at 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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