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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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State of California Enacts Statewide Franchise Cable Law

On September 29, 2006, the governor of California signed a bill entitled "Digital Infrastructure and Video Competition Act of 2006" (AB 2987), authorizing the California Public Utilities Commission ("CPUC") to issue statewide franchises for cable and video service providers. This law shifts the franchising authority from local governments to the CPUC, but retains a five percent (5%) franchise fee for municipalities, as well as their control over their local rights-of-way and the authority to enforce customer service and consumer protection standards. There are other significant provisions to this law as well, including a provision which allows existing cable franchisees to seek a state franchise and upon receipt, abrogate their existing local franchise, in cases where a state franchise holder begins to serve the area. Cable franchisees can now opt into the state franchises effective January 2, 2008, after a one-year transition period.

The CPUC may now begin accepting applications for statewide cable franchises. There are also provisions which require the CPUC to act expeditiously on such applications.

If you want further information on this new California video competition law, please let us know.

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**FCC Requests Public Comment on Possible Modifications to
Rules Governing the 700 MHz Guard Band Licensees**

The Federal Communications Commission ("FCC") has issued a Notice of Proposed Rule Making ("NPRM") that requests public comment on possible changes to the rules governing the

licensees and the Guard Band parts of the 700 MHz radio spectrum band. The NPRM also requests public comment on possible changes to the surrounding upper portions of the 700 MHz band allocation plan.

Guard Band licensees are governed by a special set of rules that stem from their role in protecting adjacent public safety radio frequency licensees. The main purpose of the Guard Bands is to protect public safety from adjacent commercial operations. The FCC has also permitted operations in the Guard Bands in order to allow for effective and valuable use of radio's frequency spectrum. Guard Band licensees or Guard Band managers make 700 MHz Guard Band spectrum available to either system operators or directly to end users in varying degrees of quantity, geographic areas and duration through private, written contracts known as "Spectrum User Agreements". Guard Band managers retain ultimate control of the radio spectrum within the Guard Band, and are responsible for coordinating the use of their radio frequencies with other Guard Band managers and the frequency coordinators in adjacent public safety radio frequency bands.

In 2000 and 2001, the FCC held two auctions of Guard Band licenses. Since that time, only a handful of Guard Band radio systems have been deployed. Thus, the FCC is seeking ways to promote more efficient and effective use of this radio frequency spectrum. Additionally, there are two developments which have sparked the FCC's NPRM. First, as part of the 800 MHz band reconfiguration proceeding, the FCC reclaimed all of Nextel Communication, Inc.'s Guard Band licenses which covered 42 of the 52 B block markets. Second, Congress recently established a firm date of February 17, 2009, for the completion of all digital television ("DTV") transitions. Thus, incumbent analog television broadcasters must vacate the entire 700 MHz band by this date, thereby making this radio spectrum available for commercial wireless, public safety and Guard Band licensees.

The FCC seeks comment on the following questions:

- whether to extend the FCC's spectrum leasing rules, established in its secondary markets proceeding to the Guard Bands, and whether to continue to maintain existing Guard Band manager rules;
- whether to increase band manager flexibility for incumbents and prospective licensees by eliminating or revision restrictions on leasing to affiliate or on using the spectrum for internal purposes;
- whether to eliminate the prohibition on deploying cellular architectures within the Guard Bands; and
- whether to change the current adjacent channel power limits in the Guard Bands.

The FCC also requested comment on proposals for relicensing the Guard Bands returned from Nextel. These proposals include: (1) reallocating the spectrum for exclusive public safety use; or (2) reallocating the spectrum from narrow band channels for critical and infrastructure industries in support of inter-operability with public safety entities.

Finally, the NPRM seeks comment on modifying the existing upper 700 MHz band plan with respect to the Guard Bands, requesting public comment on whether to consider band-planned proposals made by existing Guard Band managers or other interested parties.

The FCC has tentatively concluded that the adoption of any proposal that would entail shifting of the narrow band channels of the public safety band would require an expeditious resolution of issues related to the cost of reprogramming public safety radios, as well as international coordination for the use of any shifted narrow band channels in areas which border the U.S.

The docket number is WT Docket No. 06-169-96-86.

Please let us know if you have any questions on the foregoing.

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Claims for Breach of Contract in Equipment Sales Transactions Implicates the Uniform Commercial Code

With the introduction of new wireless and fiber optics equipment in the telecommunications industry, we have seen a rash of recent claims for breach of equipment sales contracts, particularly where equipment failed to perform or was shipped and installed with defective parts or software. Claims against equipment manufacturers for breaches of equipment purchase agreements likely implicate the Uniform Commercial Code (“UCC”) as opposed to traditional common law principles for breach of contract.

The UCC covers the sale of goods, and is applicable in all 50 states of the U.S. The term “goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than money in which the price is to be paid, investment securities, and things in action. Goods may also include software. Generally, the courts determine whether a contract is one of sale or to provide services by looking at the essence of the agreement. When a sale predominates, incidental services, such as software, maintenance and the like, provided do not alter the basic transaction. Because software packages vary depending on the needs of a purchaser of telecommunications equipment, the courts usually apply a case-by-case analysis to determine if software is part of the sale, or is a sale of services. The UCC does not apply to a sale of services.

Where software is incidental to a sale of a piece of telecommunication equipment, such as a telecommunications switch, the inclusion of software in the transaction does not defeat the characterization of a switch as a good under the UCC. In such instances, the provisions of the UCC control various aspects of the contract between the parties, including breach, notice of breach, damages, and statute of limitations.

We want you to be aware of the application of the UCC to equipment sales agreements so when you negotiate such agreements, you will keep in mind the UCC when negotiating provisions such as limitations on damages, choice of law, arbitration, types of warranties, and , statutes of limitations.

If there are questions, please let us know.

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DC Circuit Upholds the FCC’s Determination that Construction of Wireless Communication Towers is a Undertaking Subject to the National Historic Preservation Act

On September 26, 2006, the U.S. Court of Appeals for the DC Circuit upheld the FCC’s determination that construction of wireless communication towers is an undertaking subject to Section 106 of the National Historic Preservation Act, 16 U.S.C. §470f (the “Historic Act”) and deferring to a determination by the Advisory Council on Historic Preservation (“Advisory Council”) that Section 106 protects not only those properties formerly deemed eligible for listing in the National Register of Historic Places, but also those properties that simply meet the criteria for listing.

The DC Circuit held that the FCC, in making these determinations, acted reasonably, and that there was sufficient analysis of the record before the FCC on this subject for the FCC to conclude that it had approval authority over the construction of wireless communication towers in historically-designated areas under the National Historic Preservation Act.

Additionally, the DC Circuit found that the FCC’s deference to the Advisory Council with respect to a determination of properties eligible for listing in the National Register of Historic Places was a reasonable interpretation of the law.

The location of wireless towers on properties designated in National Historic places and on properties eligible for listing as national historic places has been contentious. The DC Circuit’s decision upholds the FCC’s decision with respect to determination of wireless towers on properties designated as National Historic places.

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FCC Issues Annual Report on State of Competition in the Wireless Industry

On September 26, 2006, the FCC issued its 11th Annual Report to Congress on the state of competition in the commercial radio services industry. The Report examines the conditions prevailing in the CMRS marketplace in 2005, and concludes that there is effective competition in the CMRS marketplace, based on its analysis of measures of competition. The analysis includes a number of competing carriers providing service in an area, market shares, pricing behavior and trends, technological upgrades and product innovations, subscriber growth, usage, patterns, customer turn, and service quality.

The Report reviews competitive market conditions by grouping indicators of competition in four categories: (1) market structure; (2) carrier conduct; (3) consumer behavior; and (4) market performance. The Report also covers urban-rural and international comparisons in the competitive marketplace.

The Report shows that during 2005, the number of mobile telephone subscribers in the U.S. rose from 184.7 million to 213 million, increasing the nationwide penetration to approximately 71%. The volume of text message traffic grew from 48.7 billion messages in the second half of 2005, nearly double the 24.7 billion messages in the same period in 2004. Revenue per minute fell 22% during 2005, from 9¢ in 2004 to 7¢ in 2005. The Report also shows that quality-of-service improved with the reporting problem calls per 100 calls reached its lowest level since 2003.

The Report shows there is plenty of competition in the mobile services market, but there is room for more.

If there are any questions about this report, please let us know.

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Shughart Thomson & Kilroy, P.C.'s Telecommunications and New Technologies Practice Group's Telecom Report is intended to provide general information about regulatory and legal developments in the telecommunications industry, and does not constitute legal advice. Our distribution of this Telecom Report does not create an attorney-client relationship between any recipient and Shughart Thomson & Kilroy, P.C.

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 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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