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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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U.S. Court of Appeals for 2nd Circuit Rules in Favor of Fordis, Inc., on its Claim Against the Internal Revenue Service for Refund of Excise Taxes on Long Distance Service

The U.S. Court of Appeals for the 2nd Circuit ruled on April 27, 2006, that Fordis, Inc. ("Fordis") was entitled to a refund from the Internal Revenue Service ("IRS") for federal excise taxes paid on long distance service not based on time and distance. The 2nd Circuit is the fourth U.S. Circuit Court of Appeals to rule in favor of a taxpayer's request for such a refund, and joined the 6th, 11th and D.C. circuits which have considered this issue. The 2nd Circuit made its decision for substantially the same reasons as the other Circuits. Long distance telephone services are not taxable unless based upon time and distance.

Although the IRS continues to require carriers to collect federal excise tax on such long distance service, many questions have been raised by the courts, including the U.S. Court of Appeals for the Federal Circuit which has an appeal by the IRS before it in a decision by the U.S. Court of Claims in favor of a taxpayer which had sought a refund from the IRS for payment of the federal excise tax on long distance services not based on time and distance, about the basis for the IRS's order to carriers requiring this tax to continue to be collected.

As we have indicated in our previous newsletters, there is an excellent opportunity for long distance users to seek refunds from the IRS for federal excise tax paid on long distance service not based on time and distance. See our newsletters of November 2005 (Vol. II, Issue 8), and December 2005 (Vol. II, Issue 9).

Please let us know if you wish to obtain a refund from the IRS for overpayment of federal excise tax on long distance service based not on time and distance.

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FCC Amends Rules to Implement the Junk Fax Protection Act of 2005

As we informed you in our July 2005 newsletter (Vol. II, Issue 5), the Junk Fax Protection Act of 2005 became law on July 9, 2005. The Act is an amendment to Section 227 of the Communications Act of 1934, as amended, 47 U.S.C. §227. In this Amendment to Section 227, Congress amended the Communications Act to prohibit a person from using any telephone facsimile machine, computer or other device to send to another fax machine, an unsolicited advertisement to a person who has requested that such sender not send advertisements, or to any other person unless: (1) the sender has an established business relationship with the person; and (2) the advertisement contains a conspicuous notice on its first page that the recipient may request not to be sent any further unsolicited fax advertisements, and includes a domestic telephone and facsimile number presenting such a request. The domestic telephone number and facsimile number may not be a pay-per-call number.

This Amendment also requires the FCC to provide that a request not to send unsolicited fax advertisements complies with FCC requirements if: (1) the request identifies the recipient facsimile number to which the request relates; (2) the request is made to the telephone or facsimile number; and (3) the person making the request has not subsequently provided express invitation or permission to have such advertisements sent. The Amendment authorizes the FCC to allow professional tax-exempt trade associations to send unsolicited fax advertisements to their members in furtherance of association purposes. Finally, the Amendment requires the FCC to report annually to Congress on the enforcement of the law's requirements and requires the Controller General to study the report to specify congressional committees on the complaints received by the FCC concerning unsolicited facsimile advertisements sent to facsimile machines.

As we informed you in our July 2005, newsletter, the FCC would likely issue a notice of proposed rulemaking to request public comment on proposed rules to implement the amendment. The FCC did issue a rulemaking, and now has adopted rules to implement the provisions of the amendment to Section 227 of the Communications Act. Specifically, the FCC adopted rules as follows:

(1) establishes an exemption to the fax rules in Section 227 of the Communications Act to allow fax advertisements to be sent to parties with whom the sender has an established business relationship ("EBR");

(2) requires that, even in the case of an EBR, a person sending a fax advertisement must obtain the fax number directly from the recipient or ensure that the recipient voluntarily agrees to make the number available for public distribution;

(3) provides a definition of an EBR to be used in the context of sending fax advertisements; the definition is as follows: the term "established business relationship" means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party;

bidding credit plus interest would be owed, and for year ten (10), twenty-five percent (25%) of the bidding credit would be owed. Furthermore, if a DE seeks to transfer a license with a bidding credit to an entity that does not qualify for bidding credits in advance of filing notification with the FCC for construction of the license facility, then one hundred percent (100%) of the bidding credit amount, plus interest, would be owed to the FCC. The FCC also clarified how it will supplement its rules regarding audits of Des and refined the DE reporting requirements.

In the Order, issued on April 25, 2006, the FCC also requests comment on whether the FCC should adopt additional restrictions to further safeguard the benefits reserved for DEs.

The FCC rule changes are reflected in Part 1 of the FCC's Rule, 47 C.F.R. Part 1. The new rules become effective thirty (30) days after the publication of the Order in the Federal Register, except for the "grandfathered" rules which become effective immediately.

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The FCC Adopts Relocation Procedures and Cost-Sharing Rules to Facilitate Access of Radio Frequency Spectrum for Advanced Wireless Services ("AWS")

On April 12, 2006, the FCC adopted a Ninth Order and Report ("Order"), establishing procedures by which new AWS licensees may relocate incumbent BRS and fixed microwave service ("FS") operations in the radio frequency spectrum that has been allocated for AWS.

The relocation rules affect existing BRS operations in the 2150-2160/62 MHz band and FS operations in the 2110-2150 MHz and 2160-2200 MHz bands.

The FCC also established cost sharing obligations for AWS and mobile satellite service ("MSS") entrance that benefits from the relocation of BRS and FS operations in these frequency bands.

The FCC's relocation policies are as follows:

(1) as a new entrant builds out its network, it must relocate incumbents;

(2) a new entrant can not begin operations in a particular geographic area before relocating incumbents which would cause interference; and

(3) new entrants and incumbents are allowed a period of time to negotiate the terms of the incumbents' move to comparable facilities and, if the parties are unable to reach an agreement, the new entrant may involuntarily relocate the incumbent.

With regard to FS, the FCC adopted unified relocation procedures generally based on existing relocation procedures, for FS incumbents in the 2110-2150 MHz, 2160-2175 MHz, and 2175-2180 MHz frequency bands. The Order also adopts mandatory negotiation periods that are individually triggered for each FS licensee in all of the AWS frequency bands and aligns the relocation procedures for FS incumbents under Parts 101 and 22 of the FCC's rules and regulations, 47 C.F.R. Part 101, and 47 C.F.R. Part 22.

(4) requires the sender of the fax advertisements to provide clear and conspicuous notice and contact information on the first page of a fax that allows recipients to "opt-out" of future fax transmissions from the sender;

(5) requires senders to honor "opt-out" requests within the shortest reasonable period of time, not to exceed thirty (30) days;

(6) does not exempt small business or non-profit trade associations from the rule, and

(7) clarified the term "unsolicited advertisements" as follows: the term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without the person's prior express invitation or permission, in writing or otherwise."

The FCC's rules become effective in July 2006.

Let us know if you have any questions about these new rules.

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FCC Modifies Rules for 2496-2690 MHz Broadband Radio Service ("BRS")/Education Broadband Service ("EBS") Spectrum Band to Facilitate Access to Wireless Broadband.

On April 12, 2006, the FCC modified it rules and policies governing the 2496-2690 MHz BRS and EBS band. The FCC made the rule modification to facilitate the deployment of educational and wireless broadband services using then 2496-2690 MHz radio frequency spectrum band.

Specifically, the FCC modified the process for transitioning to the new BRS/EBS band plan by changing the transition planning area from major economic areas ("MEAs") to basic training areas ("BEAs"). The FCC also allowed BRS and EBS licensees the option to self-transition to the new band plan in the markets where a proponent has not come forward or a proponent withdraws an initiation plan. You may recall that in July 2004, the FCC issued a report and order concerning the BRS/EBS band which restructured the 2496-2690 MHz band.

With respect to leases entered into under the FCC secondary market rules, the FCC held that EBS licensees are permitted to enter into excess capacity leases for a maximum of thirty (30) years. Leases with terms of fifteen (15) years or for longer must include the right to review the educational use requirements of the leases every five years, starting at year fifteen (15). Additionally, the FCC established a mechanism for eliminating overlaps between grandfathered EBS A and F channel licensees, and co-channel BRS licensees by geographically splitting the overlapping area. The FCC also affirmed that BRS and MSS operators can share a segment of the 2496-2690 MHz band at 2496-2500 MHz.

Please let us know if you have any questions about the FCC's modified rules for the BRS and EBS spectrum band and wireless broadband access to radio frequency spectrum.

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FCC Modifies its Designated Entity ("DE") Eligibility Rules in Advance of the Upcoming Advanced Wireless Service Auction

On April 25, 2006, the FCC adopted a second report and order and second Further Notice of Proposed Rulemaking ("Order") to address certain rules governing the benefits reserved for businesses that qualify as designated entities ("DEs"). The Rules affect how the FCC will determine which entities qualify for DE benefits, and how the FCC will apply these rules to advanced wireless services ("AWS") auction scheduled to begin on June 29, 2006.

Since the FCC began its auctions of radio frequency spectrum programs in the late 1990s, the FCC has established rules to facilitate the participate of small businesses in competitive bidding for radio frequency spectrum licenses. Thus, the FCC instituted various measures, including fitting credits reserved for small businesses. A DE must meet specific financial criteria – based on its gross revenues as well as those of its controlling interest, its affiliates, and the affiliates of its controlling interest (and in certain circumstances, their total assets) in order to eligible for DE benefits. The Order adopts rules to ensure that companies that are not eligible for DE benefits cannot circumvent the FCC's rules in order obtain those benefits indirectly.

Thus, the FCC placed restrictions on the ability of applicants and licensees that have certain type of spectrum leasing for resale agreements to qualify for DE benefits. The FCC determined that, except as specifically "grandfathered", in cases in which an applicant or licensee has agreements pursuant to which, on a cumulative basis, it may lease or resell, including under a whole sale agreement, more than fifty percent (50%) of its spectrum capacity for any individual license, such applicant or licensing will be considered to have an impermissible material relationship and therefore will not be eligible for DE benefits in acquiring licenses and FCC auctions in secondary markets and, as applicable, will be subject to unjust enrichment payments on a license-by-license basis.

Additionally, except as specifically "grandfathered", in cases which an applicant or licensee has agreements pursuant to which, on a cumulative basis, it may lease or resell (including wholesale agreements) more than twenty-five percent (25%) of its spectrum capacity for any individual license to any individual entity, such applicant or licensee will be considered to have an attributable material relationship for purposes of determining its eligibility for DE benefits in acquiring licenses in FCC auctions and the secondary market, and determining whether there are unjust enrichment obligations on a license-by-license basis. These rules will apply prospectively to all FCC auctions that begin on or after the effective date of the new rules, and to applications for a license, an authorization, an assignment or transfer of control, or lease filed after the release date of the new rules.

The "grandfather" rules, in substance, state that the new rules will be applied on a prospective basis.

The FCC also adopted changes to it rules relating to unjust enrichment payments in order to further ensure that DE benefits are awarded only to their intended beneficiaries. Thus, for the first five (5) years of its license term, if a DE loses its eligibility or seeks to transfer its license or to enter into a *de facto* lease with an entity that does not qualify for bidding credits, one hundred percent (100%) of the bidding credit amount, plus interest, would be owed to the FCC. For the sixth (6th) and seventh (7th) year of the license term, seventy-five percent (75%) of the bidding credit plus interest would be owed. For years eight (8) and nine (9), fifty percent (50%) of the

With respect to cost-sharing rules for AWS and MSS entrants, the FCC ordered relocation costs to be distributed more equitably among the beneficiaries of the relocation, in order to encourage the simultaneous relocation of multi-link communications systems, and to accelerate the relocation process. The cost-sharing rules are based on procedures previously used for FS relocations in the personal communications service ("PCS"), and will be administered by one or more clearing houses which the FCC will select later.

Please let us know if you have questions about these new relocation procedures and cost-sharing rules.

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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.

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