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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.

Internet Protocol Television ("IPTV") and Traditional Cable Franchises

Telecommunications companies, including incumbent local exchange, competitive carries and infrastructure service providers are now offering video services as a part of their "triple play" packages. These offerings have been spurred by a number of states which have enacted legislation allowing statewide video franchises to promote the competitive offering of video services. In addition, the FCC is reviewing its determinations and interpretations of the Cable Policy Act of 1984, as amended by the Consumer Protection and Competition Act of 1992 ("CPA"), in a major rulemaking proceeding in MM Docket No. G5-311. There is speculation in the telecommunications industry that the FCC may impose a deadline for local franchising authorities to act on an application for cable franchise from a would-be franchisee that already has authority to rights-of-way, and that the FCC will restrict build-out requirements in some manner. The FCC is expected to act on this rulemaking at year end, or early in 2007.

As many of you know, a "cable system" is defined as a facility consisting of a set of closed transmission paths and associated signaling generation, reception, and control equipment that is designed to provide "cable service" which includes video programming and which is provided to multiple subscribers within a community, with certain exceptions. "Cable service" means a one-way transmission to subscribers of video programming or other programming service, and subscriber interaction, if any, required for the selection or use of such video programming or other programming service. In traditional cable television service, the cable television provider sends programming content to every subscriber's home, and the video is displayed on the subscriber's television as the cable provider presents and distributes it. In contrast, IPTV is a new and different method of delivering and viewing television programming using an IP network and high-speed broadband access technology. Among other things, IPTV can allow a subscriber to obtain television programming whenever the subscriber decides to view it. Simply put, IPTV is not just an a new distribution or playback method for television or other video programming, but can serve to

eliminate a fixed video programming schedule and operate similarly to how a consumer may obtain information on the Internet at any time.

In light of these and other differences we have identified between cable service and IPTV, the question arises to whether a provider offering IPTV must obtain a cable franchise before offering IPTV over a fiber network.

We have analyzed the differences between traditional cable service and IPTV, and have determined that the differences are significant. Based on these differences, we have concluded that the delivery of IPTV should not require a cable television franchise, and instead, should be governed by the FCC's decision in its Cable Modem Declaratory Ruling, where the FCC determined that cable modem service is an interstate service capable of delivering a stream of information to a consumer and then not regulated as "information" telecommunications service.

We are available to consult with you on this matter, and provide you with our analysis of why IPTV would not require a traditional cable franchise.

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FCC Approves First Advanced Wireless Service Licenses

On November 29, 2006, the Federal Communications Commission ("FCC"), through its Wireless Telecommunications Bureau, granted 550 of 1087 licenses which were won in the advanced wireless services ("AWS") auction completed September 18, 2006. The licenses will be used to provide a wide variety of broadband wireless services and technologies, including voice, data, video and other wireless services.

The radio frequencies used in the AWS are broken into two bands: the first band or the higher half is 2110 MHz to 2155 MHz, and the lower half 1710 MHz to 1755 MHz.

The FCC still may issue 537 licenses also won in the advanced wireless services auction completed September 18, 2006. the largest winners of the AWS frequencies were, as expected, wireless service providers including T-Mobile, Cingular, and Verizon.

In anyone wants further information concerning the markets in which these licenses were issued, please contact us.

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United States Court of Appeals for the Fifth Circuit Holds that the federal Wiretap Act, 18 U.S.C. § 2510, *et seq.* Allows a Private Right of Action

On November 13, 2006, the U.S. Court of Appeals for the 5th Circuit has reversed a decision of the United States District Court for the Western District of Louisiana, which had ruled that Direct TV did not have a private right of action under the federal Wiretap Act, 18 U.S.C. § 2510, *et seq.* of

the United States Code against James Bennett, an individual who had pirated Direct TV satellite signals.

Direct TV sued Mr. Bennett to obtain remedies for his piracy of Direct TV's satellite signal. Direct TV's case was based upon two federal statutes. First, Direct TV relied on section 605(e)(3)(A) of the Communications Act of 1934 as amended, 47 U.S.C. § 606(e)(3)(A) for violations of §605(a)(e)(4) of the Act, and the Wiretap Act, 18 U.S.C. § 2520 for violations of section 2511(a). In the appeal, only the Wiretap Act was implicated because the federal District Court had granted default judgment in favor of Direct TV on its Communications Act claim.

Mr. Bennett did not respond to Direct TV's complaint, and Direct TV filed a Motion for Default Judgment, asking the Court to find Mr. Bennett liable under both statutes, and award injunctive relief and statutory damages. The Court found Bennett liable under the Communications Act, and awarded damages of $2,500, plus attorneys' fees. The Court declined to find liability under the Wiretap Act, which provides for greater damages or award injunctive relief. Direct TV then appealed its claim under the Wiretap Act to the 5th Circuit. Bennett did not respond to Direct TV's appeal.

In its decision, the 5th Circuit noted that the federal Wiretap Act is essentially a criminal statute, and provides that anyone who *intentionally* intercepts any electronic communication as described in the statute is subject to criminal penalties and civil suit by the federal government. Moreover, Section 2520(a) of the Wiretap Act expressly allows private civil suits by any person whose electronic communications is *intercepted* in violation of "this chapter" of the Wiretap Act. The federal District Court held that Section 2520 allows claims for damages only for interception of communications that are not "not scrambled or encrypted". Since Direct TV's signal was encrypted, the federal District Court concluded that it could not find a private cause of action.

The 5th Circuit disagreed with this analysis, finding that Section 2520 allowed a private cause of action, plus injunctive relief, plus attorneys' fees and costs because that Section of the Act applies to *any violation* of the Wiretap Act, including intentional interception of any wire, oral or electronic communication under Section 2511(1)(a). Since § 2511 is part of "this chapter" of the Wiretap Act, regardless of whether the intercepted signal is scrambled or encrypted.

The 5th Circuit ordered the district court to enter judgment in favor of Direct TV and against Bennett and also directed the district court to assess damages in favor of Direct TV against Bennett.

If there are any questions, please let us know.

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D.C. Circuit Reverses FCC's Decision of Running Bell South Telecommunication's Volume Discount Plan in Violation of the Communications Act.

The U.S. Court of Appeals for the D.C. Circuit vacated and remanded a decision of the FCC that had found Bell South Telecommunication's Volume Discount Plan discriminatory in favor of its affiliates, because the FCC's explanation for its action was insufficient.

This case involved the market for "special access services." Special access services offer users a dedicated connection between two points. The purchasers of special access services are generally telecommunications services providers: Long distance and internet service providers, as well as other telecommunications companies that connect local customers to broader networks.

In 1999, Bell South Telecommunications ("Bell South") created its Transport Savings Plan ("TSP"), which gave its customers the option of earning price discounts in exchange for committing to purchase certain volumes of service for no less than five years. The TSP also offered discounts on a tiered schedule, increasing with the number of years the customer had spent in the plan and with the customers' committed volume level. Thus, for example, five years into the TSP, purchasers who committed to at least $3 million of annual services received a 3% commission, those committed to $10 million received a 5% commission, those committing to $100 million received a 9% discount. Those committing to $300 million earned a 10% commission, and those committing to $500 million received 12%. Bell South chose this discount structure in order to provide meaningful discounts to its entire eligible customer base, including small customers.

As a condition to the discounts, Bell South required customers to commit for five years to purchase each year no less than 90% of what the customer had purchased on an annualized basis in the six months preceding their subscription to the TSP Plan. The TSP allowed customers seeking greater discounts the freedom to increase their volume commitments. The FCC ruled that the TSP prohibited customers from lowering their committed volume levels, without permanently leaving the TSP. Customers withdrawing early were also liable for termination charges and those failing to meet their commitments were liable for shortfall charges. At the end of five years, Bell South's customers retained the option of extending their discount year-by-year at the same committed volume level and at the same discount. Bell South contended that the 90% commitment requirement served a purpose to maintain lasting and stable rates of utilization on its facilities which Bell South claimed was critical for companies that have high fixed costs and low marginal costs.

After AT&T Corp. ("AT&T") subscribed to TSP, AT&T objected to the plan, because it contended the plan unlawfully discriminated in favor of Bell South's affiliate, Bell South Long Distance, the subsidiary which Bell South had created in 1996 to compete in the long distance market in competition with AT&T. AT&T claimed that TSP violated Section 272 of the Communications Act, which prohibits a Bell Operating Company from discriminating between its affiliates and any other entity in the provision or procurement of goods, services, facilities and information or in the establishment of standards. Section 272(e) further provides that a Bell operating company must charge its affiliates an amount for excess to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carrier for such service.

In ruling on AT&T's obligation, the FCC decided that a facially neutral volume discount plan offered by a Bell operating company violates Section 272 of the Act, when a plan is in fact tailored to an affiliate's specific size, expansion plans or other needs. Furthermore, the FCC concluded that a Bell operating company may violate Section 272 even absent a showing of discriminatory intent so long as its action discriminates in effect. Based on these two points, the FCC disregarded evidence in this case showing that Bell South lacked discriminatory intent when it created the TSP, because it

initiated this plan three years before its affiliates Bell South Long Distance, obtained operational authority and when Bell South Long Distance entered the TSP, it received a minuscule portion of the Plan's overall discounts. The FCC is not free to ignore evidence showing that Bell South lacked discriminatory intent. Furthermore, the Court held that the FCC's ruling that the TSP discriminated in favor Bell affiliates because the affiliates, which begin their operations with no customers, but that because of their affiliation, have abundant business contacts and name recognitions from which to build, and therefore, are inherently likely to grow rapidly and thus to obtain greater discounts under the TSP lacks merit. Indeed, the Court held that the TSP imposed no discriminatory burden on any subscriber, let alone a large subscriber compared to a small start-up subscriber such as Bell South Long Distance.

Accordingly, the Court found that the FCC's decision did not contain enough record evidence to support it, and that the FCC's explanation with respect to invalidating the TSP was inadequate. The Court remanded the case to the FCC for further proceedings, including an analysis of whether Bell South charges its affiliates an amount for access to its telephone exchange service and exchange access and is no less than the amount charged to any other unaffiliated interchange carriers for such service.

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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 newsletters from 2004 to the present under the tab "Newsletters" on the 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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