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SHUGHART THOMSON & KILROY'S TELECOMMUNICATIONS AND NEW TECHNOLOGIES PRACTICE GROUP TELECOM REPORT

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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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FCC Delays the Effective Date of FCC July 2003 Decision that Senders of Unsolicited Advertising Facsimiles Must Obtain a Prior Signed, Written Statement as Evidence of the Recipient's Permission to Receive the Facsimile

On June 27, 2005, the FCC again delayed the effective date of its July 2003 decision that senders of unsolicited faxes must obtain prior written consent from the recipient, until January 9, 2006. Thus, until that date, anyone may send an unsolicited advertising facsimile without the prior written consent of the recipient as long as the sender of the fax has an existing business relationship with the recipient.

Prior to the FCC's action in late June 2005, the U.S. Congress passed SB 714, an Amendment to Section 227 of the Communications Act, which the President signed into law on July 9, 2005, as Public Law 109-21, effective that date. In this Amendment to Section 227, Congress amended the Communications Act to prohibit a person from using any telephone facsimile machine, computer or other device to send to another fax machine, an unsolicited advertisement to a person who has requested that such sender not send advertisements, or to any other person unless: (1) the sender has an established business relationship with the person; and (2) the advertisement contains a conspicuous notice on its first page that the recipient may request not to be sent any further unsolicited fax advertisements, and includes a domestic telephone and facsimile number presenting such a request. The domestic telephone number and facsimile number may not be a pay-per-call number.

This Amendment also requires the FCC to provide that a request not to send unsolicited fax advertisements complies with FCC requirements if: (1) the request identifies the recipient facsimile number to which the request relates; (2) the request is made to the telephone or facsimile number;

and (3) the person making the request has not subsequently provided express invitation or permission to have such advertisements sent. The Amendment authorizes the FCC to allow professional tax-exempt trade associations to send unsolicited fax advertisements to their members in furtherance of association purposes. Finally, the Amendment requires the FCC to report annually to Congress on the enforcement of the law's requirements and requires the Controller General to study the report to specify congressional committees on the complaints received by the FCC concerning unsolicited facsimile advertisements sent to facsimile machines.

The FCC will likely issue a Notice of Proposed Rulemaking to request public comments on proposed rules to implement this Amendment. Importantly, the new law codifies the FCC's interpretation of its regulations that an established business relationship constitutes consent by a recipient to a fax sender for an unsolicited fax.

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Two-Lined Captioned Telephone Service is Eligible for Compensation from the Interstate TRS Fund

The FCC has ruled that two-lined captioned telephone service is a type of telecommunications relay service ("TRS") eligible for compensation from the interstate TRS fund, which is part of the Universal Service Fund. Two-lined captioned telephone service uses a special telephone number that has a text display.

A single phone telephone line permits the user to both listen to what is said over the telephone and simultaneously read captions of what the other person is saying. Two-line captioned telephone service permits the user to simultaneously listen to and read what the other person is saying; however, use of the second telephone line in two-line captioned service provides the user with access to functionality that one-line captioned telephone service does not offer. Thus, in two-line captioned telephone service, the user will be able to access a host of services that are not available under one-line service, such as call waiting, call forwarding, and *69.

Two-line captioned service also makes it possible for users to access 911 emergency services directly while simultaneously receiving captions back on the second telephone line. In addition, two-line captioned telephone service allows two or more persons to be on a call at the same time by using another telephone extension in the same location as the two-line service, because their primary connection is a direct voice connection.

Finally, captioned service can be added to a telephone call at any time during the call, even after the call is in progress, by engaging the second line which makes the call to the captioned telephone service.

The FCC also adopted an allocation methodology for allocating the number of inbound two-line captioned telephone minutes that should be compensated from the TRS Fund. The methodology is similar to the methodology used for 800 and 900 call minutes.

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Third Circuit Upholds FCC's Decision on Rates for Tandem Switching

On September 3, 2003, the FCC ruled that a carrier demonstrating that its switch serves a geographic area comparable to that served by an incumbent local exchange carrier's tandem switch is entitled to the tandem interconnection rate to terminate local telecommunications traffic on its network. *Cost-Terminating Compensation for CMRS Providers*, 18 FCC Rcd. 18441 (Sept. 3, 2003). (the "September 3 Order"). SBC Communications, Inc. ("SBC") challenged the September 3 Order in the U.S. Court for the Third Circuit, contending that the FCC's September 3 Order violated the Administrative Procedures Act ("APA") by improperly revising an FCC rule without affording notice and an opportunity for comments. SBC also argued that the September 3 Order was arbitrary and capricious.

SPC supported its claim that the FCC's ruling violated the notice and comment requirements of the APA by arguing that the FCC, in its September 3 Order, eliminated the functional equivalency test for determining a CLEC entitlement to a tandem rate, thereby changing the FCC's prior interpretation of this test. SBC argued that the FCC's actions constitute a legislative amendment to the FCC's rules, and was subject to the notice and comment requirements of the APA.

The Third Circuit, however, rejected SBC's arguments and ruled that the FCC did not modify or substantially change its prior interpretation of its regulations or impose new duties. Instead, the FCC was properly interpreting its rule in Section 51.711(a)(3), 47 C.F.R. 51.711(a)(3), that a CLEC's new technology switch is considered a functional equivalent of an ILEC tandem switch if the geographic area served by the CLEC's newer switch is comparable to the area served by the ILEC tandem switch. The Third Circuit also held that the FCC further interpreted its rule by stating that a functional equivalency test is still required only when the CLEC's newer technology switch does not serve a geographic area comparable to that served by an ILEC tandem switch. Thus, the Third Circuit held that the FCC's actions did not modify or substantively change the FCC's prior interpretation of Section 51-117(a)(3) of the FCC's rules or impose new duties and, therefore, the APA's notice and comment requirements did not apply.

SBC also contended that even if the September 3 Order did not violate the notice and comment requirements of the APA, it is arbitrary and capricious because it ensures that a CLEC will receive a higher tandem interconnection rate for all local traffic terminated over its network, regardless of whether it has incurred the costs related to operation of its tandem switch. SBC asserted that the tandem interconnection rate consists of three discrete rate elements for each of the three discrete functions -- tandem switching, transmission between the tandem switch, and office switching. SBC argued that the FCC's interpretation of the tandem rate rule in the September 3 Order entitled a CLEC to receive the entire tandem rate for all traffic delivered to its switch based only upon a showing that its switch serves a geographic area to that served by an ILEC switch, which allows a CLEC to receive compensation for local traffic at its switch, even where the traffic is switched only once and where the CLEC does not need to transmit the traffic to a distant end office switch. Thus, SBC contended that a CLEC should not receive the full tandem rate because it does not perform two of the three switching functions required to receive the full tandem rate (tandem switching and transmission to an end off switch).

The Third Circuit rejected this argument, holding that the FCC's actions were consistent with the Communications Act's requirements that only the rate for reciprocal compensation (which includes the tandem rates for CLEC) needs be based on a reasonable approximation of additional cases of terminating calls that originate in another carrier's network.

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Potential Challenges to ILEC Unbundled Network Element Rates

As you know, in March 2004, the U.S. Court of Appeals for the District of Columbia Circuit reversed portions of the FCC's unbundled network element rules which the FCC had promulgated in its triennial review order ("TRO") in August 2003. In the TRO, the FCC established rules governing an incumbent local exchange carrier's obligation to make available to competitive carriers their unbundled network elements as required by the Communications Act. The FCC also eliminated line sharing as an obligation of an incumbent local exchange carrier ("ILEC"). See *United States Telecom Ass'n. v. FCC and USA*, 359 F.3d 554 (March 2004). The FCC's unbundled network element rules which the Court overturned became invalid on June 16, 2004. The Court upheld the FCC's elimination of line sharing as an obligation of an ILEC. Thereafter, the FCC conducted a rulemaking to adopt new rules as a result of the Court's order. On December 15, 2004, the FCC adopted new unbundled network element rules.

Between June 16, 2004, and December 15, 2004, some ILECs developed new rates and proposed them to CLECs, without waiting for the FCC to promulgate new rules as a result of the Court's decision, in the form of modifications to existing interconnection agreements. Furthermore, some ILECs proposed to continue line sharing as a part of their interconnection agreements with competitive local exchange carriers, but at greatly increased rates to the competitive carriers.

The upshot was that certain ILECs entered into modified interconnection agreements with competitive carriers. In this regard, many of these amended interconnection agreements contain a "reservation of rights" clause providing both the ILEC and the competitive carrier with a reservation of certain rights. Specifically, the parties agreed that nothing in the amendment to the interconnection agreement would be deemed an admission by the ILEC or competitive carrier concerning the interpretation or effect of the rates, terms and conditions for the subject matter contained in the amended interconnection agreement, or an admission by either the ILEC or competitive carrier that the rates, terms and conditions should not be changed, vacated, dismissed, stayed or modified; and that the amended Agreement would not preclude or estop the ILEC or competitive carrier from taking any position in any forum concerning the proper rates, terms or conditions whether they should be changed, vacated, dismissed, stayed, or modified.

Thus, regardless of how much an ILEC has increased its unbundled network element rates, or commercial line sharing rates, a competitive carrier still has the opportunity to challenge these rates under the reservation of rights clause and dispute procedures set forth in the interconnection agreement. In many cases, the new rates were not really "negotiated" between the parties and, even if such rates were in fact negotiated, the reservation of rights clause allows either party to challenge them. Thus, a competitive carrier can still challenge the legality of such rates, either as an individual carrier or part of an alliance of competitive carriers formed specifically for that purpose.

If you want more information on whether an amendment to a specific interconnection agreement allows for a challenge to the rates for unbundled network elements or line sharing in the amended interconnection agreement, please let us know.

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Telecommunications Carriers Must Observe Obligations Regarding Third-Party Verification Recordings of Customer's Intent to Change Telecommunications Carriers

The FCC's Carrier Change Verification Rules in Part 64, 47 C.F.R. Part 64, require that a telecommunication carrier's sales agent "drop off" a sales call once a connection is established between the customer requesting a change in carriers and the third-party verifier that confirms the customer's intent to change carriers. *See* 47 C.F.R. 64.1120(c)(3)(i).

However, there are certain exceptions to this rule. For example, a telecommunications carrier may not be able to comply with the drop off rule because its sales force is located in an area with a telephone exchange that does not employ the technology necessary to support a drop off. In this instance, the FCC has exempted from its drop off rule those carriers that certify to the FCC that their sales agents are unable to drop off the sales call after initiating a third-party verification. Such carriers are exempt from the drop off requirement for a period of two years from the date they certify to the FCC that it is infeasible for carriers to have their agents drop off a three-way call. See *Third Order on Reconsideration*, 18 FCC Rcd. 509, 5113, para. 35.

Even if the carrier has certified to the FCC that it is unable to comply with the drop off requirement, the carrier must terminate the third-party verifier if the sales agent of an exempted carrier responds to a customer's inquiry during a verification attempt. Once a sales agent of a carrier responds to a customer's inquiry, the final third-party verification cannot include any of the customer's responses previously recorded. Instead, a new third-party verification must be initiated after the sales agent has finished responding to the customer. A carrier's sales agent, however, may respond to a question posed by a customer so long as the verification is terminated. Under no circumstances, however, may the sales agent continue to provide a customer with marketing information once a verification has begun. A third-party verification recording must include the entirety of the final verification communication, including both what the customer has said and what the customer has heard from the verifier during the course of the final verification.

Recently, the FCC has had a number of inquiries about the application of the "drop off" rule, so we are reminding carriers of this rule.

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FCC's Enforcement Bureau Will Not Seek Immediate Enforcement of the FCC's Requirement that Providers of VoIP Service Obtain Affirmative Acknowledgements Concerning Limitations of E911 Service

The FCC's Enforcement Bureau has announced that it will not seek enforcement, for a thirty (30) day period beginning July 29, 2005, of the FCC's requirement that providers of voice-

over internet protocol service ("VoIP") obtain affirmative acknowledgements by July 29, 2005, from 100% of their subscribers that they have read and understood the provider's advisory to them concerning limitations of their E911 service. To make sure that the FCC's Enforcement Bureau will not seek enforcement of this regulation against them, providers of VoIP service must obtain an extension of the July 29 deadline from the FCC by filing a specific subscriber notification and acknowledgement status and compliance report.

On June 3, 2005, the FCC released an Order requiring interconnect VoIP service providers to provide E911 capabilities to their subscribers no later than 120 days from the effective date of the FCC's June 3 Order (the "June 3 VoIP Order"). The FCC published the Order in the Federal Register on June 29, 2005, which made its effective date 30 days from that date, or on July 29, 2005. The June 3 VoIP Order required providers of interconnect VoIP service to:

- specifically advise every new and existing subscriber, prominently and in plain language, of the circumstances under which E911 service may not be available to their interconnected VoIP service or may in some way be limited by comparison traditional E911 service;

- obtain and keep a record of the affirmative acknowledgement by each subscriber, both new and existing, that the subscriber had received and understood the advisory described above; and

- distribute to its existing subscribers warning stickers or other appropriate labels warning the subscribers that their VoIP E911 service may be limited and not available, and instructing the subscriber to place these warning stickers or appropriate labels on or near the equipment used in connection with the subscriber's interconnected VoIP service. Further, the VoIP provider is required to distribute such warning stickers or other appropriate labels to each new subscriber prior to the initiation of that subscriber's interconnected VoIP service.

The FCC's Enforcement Bureau has decided that it will not initiate enforcement action against a VoIP provider which has not completed the above-described requirement until August 30, 2005, if the provider files a detailed report with the FCC by August 10, 2005, containing the following information:

- a detailed description of all actions that the VoIP provider has taken to specifically advise each subscriber, prominently and in plain language, of the circumstances under which their E911 service may not be available to their interconnected VoIP service, and/or may in some way be limited by comparison to traditional E911 service. This description should include, but is not limited to, relevant dates and methods that the VoIP provider used to contact its subscribers;

- a quantification of how many of the providers' subscribers, on a percentage basis, have submitted an affirmative acknowledgement, as of the date of the report, and

an estimation of the percentage of subscribers from whom they do not expect to receive an acknowledgment by August 29, 2005;

- a detailed description of whether and how the provider has distributed to all subscribers warning stickers or other appropriate labels warning subscribers that their E911 service may be limited or not available, and instructing the subscriber to place these warning stickers or labels on and/or near the customer's equipment used in connection with the subscriber's interconnected VoIP service. This information should include but is not limited to relevant dates and methods of contact with subscriber;

- a quantification of how many subscribers on a percentage basis to whom the provider did not send the advisory described above and/or to whom the provider did not send warning stickers or other appropriate labels described above;

- a detailed description of any and all actions the provider intends to take towards any of its subscribers that do not affirmatively acknowledge having received and understood the advisory including, but not limited to, disconnecting these subscribers' VoIP service no later than August 30, 2005;

- a detailed description of how the provider is currently maintaining acknowledgments of the advisory received from its subscriber; and

- the name, title, address, telephone number and email address of the persons responsible for the VoIP provider's compliance efforts with the FCC's June 3 VoIP Order.

After the FCC's Enforcement Bureau receives these compliance reports, it will evaluate the reports and determine what action, if any, the Enforcement Bureau should take with respect to the provider's report.

Please let us know if you have any questions about the requirements of the FCC's June 3 VoIP Order concerning VoIP E911 service, or the Enforcement Bureau's announcement described above.

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For more information about Shughart, Thomson & Kilroy, P.C. and its Telecommunications Practice, please consult our websites at www.stklaw.com and www.telecomattorneys.com.

If you have any questions about this Report, 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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