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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 Issues Notice of Inquiry on Status of Competition in the  
Video Programming Delivery Market**

The FCC issued a notice of inquiry ("NOI") on October 20, 2006, to assess the status of competition in the market for delivery of video programming, in NB Docket No. 06-189. In the NOI, the FCC solicited data and information to allow it to evaluate the status of competition in the video marketplace, changes in the marketplace since the FCC's 2005 report, and prospects for new entrance in the market, factors that have facilitated or impeded competition, and the effect these factors have, if any, on consumers' access to video programming.

More specifically, the FCC has requested data on video programming distributors, including cable systems, direct broadcast satellite services, large home satellite dish providers, broadband service providers, private cable operators who are also referred to as satellite master antenna television systems, open video systems, open video systems, wireless cable systems using frequencies in the broadband radio and educational broadband services, local exchange carrier systems, utility-operated systems, commercial mobile radio services, and other wireless providers, and over-the-air broadcast television stations.

The FCC also seeks information on video programming distributed over the Internet and via Internet protocol networks and through home video sales and rentals. The FCC intends to evaluate horizontal concentration in the video marketplace, vertical integration between video programming distributors and programming services, and other issues relating to programming available to consumers. The FCC also seeks information on various technical issues, including equipment and emerging services.

Finally, the FCC seeks information regarding developments in foreign markets, as they may contribute to the FCC's understanding of domestic markets and provide the FCC insight into factors affecting video competition. The FCC's request for data is as of June 30, 2006.

Comments are due in response to the NOI on November 29, 2006. Reply comments are due December 15, 2006. If there are any questions or you want to file comments, let us know.

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### **FCC Classifies Broadband Over Power Line-Enabled Internet Access as an Information Service**

On November 3, 2006, the FCC determined that broadband-over-power line-enabled access service ("BPL") is an "information service" under the Communications Act. This decision places BPL-enabled Internet access service on an equal regulatory footing with other broadband services, such as cable modem services and DSL Internet access services, both of which the FCC has previously declared to be "information services".

Specifically, the FCC found that the transmission component underlying BPL-enabled Internet access service is "telecommunications", and that the provision of this telecommunications transmission component as part of a functionally integrated, finished BPL-enabled Internet access service offering is an "information service". This analysis is consistent with the analysis the FCC performed in determining that cable modem service and Wireline broadband internet access are information services. Since RPD is classified as an information service, a BPC provider is not required to wholesale BPL Internet access to third parties.

Significantly, the FCC did not state how it would classify BPL itself as a service (as opposed to BPL-enabled Internet access) or decide other issues such as resale and interference.

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

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### **8<sup>th</sup> Circuit Court of Appeals Affirms Federal District Court Ruling That Filed Rate Doctrine Does Not Require Qwest to Compensate Iowa Network Services for Certain Intrastate Telephone Calls**

The U.S. Court of Appeals for the 8<sup>th</sup> Circuit on October 31, 2006, in *Iowa Network Services, Inc. v. Qwest Corporation*, affirmed the federal District Court for the Southern District of Iowa's ruling that the filed rate doctrine does not require Qwest Corporation ("Qwest") to compensate Iowa Network Services, Inc. ("INS") for charges for traffic that Qwest transports to INS for completion of INS' access service trunks, where the traffic is "local". The federal District Court found that the traffic, which originates and terminates in the local calling area for cell phone users, constitutes intrastate telephone calls, and that intrastate access fees or tariffs do not apply to such traffic. Instead, compensation for such traffic is governed by reciprocal compensation agreements that the parties should negotiate or arbitrate.

The lower federal court determined that the FCC differentiates between transport and termination of local traffic and access service for long distance telecommunications. Since the cellular telephone calls in the case of INS and Qwest originate and terminate within the same local major trading area, they are considered to be local calls. Under the FCC's interpretation of the relevant provisions of the Communications Act ("Act"), because the calls are local, they are to be governed by reciprocal compensation arrangements. As a result, INS' tariff on file with the Iowa Utility Board requiring compensation from Qwest in the form of access charges, is not effective under the Filed Rate Doctrine because the traffic is governed by Sections 251 and 252 of the Act. The Court relied on the FCC's determination that transport and termination of local traffic for purposes of reciprocal compensation are governed by Section 251(b)(5) and Section 252(b)(2) of the Act, while access charges for interstate long-distance traffic are governed by Sections 201 and 202 of the Act.

Section 251(b)(5) sets forth the reciprocal compensation obligations that apply to traffic that originates and terminates within a local area. Furthermore, while the FCC has already determined that, although Section 252(b)(5) does not explicitly state to whom a local exchange carrier's obligations run, local exchange carriers have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to any telecommunications carrier, and that Section 251(b)(5) applies to all local traffic terminated between an LEC and a commercial mobile radio service provider ("CMRS"). In this case, Qwest was providing cellular service to its customers and is therefore classified as a CMRS for purposes of their dispute with the INS, and the calls originated and terminated in an intra-major trading area served by INS.

This decision advances the FCC's stated desire to move away from tariffs and toward negotiation or arbitration of charges between carriers in order to facilitate market competition. The court noted that the FCC has been concerned that the necessity of filing tariffs hinders competitive responsiveness, and that the Filed Rate Doctrine has been used by the carriers as a shield to avoid individual contract negotiations with large and small users, thereby reducing competition among carriers.

If there are questions about this 8<sup>th</sup> Circuit decision, please let us know.

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### **FCC Grants Petition of Continental Airlines Regarding Over-the-air Reception Devices ("OTARD")**

On October 17, 2006, the FCC granted a Petition for Declaratory Ruling filed by Continental Airlines, Inc. ("Continental"), pertaining to its installation and use of a Wi-Fi system within its Presidential Lounge at Boston's Logan International Airport. In the petition, Continental claimed that the Massachusetts Port Authority ("Port Authority"), the owner of Logan Airport, demanded that Continental remove its Wi-Fi antennas, and that such restrictions imposed by the Port Authority were prohibited by the FCC's over-the-air reception device rules ("OTARD").

After considering the petition, the FCC determined that the Port Authority's restrictions on Continental's use of its Wi-Fi antennas are preempted by the OTARD and, therefore, granted Continental's petition.

The FCC's OTARD rules prohibit restrictions on property that may impair the use of certain antennas. For such rules to apply, the antenna must be installed on property within the exclusive use or control of an antenna user where the user has a direct or indirect ownership or leasehold interest in the property upon which the antenna is located.

Restrictions prohibited by the OTARD rule include lease provisions prohibiting the use of such antennas, as well as restrictions imposed by state or local laws or regulations, private covenants, contract provisions, or homeowners' association rules. Restrictions are prohibited if they unreasonably delay or prevent the installation, maintenance, or use of antennas, unreasonably increase the cost of installation, maintenance, or use of an antenna, or preclude the reception of an acceptable quality signal by means of the antenna. No distinctions are made based upon the setting of the antenna. In other words, the OTARD rules apply to both commercial and residential properties. The only exceptions relate to clearly articulated safety or environmental preservation objectives, provided such restrictions are narrowly tailored, impose as little burden as possible, and apply on a non-discriminatory basis.

In the case of the Continental petition, the FCC found that the OTARD rules apply to unlicensed devices that operate under Part 15 of the rules. Continental uses Wi-Fi devices which operate in unlicensed frequencies under Part 15 to allow its customers to receive access to the Internet wirelessly in its Presidential Club frequent flyer lounge at Logan Airport. Continental's customers who use the lounge, including employees, have access through Wi-Fi systems to receive Internet service.

The Port Authority demanded that Continental remove the Wi-Fi system, contending that it was prohibited by the terms of Continental's lease for the lounge, and the Port Authority also claimed that Continental's Wi-Fi's system was a potential source of interference to other communications within the airport, including public safety communications. Significantly, the airport has a Wi-Fi system which the Port Authority operates as a commercial enterprise (for a charge) to airport tenants and to the general public accessing the airport's facilities.

The FCC found that the Port Authority had a burden of establishing that the OTARD rules did not apply to Continental's Wi-Fi antennas, that lease provisions were reasonable, and that Continental's use of Wi-Fi in its lounge caused interference to public safety communications. The FCC further found that none of the reasons given by the Port Authority constituted an exception to the OTARD rules, and that these rules preempted the lease provisions between the Port Authority and Continental with respect to the use of Wi-Fi in Continental's Lounge. The FCC further ruled that the Port Authority had not shown that there was interference caused to any public safety device by use of Continental's Wi-Fi system in its lounge.

This ruling constitutes the first ruling under the FCC's OTARD rules that does not relate to a satellite antenna on private property.

If any of you has any questions about the ruling or want further information about the FCC's decision, please let us know.

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**FCC's Wireline Competition Bureau Requests Comments on National Lambdarail, Inc. Filing on the FCC's Rural Healthcare Pilot Program**

National Lambdarail ("NLR") has filed a petition for reconsideration or, in the alternative, clarification of the FCC's order establishing a rural healthcare pilot program to encourage the provision of telehealth and telemedicine services through the U.S. Under the pilot program designed by the FCC, selected applicants will receive up to 85% of the cost of building state and regional broadband networks and connecting those networks to the Internet, as well as the cost of the advanced telecommunications and information services that will be delivered over the broadband networks.

In its petition, NLR requests the FCC to reconsider or clarify its Order by finding that the pilot program will also provide funding to support the cost of connecting state and regional networks to the NLR.

Because of the importance of this petition, the FCC's Wireline competition bureau has requested interested parties to comment on the petition by November 21, 2006, and to file reply comments by November 28, 2006. The FCC's docket number is WC Docket No. 02-60.

If anyone is interested in filing comments or learning more about the NLR petition, please give us a call.

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For your convenience, we also have placed our newsletters from 2004 to the present under the tab "Newsletters" on the [www.telecomattorneys.com](http://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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