

## **FHH Telecom Law September, 2007**

### **Court: AT&T IPTV is “Cable Service” Contrary State PUC Holding Reversed**

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In recent years, as competition has increased between traditional cable TV operators and newer telephone company providers of video service, one important regulatory issue that has arisen is whether Internet protocol multichannel video services (IPTV) constitute “cable services” under federal law, and thus are subject to a panoply of federal, state and local regulation of cable services. Recently, the Federal District Court of Connecticut ruled that AT&T’s IPTV “U-verse” video service is indeed a “cable service” and thus subject to cable regulatory requirements. While this decision does not directly apply anywhere outside of Connecticut, it may be persuasive on other courts and/or public utility commissions that are grappling with the issue of whether IPTV systems are “cable” systems for the purposes of cable regulations.

The case arose after the Connecticut Department of Public Utilities ruled that U-verse is *not* a cable system. A cable operator association sought review of that decision in federal court.

The Court’s analysis is strictly driven by the definition of “cable service” in the Communications Act, and the legislative history surrounding that statutory language. The Act defines “cable service” to be “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other program service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”

AT&T’s core argument was that U-Verse involves so much subscriber interaction that it is fundamentally a two-way technology, as opposed to the one-way technology contemplated in the statute’s definition of cable service. AT&T made much of the fact that there is constant dynamic interaction between the subscriber’s box and the AT&T network, even just in changing channels (*i.e.*, that an individual stream of programming is sent each time the subscriber changes the channel and signals are sent upstream from the set top box, rather than mere selection from all of the programming which is sent downstream at the same time in a traditional cable technology).

The Court disposed of this argument by showing that the key issue under the Act is whether the *video* streaming is one-way or two-way, since the definition in the Act refers to “the one-way transmission to subscribers of video programming....” AT&T conceded that the video flow in U-verse is only one-way, downstream to the subscriber. The Court then pointed to extensive legislative history which shows that Congress contemplated the possibility of extensive subscriber interaction and selection of programming being sent upstream, even within a service that meets the definition of cable service.

The Court noted that the subscriber interaction in U-verse is limited to: (1) turning the set top box “off” or “on”; (2) selecting from tiers of programming controlled by AT&T and made available to all subscribers of those tiers; or (3) selecting from a list of pay-per-view or video-on-demand programming controlled by AT&T. All of this appears to be “required for selection or use of the programming” as contemplated in the Act, and consistent with examples set forth in the legislative history, and is no different than

operations on traditional cable systems. None of this functionality involves the subscriber either sending video upstream, or modifying or selecting video in a way that is unique vs. other subscribers.

The Court rejected AT&T's argument that U-Verse is an unregulated information service under the FCC's 2002 *Cable Modem Order*. The Court noted that the subscriber interactivity of U-verse is not at the "high level" of interactivity contemplated by the FCC in that *Order*: U-verse subscriber selection from a menu of programming pre-selected by AT&T is not the same as individually-tailored searches on the Internet available in a cable-modem service.

The Court also rejected AT&T's argument that U-verse is "indistinguishable" from the Free World Dial Up VOIP service that the FCC ruled to be an information service in 2004. The Court ruled that AT&T's mere use of Internet protocol to deliver packets of video does not bring it under the Free World Dial Up holding, which required the information service to be useable to transmit, store and acquire information on a two-way basis over the Internet.

Having held that "U-verse" is a "cable service" under the Communications Act, the Court easily proceeded to hold that AT&T is acting as a "cable operator" when it offers U-Verse.

In sum, AT&T's claim – that the subscriber interactivity involved in U-verse is so radically new that it cannot be considered a cable service under federal law – appears to be more hype than reality at this point. However, U-verse may evolve with additional levels of interactivity, and different IPTV systems may be able to make such a claim, now or in the future. A successful claim would probably require a showing that the subscriber can use the system to transmit video upstream, and/or to manipulate the video received downstream (perhaps real-time changing of camera angles in sports programming, or obtaining video on the Internet). Nevertheless, we believe that courts and PUCs will likely continue to look at such claims with a bit of skepticism, at least until the facts match the hype.