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

**Analysis
of
Liability and Enforcement of Forfeitures and Penalties under the Communications Act of
1934, as Amended**

I. Introduction.

The Communications Act of 1934, as amended (the "Communications Act" or the "Act"), 47 U.S.C. § 151, *et seq.*, and particularly Sections 501, 502 and 503, provide for penalties and forfeitures for persons violating provisions of the Act. While most persons that are either regulated by or required to observe the policies and rules of the Federal Communications Commission ("FCC"), the agency charged by Congress with implementing the Communications Act, are generally aware of the Act's penalty and forfeiture provisions, many such persons do not understand exactly how the FCC applies the Act's penalty and forfeiture provisions where it finds a violation, or the procedures to which the FCC must adhere before it can enforce a penalty or forfeiture it imposes pursuant to the Act.

The purpose of this article is to generally describe the statutory provisions of the Communications Act which set forth penalties and forfeitures, and the procedures which the FCC must follow in enforcing any penalty or forfeiture imposed on any person who violates the Act. This article also points out certain limited exceptions to the general penalty and forfeiture provisions contained in Sections 501, 502 and 503 of the Act.

A. **Section 501 of the Act.**

Section 501 provides that any person who willfully and knowingly does or causes or suffers to be done any act, matter or thing prohibited or declared to be unlawful or who willfully and knowingly omits or fails to do any act, matter or thing required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense for which no penalty (other than the forfeiture as provided in the Act), by fine of not more than \$10,000.00 or by imprisonment for a term not exceeding one year or both. Section 501 further provides that for a second conviction of a violation of the Act, the punishment is by fine of not more than \$10,000.00 or by imprisonment for a term not to exceed two years or both. Section 153(i) of the Act defines a person as an individual, partnership, association, joint stock company, trust or corporation. Section 501 is a general penalty section of the Act. The FCC may apply this penalty where a violator of the Act willfully refuses to obey an FCC order. The United States Department of Justice through the Attorney General ("USDJ"), acting on behalf of the FCC, must administer Section 501 through the federal courts.

B. **Section 502 of the Act.**

Section 502 of the Act concerns violation of the FCC's rules and regulations, provides that any person who willfully and knowingly violates any rule, regulation, restriction or condition made or imposed by the FCC under the Act, or any rule, regulation, restriction or condition made or imposed by international radio or wire communications treaty or convention or any regulations associated therewith to which the United States is or may become a party shall, in addition to other penalties provided by law, be punished upon conviction by a fine of not more than \$500.00 for each and every day during which such

offense occurs. As in the case of Section 501, the USDJ acts on behalf of the FCC in administering Section 502.

C. Section 503 of the Act.

Section 503 of the Act specifically concerns forfeitures to the FCC, and is the statutory provision on which the FCC most commonly relies to impose fines for violations of the Communications Act.

Section 503 contains two express prohibitions. First, Section 503 prohibits a communications common carrier from granting rebates and offsets relating to the transmission of communications. The fine for violating this prohibition is three times the amount of the rebate or offset, in addition to any other fine or penalty imposed under Sections 501 and, 502 or any other applicable section of the Communications Act.

Second, Section 503 also subjects any person who willfully or repeatedly (1) fails to comply substantially with the terms and conditions of an FCC license, permit or authorization; (2) fails to comply with the Act or an FCC order, rule or regulation; (3) violates the Communications Act prohibitions of payola and cotiers, and (4) violates similar provisions in the United States Criminal Code, to a forfeiture penalty.

Under this second prohibition in Section 503, if the violator is a broadcast station licensee or permittee, cable television operator or an applicant for a broadcast or cable television operator license, permit, certificate or other instrument of authorization issued by the FCC, the amount of any forfeiture penalty can not exceed \$25,000.00 for each violation or for each day of a continuing violation, except that the amount assessed for any continuing violation can not exceed a total of \$250,000.00 for any single act or failure to act.

If the violator is a common carrier subject to regulation under the Communications Act, or an applicant for any common carrier license, permit, certificate or other instrument of

authorization issued by the FCC, the amount of any forfeiture can not exceed \$100,000.00 for each violation or for each day of a continuing violation, except that the amount assessed for any continuing violation can not exceed a total of \$1,000,000.00 for any single act, or failure to act.

If the violator is neither a broadcast station licensee or permittee, cable television operator, or applicant for any broadcast or cable television operator license, permit, certificate or other instrument of authorization issued by the FCC, or a common carrier, the amount of the forfeiture penalty can not exceed \$10,000.00 for each violation or for each day of any continuing violation, except that the amount assessed for any continuing violation can not exceed a total of \$75,000.00 for any single act or failure to act constituting a violation.

II. **Factors Which the FCC Must Consider in Assessing a Forfeiture.**

Under Section 503, the FCC is required to take into account the nature, circumstances, extent and gravity of any violation, and with respect to the alleged violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters, in determining the amount of a forfeiture penalty for violation of the Act or noncompliance with a license or order of the FCC.

III. **FCC's Procedure in Assessing a Forfeiture Penalty.**

The FCC has two procedural avenues which it may follow in assessing a forfeiture penalty under Section 503 for violation of the Act. First, the FCC may determine the forfeiture penalty after notice to the alleged violator and an opportunity for a hearing before the FCC or an administrative judge of the FCC.

After such a hearing, a person against whom a forfeiture penalty is determined may obtain review of the FCC's order of forfeiture in a United States Court of Appeals where the person resides or has his principal place or office, or where the FCC is located.

If any person fails to pay the FCC's assessment of a forfeiture penalty determined after an FCC hearing, and if the FCC's decision is affirmed on appeal by the appropriate U.S. Court of Appeals, the FCC must refer the judgment to the USDJ, who will bring suit in appropriate federal District Court of the United States to collect the penalty. In a proceeding to collect the penalty, the violator cannot challenge the validity and appropriateness of the FCC's final order imposing the forfeiture penalty.

Second, the FCC may decide not to proceed by formal hearing before the FCC or one of its administrative law judges, and instead, issue a notice of apparent liability ("NAL"), in writing, directed to the person who is alleged to have violated the Communications Act. In the NAL, the FCC must grant the person an opportunity to show, in writing, within a reasonable period of time, why a forfeiture penalty should not be imposed. The NAL must (1) identify each specific provision, term and condition of the Act, rule, regulation, order, treaty, convention or other agreement, license, permit, certificate, instrument or other authorization which the person apparently has violated or with which the person apparently failed to comply, (2) set forth the nature of the act or omission charged against the person and the facts on which the charge is based, and (3) must state the date on which the conduct that allegedly violates the Act or FCC rule or regulation occurred. The FCC must recover any forfeiture a penalty imposed under this procedure by following the provisions of Section 504(a) of the Act. We discuss in Section IV below the recovery procedure under this section of the Act.

Significantly, the FCC cannot determine forfeiture against any person, if the person does not hold a license, permit, certificate or other authorization issued by the FCC, and if the person is not an applicant for a license, permit, certificate or other authorization issued by the FCC, unless, prior to the NAL, the FCC sends the person a citation setting forth the alleged violation, gives a reasonable opportunity to the person for a personal interview with an official of the FCC at the field office of

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the FCC which is nearest to the person's place of residence, and the person subsequently engages in conduct of the type described in the citation. In other words, the FCC must give a person who allegedly violates the Act and who does not hold the license or permit or authorization issued by the FCC and if the person is not an applicant for a license or certificate, a citation and the person must continue to engage in the violating conduct before the FCC can issue a NAL. The citation process does not apply if the person alleged to have violated the Act is engaging in activities for which a license, permit or certificate of authorization would be required, or is a cable television system operator, if the person involved is transmitting on frequencies assigned for use in a radio service which individual station operation is authorized by rule, or in the case of violations of the FCC's tower illumination requirements, if the person involved is a non-licensee tower owner who previously received notice of obligations imposed by the FCC's tower illumination requirements in Section 303 of the Act, or is the permittee or licensee of a broadcast station that uses such a tower.

Moreover, the FCC cannot impose a forfeiture against a person under Section 503 if the person holds a broadcast station license issued under Title III of the Act, if the violation charge occurred more than one year prior to the date of issuance of the NAL, or prior to the date of commencement of the current term of the broadcast license, whichever is earlier. Finally, the FCC cannot impose a forfeiture if the person does not hold a broadcast station license under Title III of the Act, and if the violation charged occurred more than one year prior to the date of issuance of the required NAL.

IV. The FCC's Procedure for Recovering Forfeitures.

Section 504 of the Act sets forth the procedures which the FCC must follow in recovering forfeitures imposed under Sections 501, 502 and 503 of the Communications Act or under any other section of the Act. Under Section 504, any forfeitures imposed against any person for violation of the Communications Act must be paid to the Treasurer of the United States. If the person fined does

not make payment of the fine voluntarily, the FCC must refer the matter to the USDJ which, in turn, must recover the fine in a civil suit in any United States District Court located in the district where the violator has its personal office or if the violator is a communications carrier, in any district through which the lines of the carrier run. If the USDJ brings suit to collect a penalty imposed by the FCC, the alleged violator is entitled to a trial *de novo*.

A trial *de novo* means that the federal court (or jury if the USDJ or the person sued demands jury trial) must determine whether the person has violated the Act without giving consideration to (1) the FCC's NAL proceedings, or (2) the amount of the forfeiture the FCC imposed as a result of the NAL proceedings. In a collection action in the Federal District Court proceeding, the USDJ has the burden of going forward and the burden of proof. The person charged with the violation may defend the action on the basis of general denials and affirmative defenses, even if he failed to raise such denials and affirmative defenses before the FCC in the NAL proceedings. In addition, a person sued by the USDJ in a collection action under this procedure may also have a statute of limitations defense, depending on the date the USDJ files the collection suit.

Forfeitures imposed by the FCC are subject to remission or mitigation by the FCC, or if suit has been filed, by the USDJ upon request of the FCC. The FCC can also direct the USDJ to dismiss or discontinue the prosecution of any suit to recover a fine. Remission or mitigation means that the FCC may settle a fine for amounts less than the FCC had originally imposed in the NAL, or may dismiss a suit brought for recovery after it has been instituted. However, the FCC can not reduce the forfeiture amount after the Court has held a trial *de novo* and determined the outcome.

V. **An NAL Does Not Constitute Admission of Guilt.**

When the FCC issues a NAL proposing the imposition of a forfeiture, that fact cannot be used in any other proceeding before the FCC, to the prejudice of the person to whom the NAL was

issued, unless the forfeiture has been paid, or a federal court has ordered payment of such a forfeiture, and such Court order has become final.

VI. **Exceptions of Forfeitures under Title V of the Act.**

Various sections under Title II and Title III of the Communications Act call for imposition of forfeitures that are separate and distinct and not cumulative of the forfeiture provisions of Sections 501, 502 and 503 of the Act. Title II of the Act is entitled "Common Carriers". Title II is divided into separate parts. Part 1 is entitled "Common Carrier Regulation." Part 2 is entitled "Development of Competitive Markets."

Title III of the Act is entitled "Provisions Relating to Radio," and is divided into four parts. Part 1 is entitled "General Provisions," and relates to licenses for use of radio communication or transmission of energy. Part 2 is entitled "Radio Equipment and Radio Operators on Board Ship," Part 3 is captioned "Radio Installations on Vessels Carrying Passengers for Hire," and Part 4 is headed "Assistance for Public Telecommunications Facilities; Telecommunications Demonstrations; Corporation for Public Broadcasting."

Certain sections of Part 1 of Title II contain specific penal provisions for violations. For example, Section 219 of the Act requires annual reports from communications carriers and their parent corporations, if any to file annual reports with the FCC. The failure of a carrier to file an annual report is subject to a fine of \$1,200.00 for each and every day the carrier fails to file the report. The \$1,200.00 fine under Section 219 is separate and distinct and not in addition to those prescribed under Sections 501 and 502 of the Act. Similarly, Sections 214, 220 and 223 have separate and distinct forfeiture provisions, which are not cumulative to the forfeiture provisions under Sections 501, 502 and 503 of the Act.

Under Title III of the Act, Part III relating to radio installations on busses carrying passengers for hire, the Act provides for forfeitures under Section 386, but these forfeitures are in addition to those provided under Sections 501, 502 and 503 of the Act.

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Shughart Thomson & Kilroy, P.C.'s Telecommunications and New Technologies Practice Group has substantial experience in enforcement proceedings before the FCC, state regulatory agencies and in the federal and state Courts. We are available to assist you in such matters. Therefore, please do not hesitate to contact us if you have any questions about this Special Report, or recent FCC or state regulatory actions, or any of our services. You may reach us as follows:

Shughart Thomson & Kilroy, P.C.
1050 Seventeenth Street, Suite 2300
Denver, Colorado 80265
Facsimile: 303.572.7883

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

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

Timothy V. Dix
Direct: 720.931.1179
Email: tdix@stklaw.com

Christopher Strohmenger
Direct: 720.931.1167
Email: cstrohmenger@stklaw.com

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

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