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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 (i FCCi) 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 ADOPTS RULES PROHIBITING THE USE OF EXCLUSIVITY CLAUSES  
BETWEEN CABLE TELEVISION COMPANIES AND MULTI-DWELLING UNITS  
OR OTHER REAL ESTATE DEVELOPMENTS**

The Federal Communications Commission (FCC) adopted rules prohibiting use of exclusivity clauses in agreements for the provision of video services to multiple dwelling units (MDUs) or other real estate developments in its *Report and Order and Further Notice of Proposed Rulemaking* (Order), on October 31, 2007. MDUs include apartments, cooperatives, and condominium buildings. For the purpose of the FCC's Order, the term also includes gated communities, mobile home parks, garden apartments, and other centrally managed residential real estate developments. The term does not include timeshare units, academic campuses and dormitories, military bases, hotels, rooming houses, jails, prisons, halfway houses, hospitals, nursing homes or assisted living facilities, or other group quarters characterized by institutional living (e.g., mental facilities), high transience, and facilities that need high security (i.e., safe houses for battered women).

In the Order, which was released November 13, 2007, the FCC noted that nearly 30% of Americans live in MDUs, and that these numbers are increasing. Thus, the FCC adopted a ban on the use of exclusivity clauses by cable television companies for the provision of video services to MDUs in order to foster greater competition for delivery of multi-channel video programming.

Exclusivity clauses are provisions in contracts that specify that, for a designated term, only a particular MVPD and no other provider may provide video programming and related services to residents of an MDU. Exclusivity clauses can also contain language that prohibits any other MVPD from access to the premises of an MDU building or real estate development. Still other exclusivity clauses grant only "wire exclusivity" which allows more MVPDs to serve an MDU or real estate developments, but prohibits them from using existing wires in the MDU or real estate development, (which existing wires may be owned by an MVPD or MDU owner). Finally, some exclusivity clauses allow other MVPDs or an MDU, but bar the owner of the MDU from marketing their services. This latter type of exclusivity clause is called a "market exclusivity" clause.

In the Order, the FCC prohibits the enforcement or execution of existing exclusivity clauses and the execution of new exclusivity clauses by multi-channel video programming distributors subject to Section 628 of the Telecommunications Act of 1996 (47 U.S.C. § 548) (the "Act"). Multi-channel video programming distributors (MVPDs) subject to Section 628 of the Act, are cable television systems. Specifically, the Order does not extend to private cable systems or direct satellite television programming providers, because, while they are MVPDs, they are not subject to Section 628, and the FCC does not have enough information in the record before it or concerning exclusivity clauses and involving these MVPDs.

Importantly, the FCC has no regulatory jurisdiction over owners of MDUs or real estate developments, and therefore, cannot prohibit a property owner from refusing MVPDs the right to enter an MDU or real estate development.

Specifically, the Order finds that:

- Exclusivity clauses that prohibit competitive entry harm competition and broadband deployment and can insulate the incumbent MPVD from any need to improve its services;
- Exclusivity clauses are wide-spread in agreements between MPVDs and MDU owners;
- Incumbent cable television operators have increased the use of exclusivity clauses in their agreements with MDU owners with the entry of local exchange carriers (i LECs) into the video marketplace; and
- The use of exclusivity clauses in contracts for the provision of video services to MDUs constitutes an unfair method of competition or unfair act or practice under Section 628(b) of the Act.

In the Order, the FCC also adopted a Further Notice of Proposed Rule Making (i FNPRM) that requests public comment on whether the FCC should address exclusivity clauses entered into by direct broadcast satellite providers, private cable operators, and other MVPDs who are not subject to Section 628 of the Act. The FNPRM also requests public comment on whether the FCC should prohibit exclusive marketing and bulk billing arrangements. We emphasize that the FCC's Order does not prevent a property owner from negotiating a bulk discount for its residents, or bargaining for increased customer service requirements. As we noted above, the Order does not give any MVPD the right to enter an MDU or real estate development over the objection of a property owner.

If you have any questions concerning the FCC's Order, let us know.

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**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT HOLDS THAT AT&T'S U-VERSE SERVICE IS A CABLE SERVICE OFFERED OVER A CABLE SYSTEM BY CABLE OPERATOR, UNDER THE FEDERAL CABLE ACT**

The United States District Court for the District of Connecticut issued an opinion on July 26, 2007, granting summary judgment in favor of the Offices of Consumer Counsel (i OCC), and the New England Cable & Telecommunications Association, Inc. (i NETA) against Southern New England Telephone Company doing business as AT&T Connecticut, Inc. (i AT&T), and against the Department of Public Utility Control of the State of Connecticut (the i DPUC), and in favor of Cablevision Connecticut, L.P., Cablevision of Southern Connecticut, L.P., and Cablevision of Litchfield, Inc. (collectively i Cablevision), and against the DPUC, by holding that the AT&T's i U-Verse service, that was the subject of a DPUC's June 7, 2006 decision, *Investigation Into Video Products*, No. 05-06-121, June 7, 2006, constitutes a i cable service being offered over a i cable system by a i cable operator, as those terms are defined in the federal Cable Act. 47 U.S.C. § 521, *et. seq.*

Accordingly, the Court held that the DPUC's conclusions to the contrary and its determination that AT&T need not comply with the franchising requirements set forth in Section 541 of the Communications Act of 1934, as amended, 47 U.S.C. § 541, and the regulations promulgated

by the Federal Communications Commission (i FCCi ) thereunder, are preempted by federal law. On October 2, 2007, the Court also denied AT&T's Motion for Reconsideration of the Court's July 26, 2007 decision.

This is the first decision by a federal court which has concluded that AT&T's i U-Versei service constitutes a i cable servicei being offered over a i cable systemi by a i cable operatori , as those terms are defined in the federal Cable Act. *See*, 47 U.S.C. §§ 522(6), 522(7) and 522(5). The DPUC's June 7, 2006 decision found that since AT&T's U-Verse service was not a cable service being offered over a cable system by a cable operator, AT&T was not subject to franchising and other regulatory requirements promulgated by state regulatory authorities pursuant to the federal Cable Act. The DPUC specifically determined that AT&T's U-Verse service, which utilizes Internet Protocol (i IPi ), is fundamentally a two-way service in nature, and as such, did not meet the federal or state definition of cable service despite the apparent similarities and images that may appear on end user's screens. The DPUC observed that the FCC considered the phrase i one-way transmissioni described in the Cable Act to reflect the traditional view of cable primarily as a medium of mass communication, with the same package or packages of video programming transmitted from the cable operator and available to all subscribers. The DPUC's decision recognized that modern cable systems may offer some two-way video capabilities; that is, video on demand (i VODi ), but stated that these capabilities are limited when compared to AT&T's IPTV service. Additionally, in AT&T's IPTV service, two-way capability and interaction is ever present, always requiring a dynamic interaction between the customer and the network. In AT&T's IPTV service, the two-way interactions occurs between each customer set-top box and AT&T's servers. The DPUC found that AT&T's network is unique in comparison to cable operators, such that it entails a switched two-way client server IP-based architecture designed to send subscribers only the programming the subscriber chooses, and entails a high level of subscriber interaction so that the subscriber will be able to tailor and integrate several different offerings over the network. The DPUC's decision described the constant communications between AT&T's servers and consumers as i processing information and interacting through its subscriber set-top boxes to insure they are authorized to receive the programmingi AT&T offered in its U-Verse service. Thus, the DPUC held that AT&T's IPTV service was merely another form of information transmitted like any other data over the Internet, and accordingly, was not subject to legacy franchising requirements.

The OCC, the NECTA and Cablevision challenged this conclusion as preempted by the Cable Act.

In its decision, the Court analyzed the statutory definitions of cable service definition in Section 522(6) of the Cable Act, and the legislative history of the 1984 Cable Act as amended by Congress in 1992, and in 1996. The Court concluded that the statutory language in Section 522 requires that AT&T's video programming service constitutes a i cable servicei as defined by that Section. The definition of i cable servicei in Section 522 requires the i one-way transmission to subscribers of video programming or other programming service and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming servicei . 47 U.S.C. § 522(6). In the case of AT&T's IPTV service, the Court noted that AT&T acknowledged that the flow of its video programming will be one-way, downstream from its network to subscribers, and that video programming will not be transmitted upstream from the customer's premises. The Court found that the way AT&T's technology worked, involving two-way transmission of data/signals between the subscriber set-top boxes and the network, is not excluded by the statutory

definition in Section 522(6) that references only one-way transmission to subscribers of video programming. The Court found that although an AT&T subscriber's set-top box would be engaged in signaling back and forth with AT&T network to retrieve programming content and engage in error correction, the subscriber will do no more than turn the box on or off, and select channels or pay-per-view/VOD programming, just as a subscriber would in traditional cable television service. The Court held that this level of required subscriber interaction did not enable a particular subscriber to engage in off-premises creation and retrieval of a category of information.

The Court also found unpersuasive AT&T's reliance on the FCC's *Cable Modem Declaratory Ruling*, 17 F.C.C.R. 4798 (2002), which held that high speed access to the Internet over cable and other facilities did not constitute a cable service under the Cable Act, and was thus an information service. The Court found that AT&T's U-Verse service still fell within the scope of a medium of mass communication, with the same package or packages of video programming transmitted from the cable operator and available to all subscribers. According to the Court, AT&T's video programming, both prescheduled broadcast programming and video on demand, is generally available to all subscribers within a particular tier of service, and the fact that the programming is not transmitted to a particular subscriber from the network until that subscriber tunes to that channel or selects that particular VOD program did not change this fact. Therefore, the Court held that the interactivity is not of the high degree contemplated by the FCC's Cable Modem Declaratory Ruling for exempting a service from the definition of cable service in the Cable Act as it requires no more interactivity on the part of subscribers than is involved in traditional cable service. Significantly, the Court found that the Cable Act did not specify that, to constitute a cable service, all available programming must be delivered to all subscribers at all times. Instead, the Court determined that the legislative history of the Act shows that programming simply must be made generally available to all subscribers, and must be limited to a specific number of options or categories delineated and created by the cable operator or programming service provider. Thus, the Court concluded that AT&T's U-Verse service fit these requirements.

The Court also rejected AT&T's argument that U-Verse service constituted an information service, and not a cable service. In rejecting AT&T's argument, the Court found that AT&T's U-Verse service provides packet of video programming content from AT&T's network to subscribers set-top boxes, and that AT&T transmits the video programming one-way from its network to set-top boxes on the subscribers' premises, and did not facilitate a two-way exchange of information, content or ideas over the public Internet.

After finding that AT&T's video programming service constituted a "cable service" under Section 522(6) of the Communications Act, the Court considered whether the service was being provided by a "cable operator" or a "cable network", such that AT&T would be subject to franchising and other regulatory requirements applicable to cable operators in Connecticut. In concluding that AT&T's programming service was being provided by a "cable operator" over "cable network", the Court analyzed the definition of "cable system" and "cable operator" as those terms were defined in the Communications Act, and found that AT&T's network was a cable system, that AT&T was a cable operator, because AT&T's network was used in the transmission of video programming directly to subscribers, and that its use is not solely to provide interactive on demand services, an exception to the definition of cable system under the Communications Act. Therefore, AT&T was providing a cable service, over a cable system, and was a cable operator.

In view of this Court's decision, the DPUC has refused to grant AT&T a statewide video franchise for the State of Connecticut, and ordered that AT&T obtain a franchise as a cable operator.

AT&T has indicated in press reports that it will appeal these decisions.

The question of whether an IPTV service is a cable service is still pending before the FCC, in its IP Enabled Services docket, as well as on a referral from the U.S. District Court for the Eastern District of Virginia in *Cavalier Telephone, LLC, et al., v. The City of Richmond*.

We will continue to follow this case to its conclusion in the court system and the issue of whether IPTV is a cable service or an information service before the FCC.

We are available to answer any questions you may have about this IPTV issue.

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### **THE FCC EXPANDS LOCAL NUMBER PORTABILITY TO VOICE OVER INTERNET PROTOCOL**

The FCC issued a Report and Order, Declaratory Ruling, Order on Remand and Notice of Proposed Rule Making (the "Order") on October 31, 2007, in which the FCC extended the obligation to provide local number portability ("LNP") to interconnected voice over Internet protocol ("VoIP") providers and the telecommunications carriers that obtain telephone numbers for such providers.

The FCC's Order also clarified that telephone companies may not obstruct or delay number porting by demanding excess information from a customer's new provider, and specifically concluded that LNP validation for a simple number port should be based on no more than four fields. These fields are: (1) ten digit telephone number; (2) customer account number; (3) five digit zip code; and (4) pass code, if applicable. The FCC also tentatively concluded that the FCC should require the telecommunications industry to complete simple ports of a customer's number to a VoIP provider from a LEC within 48 hours.

The FCC's Order also provides that customers of small wireline telephone carriers can port their telephone numbers to wireless carriers. The FCC's Order is in response to a stay of the FCC's "Inter-Mobile Number Portability Order" by the U.S. Court of Appeals for the District of Columbia, which requires the FCC to analyze the impact of its requirements on small entities under the Regulatory Flexibility Act.

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### **FCC EXTENDS CERTAIN RULES UNDER SECTION 541(A)(1) OF THE TELECOMMUNICATIONS ACT OF 1996 (47 U.S.C. § 541(A)(1)) TO INCUMBENT PROGRAMMING PROVIDERS AND NEW ENTRANTS**

The FCC adopted its Second Report and Order (the "Second Report Order") on October 31, 2007, that extends a number of the rules promulgated in the FCC's *First Report and Order* that established rules and provided guidance to implement Section 541(a)(1) of the Communications Act

of 1934, as amended, (47 U.S.C. § 541(a)(1)), which prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable television services.

In the *Second Report and Order*, the FCC made the following findings:

- The FCC's findings in the *First Report and Order* that certain specified costs, fees, and other compensation required by local franchising authorities must be counted towards the statutory 5% cap on franchise fees, should be extended to incumbents;
- The FCC's decisions relating to public, educational and governmental (i PEG) and institutional networks (i INets) should be extended to incumbents;
- The FCC's findings in the *First Report and Order* regarding mixed use networks also apply equally to incumbents and new entrants, and should be extended to incumbents;
- Other producers of the *First Report and Order*, regarding billed out and time limits for franchise negotiations are only applicable to new entrants; and
- The FCC cannot preempt local or state cable customer service requirements, nor can it prevent local franchising authorities and cable operators from agreeing to more stringent standards.

These FCC findings will be applicable 30 days after publication of the *Second Report and Order* in the Federal Register. The *Second Report and Order* also provides that the FCC does not afford incumbent cable television providers any right to breach their existing franchise agreements with franchising authorities.

The rules in the *Second Report and Order* extends to incumbents and new entrants alike are set forth in the FCC's *First Report and Order*, about which we reported in our newsletter of March/April, 2007.

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#### **FCC REVISES PROCEDURES FOR AUCTION OF 700 MHZ BAND LICENSES**

The FCC has revised its procedures for the auction of 700 MHz band licenses to take place on January 24, 2008 (Auctions No. 73 and 76). Specifically, the FCC, through the Wireless Telecommunications Bureau (i WTB), established the additional default payment percentage at 10% for the D Block License. The additional default payment percentage amount for licenses in the A, B and E Blocks remains at 15%, as the FCC has previously announced.

Any winning bidder that defaults or is disqualified after the close of an auction is liable for default payment under Section 1.214(g)(2) of the FCC Rules. This payment consists of a deficiency payment equal to the difference between the amount of the bidder's bid and the amount of the winning bid the next time a license covering the same spectrum is sold at an auction, plus an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less. In the upcoming auction for 700 MHz band licenses, the WTB had set the

additional default payment percentage at 15% of the defaulted bid for all licenses in blocks that are not subject to package bidding, including the D Block.

The C Block licenses to be auctioned in the 700 MHz band auction will be subject to package bidding. Therefore, under existing FCC Rules in Section 1.2104(g)(2)(ii), the additional default payment percentage is 25%.

The FCC's purpose in establishing the percentage used to calculate the additional default payment is to defer defaults and promote the deployment of new wireless services. The FCC believes that the costs of a default on the D Block licenses in the auction are likely to be high, because of the role the D Block will play in the establishment of a public/private partnership for the provision of public safety broadband services. You should note that in the D Block, the winning bidder must negotiate and enter into an FCC-approved network sharing arrangement with the new National Public Safety Broadband Licensee, consistent with the terms and procedures set forth in the FCC's 700 MHz *Second Report and Order* which the FCC released earlier this year.

If disputes arise in the negotiation of network-sharing for the D Block licenses, the FCC's WTB will not exercise its authority for immediate denial of a long form application filed by the winning bidder until the WTB takes one of two steps. First, the WTB will issue a decision on the disputed issues and require the submission of a draft agreement consistent with the decision; or secondly, the WTB will refer the issues to the FCC Commissioners for immediate decision.

If there are any questions about the 700 MHz auction procedures, please let us know.

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**U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT RULES IN  
TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE PARTNERSHIP V.  
CARTERET-CRAVEN ELECTRIC MEMBERSHIP CORPORATION AT NORTH CAROLINA  
COMMON LAW REQUIRING AN ELECTRIC UTILITY TO CHARGE REASONABLE  
AND NONDISCRIMINATORY RATES FOR ELECTRIC SERVICE DOES  
NOT EXTEND TO POLE ATTACHMENTS**

Time Warner Entertainment ñ Advance/Newhouse Partnership (i Time Warnerí), a cable service provider, had an agreement with Carteret-Craven Electric Membership Corporation (i Carteret-Cravení), to attach its cable to Carteret-Craven's utility poles. Carteret-Craven terminated the agreement in 2004, and demanded an increase in the pole attachment rate from \$6 per pole to \$20 per pole as a condition of any new agreement. Time Warner refused to enter into the new agreement, and filed suit against Carteret-Craven in U.S. District Court for the Eastern District of North Carolina, claiming that Carteret-Craven's actions of charging an excessive and discriminatory rental pole attachments violated its statutory duty to charge only reasonable and nondiscriminatory rates, and North Carolina's common law duty to charge only reasonable and nondiscriminatory rates. The district court granted Carteret-Craven's motion to dismiss for Time Warner's failure to state a claim, and Time Warner appealed the district court ruling only insofar as it ruled that North Carolina common law requiring electric utilities to charge reasonable and nondiscriminatory rates did not apply.

In reaching its decision, the Fourth Circuit noted the FCC had no jurisdiction over the Carteret-Cravenís pole attachment rates because membership cooperatives are excluded from the FCCís regulatory purview under the federal Pole Attachment Act. Accordingly, Time Warnerís only recourse was to bring action in the federal court.

The district court concluded that the common law prohibition in North Carolina against discriminatory rates charged by electric utilities did not extend to negotiated prices for business agreements unrelated to the basic statutory purpose of Carteret-Craven to provide electric service, and that the court could not create or expand North Carolina common law.

The Fourth Circuit upheld this ruling, finding that a common law duty under North Carolina to sell service to customers at reasonable and nondiscriminatory rates does not extend to the business of providing public access to excess space on Carteret-Cravenís electric utility poles, or on any other property Carteret-Craven owns. Accordingly, Carteret-Craven is free to negotiate pole rates it considers fair and reasonable, and is not required to make their poles available for pole attachments to any other entity.

If there are questions about this Fourth Circuit decision, please let us know.

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### **THIRD CIRCUIT UPHOLDS FCC ORDER LIMITED FEDERAL REGULATION OF HIGH SPEED WIRELINE INTERNET ACCESS**

The U.S. Court of Appeals for the Third Circuit (i Third Circuitî) issued an opinion in *Time Warner Telecom, Inc., et al., v. Federal Communications Commission, et al.*, on October 16, 2007, denying a petition for review of the FCCís Order issued in 2005 which limited federal regulation of high speed Internet access service provided over traditional telephone lines (i Wireline Broadband Internet Access Serviceî). The FCCís Order, *Appropriate Framework for Broadband Access to Internet Over Wireline Facilities*, 20 FCCR 14853 (2005) (i Wireline Broadband Orderî) rejected the proposition that Wireline Broadband Internet Access Service includes both an i information serviceî and a i telecommunications serviceî as defined under the federal Communications Act of 1934, as amended (the i Actî). Instead, the FCC found that Wireline Broadband Internet Access Service is a i functionally integrated information serviceî.

The FCCís Wireline Broadband Order followed the FCCís decision in the *Cable Modem Declaratory Ruling*, 17 FCCR 4798 (2002) (i Rulingî), in which the FCC concluded that broadband Internet access service provided by cable companies is an information service which does not include a separate telecommunications service, subject to mandatory regulation under Title II of the Act. In addition, in the *Cable Modem Declaratory Ruling*, the FCC declined to apply the rulings it made in amendment of Section 64.702 of the Commissionís Rules and Regulations, 77 FCC 2d 384 (1980) (i Computer IIî), that required telecommunications carriers engaged in the provision of enhanced services to grant competing providers access to their wirelines on a non-discriminatory basis pursuant to tariffs filed with the FCC. The U.S. Supreme Court upheld the FCCís decision in *Cable Modem Declaratory Ruling in National Cable and Telecommunications Assn v. Brand X Internet Services*, 545 U.S. 967 (2005) (i Brand Xî).

Time Warner Telecom and other petitioners, who are independent information service providers, competing telecommunication service providers, cable modem providers, and various public interest organizations challenged the FCC's *Wireline Broadband Order*. Specifically, the petitioners argued that the FCC's Wireline Broadband Order allows telephone companies to deny competitors access to their wirelines, thereby decreasing competition and consumer choice in the market for broadband Internet service.

The Third Circuit rejected this argument, finding that the FCC's decision is based on a reasonable interpretation of the Act, and a proper exercise of agency discretion. The Third Circuit reached these conclusions because the record evidence supported the FCC's decision, particularly in light of the FCC's ruling in *Cable Modem Declaratory Ruling* that cable modem service is an information service. The Court agreed that the FCC had adequately distinguished prior FCC decisions such as its order in the *Universal Service Report*, 13 FCCR 11501 (1998), its classification of broadband service under Communications Assistance for Law Enforcement Act (i CALEA), in the FCC's CALEA Order, 20 FCCR 14989 (2005). The Third Circuit stated that while these decisions may appear inconsistent, they do not render the FCC's *Wireline Broadband Order* arbitrary and capricious, since agency interpretations are not carved in stone, and the FCC's policy interpretations under the Act are made on a continuing basis. Finally, the Court found the FCC's market analysis showing that relaxing regulation of Wireline Broadband Internet Access Service would not harm the market for such service, and was reasonable and consistent with the approach the FCC used in the *Cable Modem Declaratory Order*, upheld by the Supreme Court in *Brand X*.

The Court also found that the petitioner's other arguments were without merit. Accordingly, the Court upheld the FCC's *Wireline Broadband Order*.

As of now, both cable modem service and wireline broadband internet access service are not regulated by the FCC as a telecommunications service, but are classified as information services.

If anyone has any questions about this Third Circuit decision, please give us a call.

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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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