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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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FCC Grants Petition of Verizon Telephone Company's Forbearance from Title II of the Communications Act and Computer Inquiry Rules Regarding Their Broadband Services

Verizon Telephone Company ("Verizon") filed a petition for forbearance under Title II of the Communications Act of 1934, as amended, and the FCC's *Computer Inquiry rules* on December 20, 2004. On December 19, 2005, the FCC extended the deadline for the FCC to act on the forbearance petition to March 19, 2006, as it is permitted to do under Section 10(c) of the Communications Act. Verizon amended its petition on February 7 and February 17, 2006, to supply additional information to the FCC.

Section 10(c) of the Act provides that a forbearance petitions shall be deemed granted if the FCC does not deny the petition for failure to meet the requirements of forbearance under Subsection 10(a) within one year after the FCC receives the petition, unless the one year period is extended by the FCC. Pursuant to §10(c) of the Communications Act, the Verizon petition was deemed to be granted by the FCC by operation law, effective March 19, 2006, because the FCC failed to deny the petition for failure to meet the requirements for forbearance.

The Verizon petition requested that the FCC forbear from applying common carrier regulations under the *Computer Inquiry* requirements to Verizon's high capacity broadband services. These services include packet-switch broadband services such as frame-relay asynchronous transfer mode cell relay ("ATM"), as well as non-time division multiplexing-based ("non-TDM-based") (optical networking, optical hubbing, and optical transmission services). Verizon's petition also stated that its request for relief excludes traditional special access services such as DSI and DS3 services, and excludes TDM-based optical networking. Additionally, Verizon stated that it would continue to make these services available as wholesale common carrier services. Finally, Verizon narrowed its petition by informing the FCC that it did not seek forbearance of federal Universal Service obligations for the services which Verizon sought the FCC to forbear from regulating.

The FCC's Wireless Competitor Bureau apparently determined that the relief afforded to Verizon in the petition is consistent with and similar to the relief provided by recent FCC decisions regarding broadband services, packet switching and fiber facilities. In those decisions, the FCC decided to relax regulations where competition was significant and where regulations acted as a disincentive to deploy new broadband technologies. The effect given to Verizon's petition by operation of law grants Verizon the relief sought, without a majority of the FCC commissioners explicitly granting the relief. Instead, the relief was granted by the inaction of the FCC.

If you have any questions about this FCC Wireless Competition Bureau action, please don't hesitate to give us a call.

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Tenth Circuit Determines That Federal Court Has Jurisdiction Over Claims of Various Wyoming Landowners who Allege State Law Claims Against the Union Pacific Corporation, Union Pacific Railroad Concerning Fiber Optic Easements

On March 14, 2006, the U.S. Court of Appeals for the 10th Circuit decided in *Nicodemus v. Union Pacific Corporation, et al.*, that the U.S. District Court for the District of Wyoming has jurisdiction over a complaint filed by Wyoming landowners alleging various state claims, including trespass and unjust enrichment, slander of title, and injunctive relief against the Union Pacific Corporation, and the Union Pacific Railroad Company (collectively "Union Pacific"). Union Pacific was granted railroad rights-of-way over the Wyoming landowners' property under numerous federal land grant statutes, which dated from 1852 to 1875. The landowners' claims against Union Pacific arose when Union Pacific entered into agreements with various telecommunications providers in which Union Pacific "licensed" to these providers the right to install and maintain fiber optic cables in Union Pacific's rights-of-way over the landowners' land. Union Pacific receives the revenue from these license agreements.

In 2001, the landowners filed suit in federal court in Wyoming alleging the various state law claims described above, but the federal district court dismissed the Wyoming landowners' cause of action for lack of subject matter jurisdiction. Subsequently, the U.S. Supreme Court decided several decisions which addressed the jurisdictional questions at issue in the Wyoming landowners' case. Specifically, the Wyoming landowners' claims hinge on whether Union Pacific's use of the federal land grant rights-of-way has exceeded the purpose for which they were granted. The Wyoming landowners and Union Pacific disagreed as to the interpretation of the federal land grant statutes which granted Union Pacific the rights-of-way.

Accordingly, the 10th Circuit held that the contested interpretation of the federal land grant statutes between the parties involved a substantial federal issue, that the U.S. government had a direct interest in the determination of property rights granted to Union Pacific, and therefore, the Wyoming federal district court had jurisdiction to hear the state law claims. Moreover, the 10th Circuit determined that a federal forum for the resolution of the rights-of-way issue would not disrupt the sound division of labor between state and federal courts. The 10th Circuit acknowledged that the type of property dispute at issue in *Nicodemus* had been the recent subject of several proposed class actions. In these cases, *Smith v. Sprint Communications Co.*, 387 F.3d 612 (7th Cir. 2004, cert. den., 125 Sup. Ct. 2939, 2005, 7th Cir. vacated the nationwide class certification, and *Issac v. Sprint Corp.*, 261 F.3d, 679 (7th Cir. 2001), a similar result was reached.

Accordingly, the Wyoming landowners' claims against Union Pacific will be heard in the federal court, on the state law claims, including a claim for injunction requiring Union Pacific to remove the existing fiber optic cables from the rights-of-way.

The ultimate decision in this case before the federal courts could have a significant impact on certain telecommunications providers' nationwide fiber optic routes.

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FCC Issues Notice of Proposed Rulemaking on Reallocation of 24 MHz of Spectrum in the 700 MHz Frequency Band Allocated for Public Safety Use

On March 17, 2006, the FCC adopted a Notice of Proposed Rulemaking ("NPRM") requesting public comment on whether certain channels within the 24 MHz spectrum in the 700 MHz radio frequency band allocated for public safety should be modified to accommodate broadband communications. This 700 MHz of public safety spectrum is currently be used by television broadcast stations sharing the digital television ("DTV") transition, but will become available for use by public safety agencies on February 18, 2009, when television broadcast stations' transition to DTV is completed.

In 1998, the FCC adopted a plan for use of this frequency band. Specifically, the FCC divided the 700 MHz public safety spectrum into two parts, between narrowband channels which allow voice and low speed data services, and wide band channels which allow high speed data and slow scan video services. The FCC's division of the frequency band is as follows: 764- 776 MHz for narrowband channels, and 794-806 MHz for wideband channels. Within the 12 MHz of paired wideband spectrum, 4.8 MHz is currently designated for general use, and 1.8 MHz for inter-operability. The remaining 5.4 MHz is held in reserve for future pubic safety needs. General use spectrum licenses are subject to a regional planning process similar to the process used in the 800 MHz public safety band. Under current FCC rules, the individual channels within the general use and inter-operability wideband segments have a band with the 50 kHz, and licensees can aggregate 350 kHz channels up to 150 kHz.

In December 2005, the FCC recognized that it should expeditiously review the 700 MHz public safety band plan adopted in 1988 to determine whether it should be modified to accommodate broadband communications. The NPRM seeks comments on three specific proposals to modify the 700 MHz band plan. These proposals were submitted by the National Public Safety Telecommunications Council, Motorola, Inc. and Lucent Technologies, Inc. All three plans propose combining the general use, inter-operability and reserve wideband segments in order to allow for broadband communications. These proposals also suggest a creation of guard bands to protect narrowband voice operations.

The NPRM also invites interested parties to submit additional proposals to modify the 700 MHz band, and requests public comment on the FCC's tentative conclusion not to change the narrowband portions of the 700 MHz public safety band.

The NPRM also requests comment on a proposal by the Public Safety National Coordination Committee to adopt a wideband data inter-operability standard commonly known as scalable

adaptive modulation ("SAM"), and to require that all wideband radios be capable of support the SAM standard.

The comment date on this proposal is sixty (60) days after publication of the NPRM in the *Federal Register*, and reply comments are due ninety (90) days after publication of the NPRM in the *Federal Register*.

We will notify you of the dates in the April newsletter.

If anyone wants to discuss this proposal, don't hesitate to give us a call.

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Wyoming Supreme Court Rules that End User Common Line Charge Does Not Constitute a Charge for Intrastate Telephone Service that is Subject to Wyoming Sales and Use Tax

In a decision issued March 22, 2006, the Wyoming Supreme Court held that the Wyoming State Board of Equalizations' (SBOE") finding that an end user common line charge ("EUCL") constitutes a charge for intrastate telephone service that is subject to Wyoming sales and use tax falls out of the scope of the Wyoming Tax Imposition Statute ("Wyoming Tax Statutes").

The case relates to the sales and use tax assessed against Qwest Corp. ("Qwest") resulting from the Wyoming State Department of Audits' audit of Qwest for the period July 1, 1997 to December 31, 2001. The audit revealed that Qwest billed all of its customers for the EUCL charge but did not remit sales tax to Wyoming for amounts received. Qwest considered the charges as compensation for interstate telephone service not subject to Wyoming sales tax. The EUCL charge is described in Wyoming as an interstate charge, which is imposed by the Federal Communications Commission ("FCC") and is meant to recover a portion of the costs of customer's local facilities used for providing interstate services. The charge is assessed to all of Qwest's customers on a non-transactional basis, and is imposed regardless of whether the customer chooses to obtain interstate long distance service from a provider such as the former AT&T Corp., the former MCI Telecommunications Corp., or Sprint, or any other long distance provider.

After the audit, the Wyoming Department of Audit issued a decision concluding that the EUCL charge was taxable under Wyoming law, and therefore, issued an assessment to Qwest on July 21, 2003, for $3,428,102.95 as an additional tax, plus $1,553,797.16 in interest. Qwest objected to the assessment. A hearing was held before the SBOE in May 2004. As a result of the hearing, the SBOE issued its statement affirming the Department of Audit's assessment as related to the EUCL charge. Qwest then sought a review of this decision in the Wyoming State District court, which certified the case to the Wyoming Supreme Court.

The Wyoming Supreme Court determined that the question before the Court was whether an access charge for connection to the local network for the ability to make or receive an interstate call is subject to Wyoming sales and use tax. The Wyoming Tax Statute levies an excise tax on the sales price paid for intrastate telephone and telegraph service, including the consideration paid for the rental or leasing of any equipment or service as incidental thereto. The Court stated that while this statutory language clearly indicates that intrastate telephone services are to be taxed, the statute is

not clear as to what constitutes an intrastate telephone service. Furthermore, the term intrastate telephone service was not defined in the Wyoming Tax Statute.

To answer this question, the Court looked at the origination and termination point of a call to determine whether it comprises an intrastate telephone service. Under this analysis, the Court held that an EUCL charge does not represent an intrastate telephone service, because it is incidental to interstate service, and therefore excluded from the Wyoming Tax Statute. The EUCL charge compensated Qwest for providing interstate long distance access to Wyoming customers, and is not a charge for intrastate services as contemplated by the Wyoming Tax Statute. The Court construed the Wyoming Tax Statute in favor the taxpayer, which followed the principles related to tax statutes. They are to be construed in favor of the taxpayer.

There are other states which disagree with the Wyoming opinion and require local exchange companies to pay sales tax on EUCL charges. The State of Tennessee is an example where the Tennessee Imposition Tax Statute encompasses interstate telephone services.

Since some state tax statutes impose the tax liability on the carrier, and not the end user, the carriers are responsible for remitting such sales tax to the states in which they operate where a EUCL charge is subject to state tax.

Please let us know if you have any questions about whether the end user line charge is subject to a sales tax or use tax in the various states of the United States.

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AT&T and BellSouth Corp.'s Proposed Merge

On March 5, 2006, AT&T Inc. announced their proposed merger for approximately $67 billion. Both AT&T and BellSouth contend the merger will create economies of scale that will enable the two companies to invest in new technology and benefit from substantial cost efficiencies which the merger would create.

Both companies also contend that investors will benefit from the cost efficiencies by combining the culture of AT&T with BellSouth's fiber and DSL networks, so that customers will see faster, more economic deployment of next generation internet protocol ("IP") networks. The companies also claim that businesses will gain from the combination of AT&T's national and global network, and BellSouth's local expertise.

Finally, AT&T and BellSouth maintain that government, including military and national security agencies will have a U.S.-based provided of integrated services to respond to their needs anywhere in the world.

Competitors have initially commented that the merger will substantially lessen competition in the telecommunications market place. In addition, content providers and internet phone companies have expressed concern that the merger will allow the merged companies to block their access to the public internet, and will allow the merged companies to degrade the quality of service. AT&T pledged to uphold the principles of internet neutrality until 2007, as a condition of its acquisition of AT&T Corp. which took place in 2005.

AT&T and BellSouth have not yet filed their applications with the Department of Justice ("DOJ") or the FCC for approval of the merger. Such applications are expected to be filed shortly. In addition to approval of the DOJ and FCC, both companies will need to obtain approval of state regulatory authorities for the states in which they operate.

If anyone has questions concerning this merger, please let us know.

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FCC Will Establish a Public Safety and Homeland Security Bureau

The FCC has announced the establishment of a Public Safety and Homeland Security Bureau. The Bureau is designed to provide a more efficient, effective and responsive organizational structure to address public safety, homeland security, national security, emergency management and preparedness, disaster management and other related issues.

The new Bureau's establishment is subject to Congressional notification before it becomes effective, and the FCC's coordination with the National Treasury Employees' Union Local 209 to secure its approval for issues that affect the FCC's workforce.

The new Bureau will handle the following issues and functions:

- Public safety communications
  - 911 – enhanced 911 (E911) requirements
  - Public safety answering points ("PSAP")
  - Inter-operability and operability of public safety communications
  - Communications Assistance for Law Enforcement Act ("CALEA")
- Priority emergency communications
- Alert and warrant system of U.S. citizens ("EG emergency alert system")
- Continuity of government operations and continuity of operations planning
- Public safety outreach
- Disaster management coordination
- Disaster management outreach
- 24/7 communications center
- Communications infrastructure protection
- Network reliability and resiliency
- Network security

- Advisory committees and panels focused on public safety and security issues

- Studies and reports of public safety, homeland security, and disaster management issues.

The Bureau will be organized into three divisions: Policy Division, Public Communications Outreach and Operations Division, and the Communications Systems Analysis Division. Each of these divisions will have separate functions. For example, the Policy Division will be responsible for drafting, developing and administering rules, regulations and policies including those pertaining to 911/E911 issues, PSAPs, network security and reliability, and licensing of spectrum for public safety entities such as police and fire departments. The Public Communications Outreach and Operations Division will be responsible for coordinating FCC's emergency response procedures and operations, among other responsibilities. The Communications Systems Analysis Division will administer the FCC's information and collection requirements such as network added reports, and perform analyses and studies concerning public safety, homeland security, national security, disaster management, and related issues.

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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.

Shughart Thomson & Kilroy, P.C.
1050 Seventeenth Street, Suite 2300
Denver, Colorado 80265
303.572.9300 (telephone)
303.572.7883 (facsimile)

Michael L. Glaser
Direct: 720.931.8133
Email: mglaser@stklaw.com

Michael D. Murphy
Direct: 720.931.8137
Email: mmurphy@stklaw.com

Phil Bledsoe
Direct: 720.931.1172
Email: pbledsoe@stklaw.com

Howard Gelt
Direct: 720.931.8143
Email: hgelt@stklaw.com