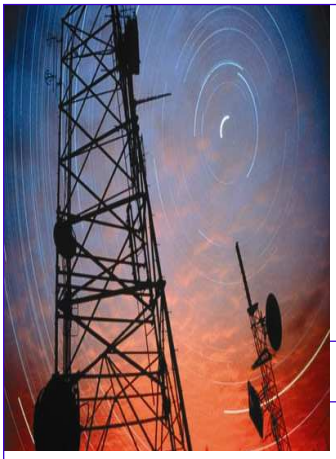

WILMER, CUTLER & PICKERING

Telecommunications Law Update

October 17, 2003

Ninth Circuit Reverses FCC's Cable Modem Ruling

On October 6, 2003, the U.S. Court of Appeals for the Ninth Circuit ruled that broad band Internet access provided over cable networks — so-called "cable modem service" — is, at least in part, a "telecommunications service" subject to common carrier regulation under Title II of the Communications Act. *See Brand X Internet Services v. FCC*, Nos. 02-70518 *et al.* (9th Cir. Oct. 6, 2003) ("*Brand X*"). The decision overturned a ruling by the Federal Communications Commission ("FCC") that cable modem service is solely an "information service" subject to regulation, if at all, only under the FCC's catch-all jurisdiction under Title I.

For several years, the FCC had studiously avoided that classification decision. In March 2002, after several courts had addressed the issue inconsistently, the FCC finally concluded that cable modem service is exclusively an interstate information service that does not contain a separate "telecommunications service" component. In addition, the FCC waived any requirement under the *Computer Inquiries* that cable operators strip out the transmission component of cable modem service and offer it as a tariffed common carrier service that unaffiliated Internet service providers ("ISPs") may purchase on equivalent terms. And the FCC likewise permitted cable operators to provide transmission capacity on a "private carriage" basis to some ISPs but not others. Various petitions for review of the FCC's ruling were filed in several federal circuits, which the Judicial Panel on Multidistrict Litigation later transferred to the Ninth Circuit.

Considering the consolidated appeals, the Ninth Circuit concluded that its own precedent compelled it to reverse the FCC. The Ninth Circuit noted that, prior to the FCC's ruling, it had considered the regulatory classification of cable modem service in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) ("*Portland*"). That case, which in part prompted the FCC's subsequent cable modem ruling, involved an attempt by a local franchising authority to condition AT&T's acquisition of cable franchises on its provision of "open access" to its cable modem platform. Title VI of the Communications Act provides that, in general, "a franchising authority may not require a cable operator to provide any telecommunications service or facilities." 47 U.S.C. § 541(b)(3)(D). In *Portland*, the Ninth Circuit ruled that cable modem service provides end users not just an information service (consisting of e-mail, web browsing, and other means of manipulating information), but also a transmission "pipeline," the use of which the court characterized as a "telecommunications service." On that basis, the court concluded that the franchising authority's "open access" requirement would compel a cable operator to provide a "telecommunications service" and was thus unlawful under Title VI.

In *Brand X,* the court explained that it could not disregard its precedent in *Portland* despite the FCC's subsequent, contrary ruling, because the *Portland* court had interpreted the relevant statutory provisions in the first instance and had not simply deferred to the FCC's own choice of competing interpretations. Indeed, the *Brand X* court added that, at the time of the *Portland* decision, "the FCC ha[d] declined, both in its regulatory capacity and as amicus curiae, to address the issue before us." Accordingly, the Ninth Circuit vacated the FCC's declaratory ruling and remanded the matter to the agency for further proceedings. FCC Chairman Michael K. Powell has already announced that the FCC will seek review of the Ninth Circuit's ruling, first by the *en banc* Ninth Circuit and then perhaps by the Supreme Court.

In the meantime, the impact of the Ninth Circuit's decision remains to be determined. Some industry analysts have construed the Ninth Circuit's ruling to mean that providers of cable modem service may be required to open their cable networks to competing ISPs. But that result is far from inevitable because, among other considerations, the Ninth Circuit left intact the FCC's decision to exempt cable modem providers from any obligation either to sell ISPs volume-discounted access to the transmission component of cable modem service or to treat all ISPs alike. And the Ninth Circuit acknowledged the FCC's broad power to "forbear" from applying regulatory constraints to any telecommunications service when it finds that competitive conditions make the imposition of such constraints unnecessary.

The *Brand X* decision can be read to mean that every information service has a telecommunications service hiding within it, thereby reversing thirty years of FCC rulings that the two categories are mutually exclusive. Because some information services providers, such as incumbent local exchange carriers ("ILECs"), are already required to make underlying transport available to their competitors, that ruling can be expected to have a far greater impact on providers that do not presently face this obligation, such as cable operators. In this regard, the Ninth Circuit's decision could put ILECs and cable operators on a more level playing field. But, while the FCC has recently shown an inclination to achieve such parity by decreased regulation of ILECs, it has had no stomach for achieving it by increased regulation of cable operators.

The Ninth Circuit's ruling on cable modem service will force the FCC to think twice about the regulatory treatment of other services that are at issue in pending proceedings. For example, the FCC is considering how to regulate wireline broadband Internet access provided by ILECs over digital subscriber line ("DSL") facilities, which the FCC (one month before its cable modem ruling) tentatively concluded is a pure information service. In addition, the issue looms whether various forms of Internet Protocol ("IP") telephony constitute information services or telecommunications services. The decision may also affect the FCC's pending review of its universal service rules, since 47 U.S.C. § 254 categorically requires all providers of "telecommunications services" to contribute to the federal universal service fund.

It remains to be seen how *Brand X* may affect the FCC's conduct of these pending proceedings. A concurring opinion in *Brand X* warns that "our holding today effectively stops a vitally important policy debate in its tracks," but the Ninth Circuit's decision, even if left intact, may merely complicate the path of this ongoing debate without determining its ultimate conclusion.

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