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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 Initiates Rule Making to Establish New "MedRadio" Service for  
Medical Radio Communication Devices**

The FCC has initiated a proceeding to establish a new service for advanced medical radio communications ("MedRadio") devices in the 401-406 MHz frequency band. The FCC commenced the proceeding because of an increasing number of medical devices which rely on radio transmissions for critical aspects of their functionality.

In the Notice of Proposed Rulemaking ("NPRM"), the FCC proposed to designate of frequency spectrum for medical devices that 401-402 MHz and 405-406 MHz, which frequencies are adjacent to the existing Medical Implant Communication Service ("MICS") frequency band at 402-405 MHz. If, after the rulemaking, the FCC designates these frequencies for the MedRadio service, it will have a total of 5 MHz of frequency spectrums specifically designated for medical device radio communications.

The current MICS is limited to use of implant devices using radio frequencies. To allow for a wider use of devices, the FCC proposed to allow the use of body-worn transmitting devices in the MedRadio service. The FCC also proposed to increase the flexibility for newly-designated 401-402 MHz and 405-406 MHz bands to allow the use of low power, load duty cycle MedRadio devices without requiring the frequency agility capability required in the current MICS rules. Finally, the FCC proposed that frequency agility would continue to be required of medical devices in the core 402-405 MHz band to accommodate devices that might be used for more critical medical purposes and which might be less compatible with non-frequency agile devices.

The FCC requested public comment on all of these issues. The FCC also requests public comment on information concerning developments that are anticipated in the medical device field

and their likely spectrum requirements. Thus, the FCC has asked public comment on the following issues:

- New implant and body-worn medical radio communication technologies and how the FCC could anticipate and proactively address the challenging array of radio frequency spectrum issues.
- The relative benefits and trade-offs that should be considered with respect to both licensed and unlicensed approaches to authorizing the operation of new implant and body-worn medical radio communication devices.
- The collaborative effort between the FCC and the U.S. Food and Drug Administration (“FDA”) regarding options for better educating medical device manufacturing industry leaders that medical radio device electromagnetic immunity issues in a radio frequency environment.

Comments on the FCC’s notice of NPRM, which bears ET docket numbers ET 06-135, 05-213, and 03-92, and RM11271.

If you want more information on the NPRM, please don’t hesitate to contact us.

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### **District of Columbia Circuit Denies Petition for Review of FCC’s Orders Reconfiguring the Electromagnetic Spectrum’s 800 MHz Frequency Band**

The U.S. Court of Appeals for the DC Circuit has denied the Petition to Review filed by Mobile Relay Associates (“MRA”) and Skitronics for review of the FCC’s Reconfiguration Plan (also known as the “Rebanding Decision”) for the 800 MHz frequency band. *Mobile Relay Associates and Skitronics v. FCC*, (No. 04-1413, July 14, 2006). In this Plan, the FCC reconfigured the 800 MHz frequency band to eliminate interference with public safety communications, to separate different communication system architectures in separate newly established segments of this frequency band.

Under the FCC’s Plan, MRA and Skitronics, who hold 800 MHz licenses which operate specialized mobile radio service (“SMR”) systems that broadcast signals from a base station antenna situated at high elevations, will be segregated from licensees who operate enhanced special mobile radio (“ESMR”) systems which use smaller and more numerous base stations and a cellular network architecture. Under the FCC’s Plan, licensees required to move to two parts of the band set aside for SMR use will be unable to use that spectrum to operate ESMR services.

MRA and Skitronics argued in their petitions for review that: (1) the Reconfiguration Plan arbitrarily treats them differently from similarly situated licensees; (2) constitutes unlawful retroactive agency; and (3) unconstitutionally takes a protected interest in radio frequency spectrum. They also claim that the FCC overvalued spectrum offered by Nextel Communications, Inc.

(“Nextel”), pursuant to the spectrum migration part of the Plan. Finally, MRA claimed that the FCC was obligated to compensate it for its customer loss resulting from the migration.

The court denied MRA and Skitronics’ petitions to review, holding that the FCC Reconfiguration Plan for 800 MHz did not arbitrarily treat them differently from similarly situated licensees, because MRA and Skitronics are similarly situated to Nextel and Southerlink, two ESMR licensees who benefit from the Reconfiguration Plan. Nextel and Southerlink operate cellular systems, and MRA and Skitronics do not; therefore, the FCC’s Reconfiguration Plan which authorizes Nextel and Southerlink to move to the ESMR block, but not to allow MRA and Skitronics the same move was reasonable.

Skitronics also claimed the FCC engaged in retroactive rule making because Skitronics had purchased eight economic area 800 MHz SMR licenses at an auction, with the expectation that they could be used for a number of operations, including ESMR operations, as business permitted. For the FCC’s Reconfiguration Plan, Skitronics would not be able to use these eight licenses to operate an ESMR system. The court held that, because Skitronics had an integrated communications system when the FCC’s Reconfiguration Plan was adopted, Skitronics retained the ability to move to the ESMR block so long as it converted to ESMR by the end of the current license term of eight EA licenses. Thus, the court found that Skitronics must convert to ESMR by the year 2011. The court held that an agency order that alters the future effects and not past legal consequences of an action or that upsets expectations based on prior law is not retroactive. In Skitronics’ case, since it would be able to operate an ESMR system in its current spectrum allotment, the effect of the FCC’s Reconfiguration Plan was not retroactive, but prospective.

MRA and Skitronics also contended that the FCC unlawfully took their property in violation of the “takings” clause of the U.S. Constitution, because the segregation of ESMR system’s architecture departs from the 800 MHz band that do not allow for conversion to ESMR architecture reduces the value of their spectrum assignments. They argued that the FCC’s actions deprived them of the flexibility which entitled them to operate either high-sight ESMR or cellular ESMR systems with their current frequency allotment, and that the Reconfiguration Plan deprived them of this flexibility without compensation.

The court rejected this argument, holding that when the FCC grants a license, it grants the right to use radio frequency spectrum for a set period of time, but not ownership of the spectrum. Moreover, the court acknowledged that the policy of the Communications Act is clear that no person is to have anything in the nature of a property right as a result of being granted a license. Moreover, the court found that under the Communications Act, the FCC has the unilateral authority, provided it gives notice to the licensee, to modify a license, either for a limited time or for the duration of the term of the license, if the FCC finds that such action would promote the public interest, convenience and necessity. Thus, the licenses MRA and Skitronics hold confer the right to use the spectrum for a duration expressly limited by the Communications Act, subject to the FCC’s considerable regulatory power and authority. This right does not constitute a property interest protected by the Fifth Amendment of the Constitution.

The court also rejected MRA’s argument that if the FCC validly reconfigured the 800 MHz band, it acted arbitrarily in refusing to compensate MRA for the loss of its customers that it would

suffer as a result of frequency migration under the Reconfiguration Plan. The court held that the FCC's Reconfiguration Plan, however, simply required retuning of frequencies used and consequently, customer inconvenience, for which the FCC is not obligated to compensate MRA.

Finally, the court held that MRA and Skitronics' argument that the FCC improperly undervalued that part of the ESMR block of the reconfigured 800 MHz frequency spectrum it granted to Nextel could not be considered. The court held that MRA and Skitronics' alleged injury as a result of Nextel is too speculative, and therefore they lacked standing to raise this issue.

For your information, the FCC's 800 MHz frequency Reconfiguration Plan is currently under way; the court did not halt or stay this Plan, and Nextel and others in the ESMR business are currently in the process of reconfiguring their ESMR systems. The FCC has also reimbursed Nextel for the value of the frequencies it returned to the FCC under the Plan, for use by public safety communications users.

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### **D.C. Circuit Upholds the FCC's Regulatory Classification of Enhanced Prepaid Calling Cards**

In *AT&T Co. v. FCC and USA* (No. 05-1096), July 14, 2006, the D.C. Circuit upheld the FCC's regulatory classification of enhanced prepaid calling cards. Prepaid calling cards allow purchasers to make long distance telephone calls without subscribing to a long distance service or using a credit card. Instead, the purchaser buys a fixed number of minutes at a fixed price. When the purchaser wants to make a long distance call, he dials a toll-free number printed on the card to reach that service provider's computer platform. When prompted by the platform, the user enters a unique identification number associated with the card, and then dials the number he is trying to reach. The provider's platform routes the call and the duration of the call is deducted from the minutes remaining on the card.

AT&T claimed that it enhanced this service by the addition of advertising or other message the cardholder heard before his call was completed. AT&T provided its prepaid calling cards at wholesale rates to large retail outlets, such as Wal-Mart, and other third-party distributors. These distributors could design or choose the advertising message that was played when one of their purchasers used the card.

Based on AT&T claimed enhancement of prepaid calling cards, AT&T refused to pay intrastate access charges on enhanced prepaid calling cards between parties within the same state. AT&T sought a declaratory ruling from the FCC that its service was jurisdictionally interstate, by asserting that its cards were solely information service, which is not regulated by the FCC. In ruling on AT&T's declaratory ruling request, the FCC disagreed, and found that AT&T enhanced prepaid calling card service was a telecommunications service under the Communications Act, because it did not off to the card user anything other than telephone service, nor was the customer provided with the capability to do anything other than make a telephone call. The FCC also determined that the provision of the advertising message is an adjunct to basic service, and therefore not an enhanced service under the FCC's rules. The FCC noted that AT&T had not paid about \$160 million in

Universal Service Fund contributions on prepaid calling cards, because AT&T regarded the prepaid calling card as an information service, exempt from Universal Service charges. Accordingly, the FCC directed AT&T to repay any past-due Universal Service amounts. AT&T appealed this FCC decision to the D.C. Circuit, arguing that the FCC improperly made its ruling retroactive.

The D.C. Circuit held that the FCC's action constituted an adjudication. Retroactivity is a norm in agency adjudications no less than in judicial adjudications. The court held that there was a distinction between agency decisions as substantive new law for old law that was reasonably clear, and agency decisions which merely constitute new applications of existing law, clarifications and additions. The latter type of decisions carries a presumption of retroactivity from which the court would depart only when to do otherwise would lead to a manifest injustice.

The court ruled that the FCC's decision in this case did not change established law. AT&T did not point to any set rule on which it reasonably relied before the FCC's decision that the prepaid calling cards were telecommunications service and not information service. The court pointed out that before the FCC's order classifying AT&T's prepaid calling card as a telecommunications service, the FCC had not determined the regulatory classification for AT&T's calling card service or any analogous service. In short, the court held that the FCC's order classifying AT&T's prepaid calling card service as a telecommunications service was not a departure from clear, prior policy, and that AT&T unilaterally chose not to pay Universal Service contributions, and that in doing so, it assumed the risk of an adverse FCC decision on the classification of its prepaid calling card service. Since the court found the FCC did not commit error in its regulatory classification of this service, the court upheld the FCC's order. AT&T therefore must pay approximately \$160 million to the FCC's Universal Service Fund.

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### **The FCC Will Classify Broadband over Power Line Internet Access Service**

In early August, the FCC will decide how to classify broadband over power line ("BPL") service. The FCC must decide whether to classify BPL as a telecommunications service or an information service. If the FCC classifies BPL as a telecommunications service, it will be regulated under Title I and perhaps Title II of the Communications Act. If the FCC considers BPL an information service, it will not be regulated under Title II of the Act, but it may require some reporting under Title I of the Act. Thus, if BPL is a telecommunications service, the FCC could regulate BPL much in the same manner as it regulates telecommunications services under Titles I and II of the Act. If the FCC holds that BPL is an information service, it will not regulate such service, applying the same principles as it did when it determined that cable modem service and DSL service were information services.

We will keep you advised of the FCC's decision on BPL.

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**FCC Has Announced that Licensees Who are Required to Pay Annual Regulatory Fees Must Make Their FY 2006 Payment no Later Than September 19, 2006**

The FCC has announced that licensees who hold radio frequency spectrum licenses issued by the FCC who are required to pay annual regulatory fees for such licenses must make their fiscal year 2006 payment no later than September 19, 2006. Payments can be made from September 6 – 19, 2006. Payments can also be made prior to September 6, 2006. But, all regulatory fee payments must be received at the FCC by September 19, 2006, to avoid being charged a 25% late payment penalty.

For your information, the FCC has been very diligent in applying late fees to licensees who do not pay their annual regulatory fee on time.

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**FCC Proposes Changes to its Rules Governing Stolen Vehicle Recovery Systems**

The FCC has issued a Notice of Proposed Rulemaking (“NPRM”) in Docket No. WT Docket No. 06-142, RM 11135, to modify Section 90.20(e)(6) of its rules to accommodate future narrow band operations on frequency 173.075 MHz and to permit other services, in addition to stolen vehicle recovery systems (“SVRS”). In connection with this rule, the FCC proposes to revise it to permit increased mobile output power, to permit digital emissions in addition to the analog emissions currently authorized by this section of the rules, and to relax the limitation on duty cycles. The FCC requests public comment on these matters, and whether the FCC should authorize mobile transceivers by rule, rather than continuing to follow its current practice of licensing mobile units together with their respective individual base stations.

The FCC also requests comments on the merits of broadening the scope of Section 90.20(e)(6) to permit the use of the frequency 173.075 MHz for other than SVRS operations. The FCC has initiated a rule making to consider whether enhancing SVRS operations is in the public interest, and would assist in the migration of related communications to an error-band technology.

Many of you will recall that in 1989, the FCC designate the frequency 173.075 MHz for use by stolen vehicle recovery system licensees on a shared basis, with the U.S. government. As a result, companies develop and operate stolen vehicle recovery networks, particularly Lo Jack, which has a stolen vehicle recovery network in cooperation with state and local police departments across the U.S. The Lo Jack system is also used in 24 other countries. Lo Jack is currently the only SVRS operator in the U.S. In the Lo Jack system, vehicles are fitted with a vehicle location unit that remains dormant until an owner reports the vehicle’s theft. Once the stolen vehicle report is received by the police, the officials send an electronic message to a central law enforcement computer, which causes a network of radio base stations licensed to the police to broadcast a message that instructs the vehicle location unit to begin transmitting a brief tracking message. Activation messages are transmitted by these base stations every 15 minutes for the first two hours, and once an hour thereafter, until the vehicle is recovered or 30 days have passed, whichever is sooner.

The tracking message contains a unique reply code that is received by the vehicle tracking unit, located in law enforcement vehicles. Police identify the vehicle make, model and registration number from a reply code, and then use that information to track and recover a stolen vehicle. The FCC's current Section 90.20(e)(6) of its Rules establishes requirements for SVRS operations, including technical operations. Lo Jack seeks a change in these technical requirements to assist in transitioning its stolen vehicle recovery system to a narrow band operation, and to permit greater operational flexibility, to allow a more efficient redeployment of its SVRS facilities. The FCC has determined that Lo Jack's proposal is reasonable because it would permit Lo Jack to recover stolen vehicles more quickly.

Accordingly, the FCC has requested comment on the various changes to the technical requirements under Section 90.20(e)(6) of its Rules. If you are interested in filing comments on this NPRM, please let us know.

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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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