VOLUME II, ISSUE 7
September – October 2005

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 Declaratory Ruling on the Established Business Relationship Exemption of the Telephone Consumer Protection Act

The FCC has issued a declaratory ruling that State Farm Mutual Automobile Insurance Company's ("State Farm") exclusive agents may rely on the established business relationship exemption for the Telephone Consumer Protection Act ("TCPA") to make telephone solicitations on behalf of State Farm to consumers on the National Do Not Call List. In issuing this ruling, the FCC reiterated that once a company receives a consumer's specific do-not-call request, whether in this case made to State Farm or to any of its agents, which telemarket on behalf of State Farm, State Farm and all of its agents must honor that request and cease calling the consumer.

State Farm depends on approximately 16,000 independent contractor insurance agents, who have an exclusive relationship with State Farm, to both represent State Farm to consumers and provide service to policyholders. As a result, State Farm requested FCC clarification on whether State Farm's exclusive agents are permitted to telemarket to State Farm's customers on State Farm's behalf so long as State Farm otherwise has a valid, established business relationship with the customer. State Farm contended that its exclusive agents are similarly situated to other parties that

are permitted by the FCC to make telephone solicitations pursuant to an ongoing business relationship between a financial services company and a consumer.

The FCC ruled that State Farm's exclusive agents are permitted to rely on the established business relationship of State Farm with its policyholders to make telephone solicitations on behalf of State Farm so long as State Farm has an established business relationship with the customer. Under State Farm's exclusive agency relationship with its exclusive agents, the agents are authorized to perform almost all communications with customers of State Farm, including telemarketing on behalf of State Farm. State Farm's agents are responsible for answering policyholders' questions, providing updates to consumers when adjustments and coverage may be appropriate, soliciting applications for coverage, submitting claims and, in some cases, paying claims. State Farm conducts no in-house telemarketing whatsoever. Thus, in contrast to insurance agents or brokers that are only involved in an original transaction between an insurance company and a customer, State Farm's exclusive agents perform the same services for State Farm as employees of companies that in-source customer service functions. The FCC previously determined that in the case of an insurance policy, the established business relationship may extend for the duration of the policy and for an additional 18 months following termination of the policy.

The FCC stressed, however, that a company on whose behalf a telephone solicitation is made bears the responsibility for any violation of the FCC's telemarketing rules. Calls placed by a third-party on behalf of such a company are treated as if the company itself placed the call. Moreover, the FCC further emphasized that a consumer may terminate the established business relationship with a company for the purpose of telemarketing calls at any time by making a company-specific do not call request. Once the consumer makes such a call, whether to the company or the company's agent, the company and its third-party telemarketer may not call the consumer again on behalf of that company to make a telephone solicitation, regardless of whether the consumer continues to do business with the company.

Please let us know if you have any questions about this FCC declaratory ruling.

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Arizona Court of Appeals Rules That the Telephone Consumer Protection Act Applies to Unsolicited Advertisements in the Form of Text Messages and Delivered to a Cellular Telephone

On September 20, 2005, the Arizona Court of Appeals ruled that Acacia Mortgage Corporation ("Acacia") violated the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. §227, by delivering unsolicited advertisements in the form of text messages to the cellular telephone of Rodney L. Joffe ("Joffe"). Acacia's unsolicited advertisements in the form of text messages to Joffe were part of a marketing campaign to advertise low interest rates on home mortgages. Acacia programmed its computers to send the solicitations as electronic mail messages ("email") over the Internet to consumer email addresses. In Joffe's case, Acacia's computers generated a cellular telephone number plus the cellular telephone carrier's domain name, and sent the solicitation to an email address which constituted his cellular telephone number and his cellular telephone carrier's domain name. When Acacia's emails reached Joffe's cellular carrier's domain,

the carrier automatically converted the text message into a format that could be transmitted to Joffe's cellular telephone number. Acacia was thus able to take advantage of a service provided to Joffe by his cellular telephone carrier known as short message service ("SMS"). SMS allows cellular telephone subscribers to send and receive text messages on their cellular telephones.

The Arizona Court of Appeals ruled that Acacia had violated a TCPA prohibition on using "any automatic dialing system" to make "any call" to "any telephone number assigned to a...cellular telephone service." 47 U.S.C. §227(b)(1)(A)(iii). The Court rejected Acacia's argument that the TCPA was directed at telephone calls that involved two-way voice communications and not at the sending of text messages. In rejecting this argument, the Court pointed out that the TCPA prohibits "any calling" using "automatic dialing telephone system" to "any telephone number assigned to a...cellular telephone service." Recognizing that the TCPA does not define the word "calling", the Court nonetheless determined that the TCPA was designed to regulate the receipt of automatic telephone calls, and that Congress used the word "call" in the TCPA to mean an attempt to communicate by telephone. Further, the Court held that the TCPA did not limit the attempt to communicate by telephone to two-way realtime voice communications.

In support, the Court pointed out that the TCPA prohibits any call using any artificial or prerecorded voice to a telephone number assigned to a cellular telephone service or to a residential telephone line. In light of this prohibition, the Court determined that a call made by an artificial or prerecorded voice has no potential for realtime voice communications, thus the word "call" used in the TCPA is not restricted to a two-way realtime voice communication.

Finally, in ruling on Acacia's argument that it did not call Joffe because it had simply sent an email to an email address, the Court determined that the TCPA applied to an SMS transmitted phone to phone or Internet-to-phone, and the fact that a cellular telephone customer's cellular carrier converts an email message into a different format was not a defense to a violation of TCPA. The Court ruled that Acacia had co-opted the SMS service offered by Joffe's cellular carrier to deliver the SMS text message to Joffe by telephone, and that Acacia had attempted to communicate by telephone using an automatic system. In other words, Acacia took advantage of the Internet-to-phone SMS technology, knowing that its unsolicited advertisement in the form of a text message would be delivered to Joffe's cellular telephone number.

If you want further information on this court ruling, please let us know.

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The Basis for FCC's Fine of Madison River Telephone Company for Blocking Ports Used for Voice-Over Internet Protocol (VoIP) Applications Affected by the FCC Decision that Wireless Internet Access Services are Information Services

On March 3, 2005, the FCC fined Madison River Telephone Company , LLC ("Madison River"), the sum of $15,000 pursuant to the FCC's authority under Section 201(b) of the Communications Act, for blocking ports used for VoIP applications. Section 201(b) provides, in substance, that all practices in connection with interstate communications service shall be just and

reasonable and any such practice that is unjust and unreasonable is declared to be unlawful. Madison River's blocking of the ports affected customers' ability to use VoIP service. The FCC fine resulted from a complaint filed by Vonage Holdings Company that Madison River was blocking ports used for its VoIP service.

In fining Madison River, the FCC determined Madison River's blocking ports used for VoIP applications was an unjust and unreasonable practice under Section 201(b).

As we reported to you in our August 31, 2005, newsletter (Vol. II, Issue 6), on August 5, 2005, the FCC issued new rules placing telephone and cable companies on an equal regulated footing by releasing incumbent local exchange carriers from their obligation to share DSL lines with Internet access to Internet service providers. The FCC ruled that wireline broadband Internet services are information services functionally integrated with a telecommunications component. As a consequence, incumbent local exchange carriers are no longer required to offer such services separately on a common carrier basis. The FCC further ruled, however, that it had the power to regulate information services under Title I of the Act.

In light of the FCC's August 5 decision, if an incumbent local exchange carrier were to block ports used for VoIP applications today, the FCC would not be able to rely on Section 201(b) of the Communications Act to impose a forfeiture for such conduct. Title I gives the FCC ancillary jurisdiction over services that were not specifically subject to regulation by other titles to the Act and Title VI (cable communications) as to Title II (common carriers), Title III (radio frequency use).

In addition, the FCC issued broadband access rulemaking on September 23, 2005, the FCC released its report, order and notice of proposed rulemaking ("NPRM") on the appropriate framework for broadband access to the internet over Wireline facilities, which detailed its August 5, 2005, decision holding that DSL services are information services and not telecommunications services and, thus, exempt from regulation as a common carrier under Title II of the Act. In the NPRM, the FCC requests comments on specific issues devoted to whether consumer protection needs are met by providers of internet access service, whether offered through DSL, cable modem, or other technology. More particularly, the FCC has requested comment on its imposed regulations pursuant to the FCC 's ansulary jurisdiction under Title I of the Act on the following subjects:

- consumer proprietary network information, such as a customer's account and usage information;
- slamming of broadband providers of internet access service;
- truth in billing as applied to internet access services;
- network outage reporting of outages of broadband internet access service, whether Section 214 discontinuance requirements should apply to providers of broadband internet access, and whether the FCC should exercise its Title I authority to impose rate averaging requirements under Section 254(g) of the Act to providers of broadband internet access services, particularly as consumers substitute broadband services and applications for narrow band services that were previously covered by inner-exchange telecommunications services to subscribers in rural and high-cost areas.

Comments on these issued raised in the NPRM are due 90 days after the FCC's report and order in NPRM are published in the *Federal Register*, with the reply due 135 days after the *Federal Register's* publication of the same. Comments are due on November 14, 2005, and reply comments are due on December 12, 2005.

Please let us know if you have any questions about the report and order of NPRM or the issues on which the FCC comments. Also, don't hesitate to contact us if you wish to file comments.

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FCC Requires Certain Broadband and VoIP Providers to Accommodate Law Enforcement Wiretaps

The FCC has determined that providers of certain broadband and interconnected voice-over internet protocol ("VoIP") services must accommodate law enforcement wiretaps. The FCC had determined that these services can essentially replace conventional telecommunication services that are currently subject to wiretap rules. Such conventional services include circuit switch voice service (plain old telephone service) and dial-up internet access. Thus, the FCC determined that these new services are covered by the Communications Assistance for Law Enforcement Act ("CALEA"). This statute requires the FCC to preserve the ability of law enforcement agencies to conduct court-ordered wiretaps in the face of technological change.

The FCC's order regarding certain broadband and interconnected VoIP services is limited to facilities-based broadband internet access service providers and VoIP providers that offer services permitting users to receive calls from, and place calls to, the public switch network. Such VoIP providers are called interconnected VoIP providers.

Significantly, the FCC determined that the definition of "telecommunications carrier" in CALEA is broader than the definition of that term in the Communications Act. See 47 U.S.C. § 153(44). Moreover, the FCC found that the term "telecommunications carrier" encompasses providers of services that are not classified as "telecommunications services" under the Communications Act. As we have previously reported to you (Vol. II, Issue No. 6), the FCC recently ruled that digital subscriber lines ("DSL") service used for broadband internet access is an information service, and not subject to regulation as a telecommunications service under the Communications Act.

Thus, providers of broadband internet access through DSL are not regarded as telecommunications carriers. CLEA contains a provision, however, that allows the FCC to deem an entity a "telecommunications carrier" if the FCC finds that such service offered by the entity is a replacement for a substantial portion of the local telephone exchange service. Thus, the FCC made its determination that providers of certain broadband and interconnected VoIP services must be prepared to accommodate law enforcement wiretaps, even though such providers are not classified as telecommunications carriers, nor are their services classified, at least in the case of broadband internet access through DSL or cable modem as a telecommunications service. The FCC has not yet classified VoIP as either a telecommunications service or information service, and has only ruled that VoIP is an interstate service and not subject to regulation by the states.

The FCC established a deadline of 18 months from September 23, 2005, or March 23, 2007, for the providers of the new-covered service to be in full compliance with CALEA.

The FCC also adopted a further Notice of Proposed Rulemaking ("NPRM") that will seek more information about whether certain classes or categories of facilities-based internet access providers, such as small and rural providers and providers of broadband networks for educational and research institutes, should be exempt from CALEA.

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Eleventh Circuit Upholds Injunction Barring Enforcement of an Order of the Georgia Public Service Commission Requiring BellSouth to Negotiate Terms of Providing Competitors Unlimited Access to its Facilities

On September 15, 2005, the United States Court of Appeals for the Eleventh Circuit issued an order upholding the order of the U.S. District Court for the Northern District of Georgia which barred enforcement of an order of the Georgia Public Service Commission ("GPSC") which required BellSouth Telecommunications, Inc. ("BellSouth") to negotiate the terms of providing its competitors unlimited access if its facilities. The Eleventh Circuit held that because the FCC had ruled that unlimited access mandated to the facilities of an incumbent local exchange carrier was no longer permitted, the federal District Court did not abuse its discretion when it determined that BellSouth showed a substantial likelihood of success on the merits of its claims, and both the balance of harms and the public interest supported the entry of the preliminary injunction.

This case arose when BellSouth informed various competitors that it would not accept new orders for unbundled local switching or unbundled network element-platform ("GNE-P"), nor would it accept loop and transport orders no longer required under the FCC's triennial review remand order ("TRRO") which was effective March 11, 2005. In response, various competitive local exchange carriers filed an emergency motion with the GPSC arguing that BellSouth was required to continue serving them for unbundled local switching and must accept new UNE-P orders so long as the parties were negotiating a change of law under their interconnection agreements with BellSouth.

The GPSC granted the motions, ruling that the FCC and the TRRO required carriers to implement through negotiations all changes mandated by the TRRO. Although the GPSC stated that the FCC had the power under the proper circumstances to alter carriers' rights under interconnection agreements, the GPSC concluded that the FCC had not intended to abrogate the usual change-in-law process between carriers in their interconnection agreement. Therefore, the GPSC required BellSouth to negotiate with CLECs regarding an amendment to their interconnection agreements.

BellSouth then sued the CLECs and the GPSC in federal court in Atlanta and moved for a preliminary injunction. The federal District Court granted BellSouth's request for an injunction, holding that because the TRRO was effective, there was nothing to negotiate regarding the FCC's determination that unbundled network elements were no longer mandated for local switching and, in limited circumstances, for loops and transport facilities. The District Court reasoned that to allow

CLECs to add new UNE-P customers would be inconsistent with the plain language of the FCC's TRRO.

The District Court also found that BellSouth would suffer irreparable harm due to the loss of customers and those customers' good will, and the harm to BellSouth outweighed the harm to the CLECs. The District Court found that CLECs, on the other hand, would suffer harm only if they intended to compete by engaging in conduct that the FCC concluded is anti-competitive and contrary to federal policy. The District Court determined that a preliminary injunction was in the interest of the public, because the FCC had authoritatively determined that the practice unbundling network elements harmed competition and was contrary to the public interest.

The Eleventh Circuit agreed with the District Court, and held that the FCC's TRRO left nothing to be done regarding UNE-P orders for new customers, because they were no longer allowed. Thus, no negotiations were necessary to implement this aspect of the TRRO.

In addition, the Eleventh Circuit agreed that the District Court did not abuse its discretion when it determined that BellSouth had established both irreparable harm and that the balance of harms was in its favor, and therefore issued the preliminary injunction. The record shows that BellSouth faced a loss of customers due to the GPSC order. The Eleventh Circuit Court recognized that although economic losses alone do not justify a preliminary injunction, loss of customers and goodwill is an irreparable injury. The Eleventh Circuit Court found that the record showed that BellSouth was losing approximately 3200 customers per week when it was required to provide its competitors unlimited access to its facilities.

Finally, the Eleventh Circuit determined that the injuries to BellSouth outweighed any injuries to the CLECs which claimed that they would lose customers if they were not permitted to place new orders for UNE-Ps with BellSouth during the transitional period allowed in the TRRO. Thus, the Eleventh Circuit confirmed the District Court's issuance of a preliminary injunction.

If you have any questions about this decision, please let us know.

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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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