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Amy L. Signaigo

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National Cable & Telecommunications Association v. Brand X Internet Services:

Resolving Irregularities in Regulation?

By Amy L. Signaigo*

I. INTRODUCTION

¶1 As technological advances in communications occur with increasing speed, the federal government has struggled to appropriately classify these emerging technologies for purposes of regulation. The legislature, the courts, and the FCC have all grappled with definitions, and the results have been generally confusing and inconsistent. Unfortunately, rather than offering any sort of clarity, the most recent Supreme Court decision in this ongoing battle, the *Brand X*¹ decision, simply muddies the waters further and virtually guarantees that the disputes will continue for months or years to come, not only in the courts but in the Congress and the FCC.

¶2 Part II of this case note will give a brief overview of the Communications Acts of 1934 and the subsequent amendments of the Telecommunications Act of 1996, discussing in particular the relevant statutory language and the development of the distinction between so-called “telecommunications” services and “information” services. Part III will generally discuss the tension between agency, statutory, and judicial law, and will focus specifically on how the *Brand X* decision merely exaggerated that tension in this application while purporting to solve it. Part IV will discuss the substantive question before the court in *Brand X*, which was whether cable companies which sell broadband Internet services should be considered telecommunications providers or information service providers, as well whether such classifications are even sensible in the light of today’s complex and emerging technologies. Finally, Part V will explore the possible effect of the *Brand X* decision with respect to other types of modern telecommunications services, such as DSL and wireless Internet.

II. BACKGROUND

¶3 The original Communications Act of 1934 did not include definitions or classifications of telecommunications carriers or information services.² The two classifications originated in the 1970s, as the Federal Communications Commission

* Amy Signaigo is a 2007 J.D. Candidate at Northwestern University School of Law. She received her B.S. in Computer and Electrical Engineering from Purdue University in 1994 and was employed as a hardware engineer in the telecommunications field for six years prior to entering law school.

¹ Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005).

² Communications Act of 1934, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 (2000)).

(“FCC”) attempted to develop rules to regulate data processing services offered over telephone wires.³ Originally, the FCC distinguished between basic services and enhanced services, defining each in terms of how the customer would perceive the services being offered.⁴ The FCC defined a basic service as a “pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.”⁵ “Pure” transmission meant that the customer transmitted an ordinary language message with no computer processing or information storage required, other than that of converting the message to an electronic format for the purposes of transmitting over a network.⁶ Transmissions over the traditional telephone network (e.g. a regular phone call) were considered “pure” under this definition.⁷ On the other hand, the FCC defined enhanced services as those in which “computer processing applications [were] used to act on the content, code, protocol, and other aspects of the subscriber’s information.”⁸ Voice and data storage services as well as protocol conversion (ability to communicate between networks that employ different data transmission formats) were considered enhanced services.⁹ Basic services were subjected to traditional common carrier regulation, but enhanced services were not.¹⁰

¶4 These “basic” and “enhanced” distinctions were essentially codified in the Telecommunications Act of 1996,¹¹ which established the terms “telecommunications services” (analogous to the former “basic” service) and “information services” (analogous to the former “enhanced” service).¹² As basic services, telecommunications service providers continue to be subject to regulation as common carriers,¹³ which means, among other things, that they must charge reasonable, non-discriminatory rates, design their systems such that other carriers can connect with their networks, and contribute to the universal service fund.¹⁴ Information services providers are not subject to this type of regulation.¹⁵ The FCC’s stated policy behind this distinction was that it would be unwise to subject enhanced services to the same types of regulations as basic services because of the “fast-moving” market in which enhanced services existed.¹⁶

¶5 In March of 2002, the FCC issued a ruling which classified broadband cable Internet service as an “information” or enhanced service and not a telecommunications or basic service.¹⁷ One result of that decision was that broadband cable Internet service providers have not been subject to traditional common carrier regulation under Title II of

³ Amendment of Section 64.702 of the FCC’s Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 417-23 (1980) [hereinafter *Computer II Order*].

⁴ *Id.*

⁵ *Computer II Order*, 77 F.C.C.2d at 416.

⁶ *Id.* at 419-420.

⁷ *Id.*

⁸ *Id.* at 420.

⁹ *Id.* at 421-22.

¹⁰ *Computer II Order*, 77 F.C.C.2d at 417-23.

¹¹ 47 U.S.C. § 153 (2000).

¹² *Id.* See *Brand X*, 545 U.S. at 976.

¹³ See *Brand X*, 545 U.S. at 975-77.

¹⁴ 47 U.S.C. §§ 201-209, 251(a)(1), 254(d) (2000).

¹⁵ See *Brand X*, 545 U.S. at 976; *Computer II Order*, 77 F.C.C.2d 384 at 428-32.

¹⁶ *Computer II Order*, 77 F.C.C.2d 384 at 434.

¹⁷ *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002) [hereinafter *Declaratory Ruling*].

the Communications Act.¹⁸ Various parties on all sides of the telecommunications industry have been disputing these classifications ever since.¹⁹

¶16 The FCC relied heavily on its own *Universal Service Report*²⁰ when classifying individual types of services into either “telecommunications” or “information,” and analogized to its earlier concepts of basic and enhanced services.²¹ However, emerging technologies have blurred this distinction between delivery of “telecommunications services” and delivery of “information services” in the way they are currently defined by statute (and interpreted by courts) and by the FCC.²² Because the FCC has been mostly silent about classification of these emerging technologies, some courts have stepped in to fill the void.²³

III. AGENCY LAW OR *STARE DECISIS*?

¶17 The *Brand X* litigation began when multiple parties in the Courts of Appeals for the Third, Ninth, and District of Columbia Circuits petitioned for judicial review of the FCC’s *Declaratory Ruling*.²⁴ By judicial lottery, the Ninth Circuit was selected to hear the case in May of 2003.²⁵

¶18 The Ninth Circuit first had to address the question of whether it should accept the FCC classifications found in the *Declaratory Ruling*, or whether its own previous case law should govern instead.²⁶ In *AT&T Corp. v. City of Portland*, issued prior to the FCC’s *Declaratory Ruling*, the Ninth Circuit had held that cable Internet broadband service was a “telecommunications” service within the meaning of the statute.²⁷ The *Portland* decision explicitly pointed out that the FCC had, until that point, declined to address the specific issue of proper classification of cable broadband Internet service.²⁸ Therefore, the Ninth Circuit did not have to determine whether any deference to an agency definition was warranted.²⁹ Instead, the court considered the FCC’s existing classifications of traditional dial-up Internet service providers (ISPs), and ultimately decided that broadband cable service was more properly a telecommunications service

¹⁸ For some additional background on regulatory history with specific reference to the *Brand X* litigation, see Steven Aronowitz, *Annual Review 2005: Part II: Entertainment Law and New Media: IX, Telecommunications: Brand X Internet Services v. FCC: The Case of the Missing Policy Argument*, 20 BERKELEY TECH. L.J. 887 (2005).

¹⁹ See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1127 nn.10 & 12 (9th Cir. 2003). Among the parties disputing the result of the *Declaratory Ruling* were Brand X, Earthlink, Verizon, SBC, the State of California, the National Association of Telecommunications Officers and Advisors, the Center for Digital Democracy and various other municipalities and organizations.

²⁰ *In re Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11501, 11531 (1998) [hereinafter *Universal Service Report*].

²¹ *Declaratory Ruling*, 17 F.C.C.R. at 4820.

²² See *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

²³ See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-78 (1999); see also *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 333-39 (2002); *Verizon Commc’ns Inc. v. FCC*, 535 U.S. 467, 489-90 (2002).

²⁴ *Brand X*, 345 F.3d at 1120.

²⁵ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 979 (2005); *Brand X*, 345 F.3d at 1127.

²⁶ *Brand X*, 345 F.3d at 1120.

²⁷ *City of Portland*, 216 F.3d at 878.

²⁸ *Id.* at 876.

²⁹ *Id.*

and not an information service, in part because of the integrated nature of cable Internet service.³⁰ With dial-up service, the ISP's services are fairly easily separated from the telephone services, and indeed are generally provided by two different entities.³¹ However, broadband cable access services are not as easily separable, since the cable company provides the physical connection to the Internet as well as the providing the Internet service, and users are not required to purchase the services of a separate ISP. In *Portland*, the Ninth Circuit did recognize that, to the extent the services were separable, the cable company provided both "information services" and "telecommunications services", but ultimately decided that the overall service was more properly a telecommunications service.³²

¶9 The Ninth Circuit precedent of *City of Portland* was in direct conflict with the *Declaratory Ruling* when the Ninth Circuit faced its decision in *Brand X*. Therefore, the Ninth Circuit had to consider whether deference to the agency decision was warranted. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,³³ the Supreme Court held that ambiguity in a statute required the courts to defer to an agency's interpretation if that interpretation was reasonable, even if the court did not agree that the agency interpretation was the *best* reading of the statute.³⁴ *Chevron* provided for a two-part test for deference to agency rulings.³⁵ The court is first required to look to Congressional intent.³⁶ That is, if Congress has clearly expressed its own intent in how a statute is to be interpreted, no further inquiry is needed.³⁷ Both the court and the agency must yield to the unambiguously expressed intent of Congress.³⁸ In that case the judiciary is the final authority of the issue of statutory construction and must reject any agency interpretation which is contrary to clearly expressed Congressional intent.³⁹ However, if the court determines that Congress has not precisely addressed the particular issue, or if the statute is silent or ambiguous on the point, the question is whether the agency's interpretation is based on a permissible construction of the statute.⁴⁰ If so, the court is required to defer to the agency construction.⁴¹

¶10 The Ninth Circuit recognized the *Chevron* framework in its own *Brand X* opinion.⁴² However, the Ninth Circuit noted that it had explicitly held in *Portland* that a cable broadband Internet provider was a telecommunications provider under the

³⁰ See *id.* at 877-78.

³¹ Services which are severable do not cause as much difficulty for classification purposes; one can readily identify the physical phone line in a traditional dial-up connection as a telecommunications service while identifying the overlying Internet service provider as an information service.

³² *City of Portland*, 216 F.3d at 878. Ironically, this integration of services by cable Internet providers was a point of extensive discussion for the Supreme Court in the *Brand X* decision, with both the majority and dissenting opinions relying on the integration to support their respective arguments. *Brand X*, 545 U.S. at 990-91, 1007-08. However, unlike the Ninth Circuit, the Supreme Court majority found that the service integration more properly supported an overall classification of "information service" provider. *Id.* at 990.

³³ *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

³⁴ *Chevron*, 467 U.S. at 837.

³⁵ *Id.*

³⁶ *Id.* at 842.

³⁷ *Id.* at 865-66.

³⁸ *Id.* at 843.

³⁹ *Id.* at 837.

⁴⁰ *Id.*

⁴¹ *Id.* at 843-44.

⁴² *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1130-31 (9th Cir. 2003).

Communications Act.⁴³ Furthermore, under Ninth Circuit law, such precedent could be disregarded only when the precedent constituted deferential review of agency decision making.⁴⁴ Finally, the Ninth Circuit found support for adhering to precedent instead of to agency construction in the case of *Neal v. United States*.⁴⁵ Therefore, the Ninth Circuit ruled that it should follow the principle of *stare decisis* and that *Portland* should govern its decision.⁴⁶ The result was the affirmation that cable Internet services should, indeed, be classified as “telecommunications services.”⁴⁷

¶11

On appeal, the Supreme Court rejected the Ninth Circuit’s reasoning in its *Brand X* ruling and ruled that the Ninth Circuit should have applied the *Chevron* deference test rather than adhering to *Portland*.⁴⁸ In so concluding, the Court appeared to qualify the doctrine outlined by *Chevron*. The Court stated that a lower court’s prior construction of a statute trumps an agency construction only when the judicial precedent holds that “the statute unambiguously forecloses the agency’s interpretation.”⁴⁹ The Court attempted to clarify this statement by further stating that judicial precedent can govern only if the precedent case explicitly holds that the judicial construction is the “only permissible reading of the statute” and not merely the best one.⁵⁰ As Justice Scalia pointed out in his

⁴³ *Id.* at 1128.

⁴⁴ *Id.* at 1130-31; see *Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (en banc). Though the *Mesa Verde* court held that a panel could adopt an agency interpretation that was reasonable and consistent with the law, even if circuit precedent was to the contrary, the holding was qualified with the statement that the precedent had to have involved a deferential review of agency decision-making. *Id.* at 1136. Because the FCC had declined to address the issue prior to *Portland*, there was no existing agency decision to review at that time, and therefore *Portland* did not meet the *Mesa Verde* requirement. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000).

⁴⁵ *Neal v. United States*, 516 U.S. 284 (1996) (“Once we have determined a statute’s meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency’s later interpretation of the statute against that settled law.”)

⁴⁶ *Brand X*, 345 F.3d at 1130-31.

⁴⁷ *Id.* at 1131.

⁴⁸ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). The Court also asserted that the Ninth Circuit had misread the ruling in *Neal*. The Court claimed that the Ninth Circuit had looked to *Neal* to support the proposition that prior judicial construction of a statute controlled an agency’s contrary construction. The Supreme Court instead stated in *Brand X* that *Neal* established that only a precedent which held a statute to be unambiguous foreclosed a contrary agency construction. Thus the Court claimed that the *Neal* holding was more narrow than the Ninth Circuit understood it to be, and that the rule is that a court’s interpretation of a statute trumps an agency’s interpretation under the doctrine of *stare decisis* only if the prior court holding determined a statute’s “clear meaning.” *Brand X*, 545 U.S. at 984 (quoting *Maslin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990)).

⁴⁹ *Brand X*, 545 U.S. at 982-83.

⁵⁰ *Id.* For just one example of the confusion regarding how a court might state its holding in order to foreclose any future agency definitions, see *Chapman v. United States*, 500 U.S. 453 (1991). In *Chapman*, the Court held that the statute at issue was “not unconstitutionally vague.” *Id.* at 540. The statute was one which provided for penalties for possession and distribution of the hallucinogen LSD. Specifically, the statute used the language “mixture and substance” in reference to the amount of LSD involved, which was in turn relevant to the severity of the penalty. Neither the word “mixture” or “substance” was defined in the statute. The Sentencing Commission, in its own attempts to resolve the ambiguity, invited public comment on the construction. *Id.* at 470 (Stevens, J., dissenting). Legislative history, though sparse, showed at least one letter from Senator Biden regarding the ambiguity of the language as well as an attempt by Senator Kennedy to amend the confusing language. *Id.* When *Chapman* was argued before the Court of Appeals for the Seventh Circuit, multiple judges construed the language of the statute in different ways. 908 F.2d 1312, 1326 (7th Cir. 1990) (en banc). Nevertheless, the Supreme Court in *Neal* concluded that *Chapman* was controlling under the principle of *stare decisis* because it had ruled that the statute was “unambiguous” and therefore no deference to the Sentencing Commission’s interpretation of the statute was required. *Neal*, 516 U.S. at 284.

Brand X dissent, this particular statement “creates many uncertainties to bedevil the lower courts.”⁵¹ For instance, how do future courts specify that their judicial constructions are the only permissible constructions and therefore immune from agency reversal? Must courts explicitly state that their construction is the “only permissible” reading or merely the “best reading”? More importantly, in light of the Supreme Court’s *Brand X* ruling, could (or would) the lower courts be able to avoid any sort of agency reversal with the mere semantics of some additional words in their holdings? What about the administrative burdens the courts now face in trying to determine whether past decisions (those that predate this *Brand X* interpretation of *Chevron*) were the *only* permissible statutory constructions or merely a *preferable* statutory construction? Do dozens or even hundreds of judicial constructions now become agency-reversible merely because prior courts did not include the word “unambiguous” somewhere in their holdings regarding the construction? Unfortunately, the Supreme Court answered none of these questions in *Brand X*.⁵² In fact, the majority opinion went so far as to state that “the agency’s decision to construe [a] statute differently from a court does not say that the court’s holding was legally wrong.”⁵³ Presumably the Court intended to suggest that *Portland*, for example, has not been explicitly overruled either by *Brand X* or by any agency construction of the Communications Act.⁵⁴

¶12 A further problem with the Supreme Court’s requirement that a judicial construction rules only if such construction is considered unambiguous is that the Court did not provide any sort of test for what constitutes unambiguous.⁵⁵ It is unclear whether the Court intended for the unambiguous test to be the same one that governs part one of the *Chevron* test, if indeed “ambiguity” under the *Chevron* framework is even well-defined.⁵⁶ In any event, it seems that every case that reaches step two of the *Chevron* test is potentially agency-reversible.⁵⁷

¶13 Once the Supreme Court concluded that the *Chevron* test should govern in *Brand X*, its next step was to apply it, which necessarily addressed the substantive question before the Court: is a cable broadband Internet service provider offering “information services” or “telecommunications services” within the meaning of the Telecommunications Act?

⁵¹ *Brand X*, 545 U.S. at 1018 (Scalia, J., dissenting).

⁵² See generally *id.* Justice Scalia does raise some of these questions in his dissent, going so far as to suggest that the Court had created a world “full of promise for administrative law professors in need of tenure articles.” *Id.* at 1019.

⁵³ *Brand X*, 545 U.S. at 983.

⁵⁴ *Id.* The Court seems peculiarly concerned with not explicitly overruling *City of Portland*, presumably because *City of Portland* and its issues were not properly before the Court in its *Brand X* ruling. However, it also seems clear that, despite the claim that a judicial construction is not be “legally wrong” and that an agency is not “overruling” the judicial construction, the net result appears to be exactly that. In light of the Supreme Court’s *Brand X* decision, the Ninth Circuit is basically forced to abandon *City of Portland*. *Id.* at 1019-20 (Scalia, J., dissenting).

⁵⁵ See *id.* at 1018 (Scalia, J., dissenting).

⁵⁶ *Id.*; see *Neal v. United States*, 516 U.S. 284, 290 (1996).

⁵⁷ *Brand X*, 545 U.S. at 1017 (Scalia, J., dissenting).

IV. IS A CABLE MODEM PROVIDER AN “INFORMATION SERVICES” PROVIDER OR A
“TELECOMMUNICATIONS” PROVIDER?

¶14 Under the *Chevron* framework, the Supreme Court conducted the familiar two-part inquiry to determine whether the FCC’s construction of the definition of “telecommunications service” was a permissible reading of the Communications Act.⁵⁸ The first part of the inquiry was whether the plain terms of the Communications Act “directly address[ed] the precise question at issue.”⁵⁹ Finding that the statute did not directly address the issue, the Court moved to the second part of the test, which was to inquire whether the agency’s interpretation of the statute was a “reasonable policy choice for the agency to make.”⁶⁰ The Court concluded that the FCC’s interpretation was permissible and reasonable at both steps.⁶¹

¶15 The Communications Act defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. . . .”⁶² A telecommunications service is defined as the “offering of telecommunications for a fee directly to the public.”⁶³ “Telecommunications,” in turn, is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁶⁴

¶16 The FCC first concluded that broadband cable Internet services are information services under the statutory definition.⁶⁵ It reasoned that cable broadband Internet services are information services because they provide consumers with a “comprehensive capability for manipulating information using the Internet via high-speed telecommunications.”⁶⁶ For instance, users of cable broadband Internet services can, among other things, browse the World-Wide Web, transfer files via File Transfer Protocol (FTP), send and receive email, and access Usenet newsgroups.⁶⁷ In this respect, cable broadband Internet service providers are similar to ISPs which are accessed through dial-up services.⁶⁸

¶17 None of the parties to the *Brand X* case challenged the ruling that, to the extent that cable companies acted as ISPs, they were providing “information services.” Instead the primary question was whether cable broadband Internet providers were also providing “telecommunications services” within the meaning of the statutory language of that phrase.⁶⁹ The initial ruling by the FCC concluded that they were not.⁷⁰

⁵⁸ *Brand X*, 545 U.S. at 986.

⁵⁹ *Id.* (quoting *Chevron*, 467 U.S. at 843).

⁶⁰ *Id.* (quoting *Chevron*, 467 U.S. at 845).

⁶¹ *Id.*

⁶² 47 U.S.C. § 153(20) (2000).

⁶³ *Id.* at § 153(40).

⁶⁴ *Id.* at § 153(43).

⁶⁵ *See Brand X*, 545 U.S. at 987.

⁶⁶ *Id.*

⁶⁷ *Id.* *See also Declaratory Ruling*, 17 F.C.C.R. at 4821; *Universal Service Report*, 13 F.C.C.R. at 11537.

⁶⁸ *See Brand X*, 545 U.S. at 987.

⁶⁹ *Id.*

⁷⁰ *Id.*

¶18 The FCC's determination on the appropriate classifications focused on the nature of the function offered to the end user.⁷¹ Seen from the consumer's point of view, the FCC decided that cable broadband Internet services were not telecommunications because the consumer always used the physical connection (the high-speed wires) in conjunction with the information services capabilities.⁷² In other words, unlike a dial-up Internet connection, where the consumer could easily distinguish between his local phone line (the "telecommunications services" provider) and the Internet service provider from whom he chose to purchase Internet access (the "information services" provider), cable broadband access is integrated. The consumer uses the cable company's physical facilities to access the Internet and the cable company's ISP offerings to navigate it. The integrated character of the offering led the FCC to conclude that the consumer was not purchasing a stand-alone, transparent offering of telecommunications.⁷³

¶19 The Supreme Court concluded that the statutory definitions in this instance provided enough ambiguity to pass the first part of the *Chevron* test because Congressional intent was not unambiguous as to the meanings of "telecommunications services" and "information services."⁷⁴ Here the Court focused on the purported ambiguity of the word "offering,"⁷⁵ specifically as it is used in the statutory definition of "telecommunications service."⁷⁶ The Court stated that "offering" could reasonably mean "stand-alone" offering and that, from a consumer point-of-view, the cable broadband Internet service providers were not offering stand-alone telecommunications services.⁷⁷ The Court drew an analogy with a car dealership, where one would say that the dealer offered cars for sale, but one would not normally say that dealers offered engines or chassis for sale.⁷⁸ However, the Court asserted, even if one thought it was linguistically permissible to say that a car dealer offered engines for sale, that would prove only that there was ambiguity surrounding the word offer, which in turns supports the final conclusion that the language of the Communications Act is ambiguous and that agency deference was warranted.⁷⁹

¶20 The dissent responded with an analogy of its own. First, Justice Scalia slightly recharacterized the purported ambiguity: rather than focus on the purported ambiguity of what it meant to "offer", Justice Scalia asserted that the proper inquiry should focus on the identity of what is being offered.⁸⁰ That is, did the individual components in a package still possess sufficient identity as to be described as separate components of the offer?⁸¹ Justice Scalia likened the cable broadband Internet providers to pizzerias who offered not just pizzas, but also delivery services.⁸² The consumer generally understands that the delivery service is integrated with the pizza service. One does not purchase

⁷¹ *Declaratory Ruling*, 17 F.C.C.R. at 4823.

⁷² *Id.*

⁷³ *See Brand X*, 545 U.S. at 988.

⁷⁴ *Id.* at 989.

⁷⁵ *Id.*

⁷⁶ 47 U.S.C. § 153.

⁷⁷ *Brand X*, 545 U.S. at 989.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Brand X*, 545 U.S. at 1006 (Scalia, J., dissenting).

⁸¹ *Id.* at 1006-07.

⁸² *Id.* at 1007.

delivery without purchasing a pizza, but, if asked, the consumer would affirmatively respond that the pizzeria offers delivery.⁸³

¶21 Both the *Brand X* majority opinion and the dissenting opinion provided other possible analogies between Internet service and other types of integrated purchases.⁸⁴ The majority's conclusion was simply that these "warring analogies" provided even further support for the ambiguity given by the term offer and underscored the need for the FCC to provide clarity to the statutory definitions.⁸⁵

¶22 While reasonable people could certainly differ about whether the majority or the dissent had the better side of the analogy competition, the dissent touched on one point that the majority generally failed to address. That is, though cable broadband Internet service providers have traditionally integrated their services (the customer purchases both the physical connection and the associated Internet services such as email from the cable company), such services do not necessarily have to be integrated.⁸⁶ The majority pointed out that, unlike pizza delivery, where the consumer could purchase the pizza without the delivery (for instance, the consumer could pick up the pizza from the restaurant), the consumer of broadband cable Internet service cannot purchase the Internet services without purchasing the physical connection to the Internet (the delivery).⁸⁷ While this is true, the majority does not satisfactorily address the idea that such services do not necessarily have to be sold together.⁸⁸ Instead, the majority opinion was, at best, inconsistent. Certainly a consumer could purchase cable broadband access and eschew the cable company's Internet services offering in favor of another Internet service provider, such as America Online, which offers ISP-only services for consumer who already have a broadband connection.⁸⁹ The majority did acknowledge that it is possible for cable companies to provide transmission service and ISP service separately,⁹⁰ but then stated in other parts of the *Brand X* opinion that the two services are too integrated to be reasonably considered separately.⁹¹ The majority opinion also briefly touched upon the idea that, even if the services were offered separately, a customer would necessarily have

⁸³ *Id.*

⁸⁴ *See id.* at 990-92, 1008.

⁸⁵ *Brand X*, 545 U.S. at 992.

⁸⁶ *Id.*

⁸⁷ *Brand X*, 545 U.S. at 992.

⁸⁸ *Id.* Ironically, the FCC did recognize that such services are separable in the *Declaratory Ruling*. *Declaratory Ruling*, 17 F.C.C.R. at 4806.

⁸⁹ *See* America Online, Usage Plan: Broadband Unlimited, http://discover.aol.com/price_plans/broadband_unlimited.adp (last visited Nov. 15, 2005). Of course, purchasing service in such a manner may result in additional costs to the consumer, as the cable companies are perhaps unlikely to offer any consumer plans that involve only the purchase of the high-speed connection without the purchase of the associated Internet services. That is, a consumer who chooses to purchase AOL Broadband, for example, is still paying for email and other services from the cable provider; he is simply not using them. To continue with the analogies in *Brand X*, a consumer who chooses to pick up his pizza from the restaurant may still be paying for the cost of delivery, as it is often built-in to the cost of the pizza itself.

⁹⁰ *Brand X*, 545 U.S. at 975 ("Cable companies . . . can either provide Internet access directly to consumers, thus acting as ISPs themselves, or can lease their transmission facilities to independent ISPs that then use the facilities to provide consumers with Internet access.").

⁹¹ *Id.* at 978 ("[Cable companies] offer a 'single, integrated service that enables the subscriber to utilize Internet access service...and to realize the benefits of a comprehensive service offering.'"). *Id.* at 2705 ("We think that [cable modem service] is 'sufficiently integrated, because a consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access'").

to use some minimal amount of the “information services” capability of the cable modem even to access ISP services from a third-party ISP.⁹²

¶23

The dissent, on the other hand, pointed out some of the inconsistencies not only in the majority opinion but also in the FCC’s initial finding that cable broadband Internet service was so integrated as to be impossibly classified as a telecommunications offering. First, and perhaps most persuasively, the dissent correctly pointed out that the other two most common types of Internet access methods, dial-up and digital subscriber line (DSL) are considered to be made up of both the transmission component (telecommunications service, subject to regulation) and also the ISP component (information service, not subject to regulation).⁹³ In fact, the law actually requires the severability of the components.⁹⁴ Therefore, under the FCC’s policy of viewing a product offering from a consumer’s point of view, it hardly seems unreasonable to expect that the consumer would be able to readily identify cable broadband Internet access as consisting of two independent and separable components, even if they are typically bundled together. In actuality, construing the offerings in the way the FCC has done, as an inseparable package, seems to be the anomalous and unexpected conclusion.⁹⁵

¶24

The *Brand X* majority also raised the concern that allowing cable broadband Internet service providers to be classified as telecommunications services would necessarily subject them (and subsequently all Internet service providers) to common carrier regulations.⁹⁶ Traditionally, for regulatory purposes, the FCC has distinguished between so-called non-facilities-based providers and facilities-based providers. A non-facilities based provider is one who does not own the physical transmission pathways over which it provides its Internet access. America Online is one such type of service.⁹⁷ In contrast, cable broadband Internet service providers are facilities-based, in that the cable company owns the physical transmission pathways (the cables themselves) as well as providing the Internet services that consumers commonly associate with ISPs, such as email, web browsing, and personal web page space.⁹⁸ Non-facilities based providers have historically been subject to less stringent regulations than facilities-based providers.⁹⁹ Thus, ISPs such as America Online have not been subject to common-carrier regulation.

⁹² *Brand X*, 545 U.S. at 990-91.

⁹³ *Id.* at 1009; see Oxman, *The FCC and the Unregulation of the Internet*, 13 (July 1999), http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf. The paper points out that, in the case of Internet access, the end user utilizes “two different and distinct services.” The first is the transmission pathway, which is a telecommunications service that the consumer purchases from his local telephone company. The second is the Internet access service, which is an information service provided by the ISP and may be purchased from a variety of local and national providers. The functions provided by the ISP are separate from the transmission pathway. The transmission pathway is a regulated telecommunications service; the enhanced service offered over the pathway is not.

⁹⁴ *Brand X*, 545 U.S. at 1008 (Scalia, J., dissenting); see also *Universal Service Report*, 13 F.C.C.R. at 11571-11572.

⁹⁵ See *Brand X*, 545 U.S. at 1005-06 (Scalia, J., dissenting).

⁹⁶ *Brand X*, 545 U.S. at 996.

⁹⁷ America Online provides the consumer only with services such as email, web browsing, personal web page space, and so forth. It does not own any of the actual physical pathways to the Internet such as phone wires or cables.

⁹⁸ Phone companies are facilities based, and thus companies such as SBC, which offer ISP services over their physical networks via a digital subscriber line (DSL) are facilities-based, and subject to additional regulation.

⁹⁹ See *id.* at 993-94.

The majority asserts that classification of broadband cable Internet services would logically lead to the conclusion that all Internet service providers, including non-facilities based providers such as AOL, would then become subject to regulation as common carriers. Under the current *Computer II Order* rules,¹⁰⁰ this concern seems unfounded, as the FCC has the power to forbear from regulating so-called “value-added networks” – non-facilities-based providers who lease basic (telecommunications) services from common carriers and bundle them with enhanced services.¹⁰¹ In addition, the statute itself provides for the FCC to exercise authority to forbear from imposing most regulations.¹⁰²

¶25 The difficulty that the FCC and the courts have had with shoehorning modern technologies into the FCC classifications simply underscores the need for change or even elimination of these classifications. Distinguishing between “basic” telecommunications service and “enhanced” information services no longer makes sense in light of the complexity of these technologies.

V. PUBLIC POLICY: IMPLICATIONS OF THE SUPREME COURT RULING

A. *The Declaratory Ruling and Policy Prior to Brand X*

¶26 In the *Brand X* decision, both the majority and dissent generally ignore any discussion of public policy, as did the Ninth Circuit in its initial *Brand X* decision.¹⁰³ The Supreme Court seemed reluctant to engage in any discourse about what sort of regulation or lack thereof would most benefit the consumer, instead asserting, though indirectly, that the FCC has the proper expertise to make the correct decisions, referring to the FCC’s “expert policy judgment” in its resolution of the “technical, complex, and dynamic questions.”¹⁰⁴ Indeed, any public policy discussion by either the Ninth Circuit or the Supreme Court may be unconvincing, as it is generally agreed that the FCC, and not the courts, have the institutional capability to handle such public policy debate.¹⁰⁵

¶27 The difficulty with this deference to the FCC’s so-called policy expertise is that the FCC’s decisions do not always seem to be consistent with its stated policy goals, and, in fact those policy goals themselves may not be in the best interests of the consumer.¹⁰⁶ In its *Declaratory Ruling*, the FCC stated four primary policy goals which guided its consideration of the proper classification of cable Internet broadband services.¹⁰⁷ First, the FCC stated that, consistent with statutory mandate, its primary policy goal was “to encourage the ubiquitous availability of broadband to all Americans.”¹⁰⁸ Second, the

¹⁰⁰ See *Computer II Order*, 77 F.C.C.2d at 474.

¹⁰¹ *Id.*

¹⁰² 47 U.S.C. § 160 (2000); see *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1012 n.5 (2005). See also *Computer & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 212, 224 (D.C. Cir. 1982).

¹⁰³ *Brand X*, 545 U.S. 967; *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003); see also Aronowitz, *supra* note 18.

¹⁰⁴ *Brand X*, 545 U.S. at 1002-03.

¹⁰⁵ See Aronowitz, *supra* note 18.

¹⁰⁶ *Id.*

¹⁰⁷ *Declaratory Ruling*, 17 F.C.C.R. at 4840.

¹⁰⁸ *Declaratory Ruling*, 17 F.C.C.R. at 4840; see *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No.

FCC noted that it was “mindful of the need to minimize . . . regulation of broadband services” in order to promote investment in a competitive market.¹⁰⁹ The third policy goal was “to encourage facilities-based broadband competition.”¹¹⁰ Finally, the FCC stated that it was “striv[ing] to develop an analytical approach that [was], to the extent possible, consistent across multiple platforms.”¹¹¹ These stated goals sounded laudable and encouraging. However, it is questionable whether the FCC’s decisions have been consistent in furthering these stated policy goals.

¶28 The first example of the FCC’s inconsistency with these stated policy goals is easily seen by looking at the classifications of Internet services prior to *Brand X*. As previously discussed (and raised by Justice Scalia in his *Brand X* dissent), after the *Declaratory Ruling*, Internet access via dial-up service was subject to regulation, as was DSL service.¹¹² Cable services, including cable broadband Internet access, were not. This certainly did not fit with FCC’s stated intent of developing a consistent approach to regulation across multiple platforms. In the *Declaratory Ruling*, the FCC noted this inconsistency, but did not address it nor attempt to provide explanation for it.¹¹³ In fact, the FCC specifically noted that cable Internet service providers enjoyed a significant advantage over DSL providers in the broadband market and cable providers were continuing to increase their market share while DSL deployments were decreasing.¹¹⁴

¶29 The original Ninth Circuit *Brand X* decision was therefore seen by some as correctly bringing all major Internet access methodologies in line with each other and potentially subjecting them to similar regulatory structures.¹¹⁵ While dial-up access has become increasingly rare in just the time the *Brand X* legislation worked its way through the courts, digital-subscriber line service (DSL), cable’s most direct competitor, has begun to overcome some of its initial deployment hurdles and become more available.¹¹⁶ The FCC might argue that this swing in the market supports its policy decision that it is appropriate to allow the market to correct itself during this unprecedented period of growth, and that the inconsistency between the regulation of DSL services and the lack of

02-33, Notice of Proposed Rulemaking ¶ 3 (rel. Feb. 15, 2002).

¹⁰⁹ *Declaratory Ruling*, 17 F.C.C.R. at 4840.

¹¹⁰ *Id.*

¹¹¹ *Id.* The FCC seems to equate facilities-based competition with promotion of “development and deployment of multiple platforms,” which it states will ensure that public demands for broadband can be met. *Id.*

¹¹² Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1008 (2005).

¹¹³ *Declaratory Ruling*, 17 F.C.C.R. at 4840.

¹¹⁴ *Id.* at 4804.

¹¹⁵ Aronowitz, *supra* note 18, at 900-901. Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41, 41-42 (2003).

¹¹⁶ Dial-up service is a so-called “narrowband” service, with access speeds limited. On the other hand, DSL and cable services are “broadband” services, allowing for much higher data transfer rates. When first available, broadband services tended to be significantly more expensive for the consumer than dial-up services, and thus many consumers opted to remain with dial-up Internet access services. Broadband services were also not widely available to many consumers, particularly in rural areas. However, desire for better Quality of Service (QoS) has begun to outweigh cost concerns for many consumers. At the same time, availability of broadband services has increased, and costs have dropped to enough degree to make broadband service the more attractive option for many consumers. Cable services still tend to be much more widely available than DSL, in part due to the technology involved.

regulation of cable services has not hurt consumers. However, it is not clear that this change is due to the “vibrant and competitive free market.”¹¹⁷

¶30 A second, and perhaps better example of how the conclusions reached by the FCC in its *Declaratory Ruling* were inconsistent with its stated policy goals (and why the Ninth Circuit’s original *Brand X* decision was the more correct result) is found by simply considering the logical effect of regulation and non-regulation on the marketplace. Common-carrier regulation requires that facilities-based providers allow competitors open access to their physical transmission lines. In other words, if a new local phone service wishes to compete with an existing provider, the new service does not have to establish its own physical network first. Instead, it must be permitted access to the existing infrastructure. More importantly, open access requirements also prohibit the restriction or discrimination on the *type* of information transmitted over the network.¹¹⁸

¶31 Open access makes sense on multiple levels. First, it is generally not economically feasible for an entrant to the market to invest in infrastructure, and thus competition would be reduced or even eliminated without such regulatory requirements. Second, it is an inefficient use of public resources to establish multiple infrastructures of this type.¹¹⁹

¶32 On the other hand, lack of regulation allows the owner of the facilities to “close” his network to competitors. That is, the owner of the physical network is not required to allow anyone else access to that network. In the context of cable Internet broadband access, this means that the cable companies who own the physical pathways (in this case, coaxial cable) to the consumers also have the exclusive right to provide associated Internet access services to those consumers. Any Internet service provider, such as America Online or Earthlink, who wishes to provide service on a cable broadband network, must attempt to enter into a partnership or licensing agreement with the cable company, or, as AOL has done, must price itself such that consumers are willing to “double pay” for Internet service.¹²⁰ This hardly seems consistent with the FCC’s stated goal of making broadband service available to everyone.

¶33 Perhaps more importantly than physical access to the network, open access also prohibits restriction or discrimination on the actual information flowing through the network. In the case of dial-up Internet access, for example, the phone company who owns the network cannot restrict access to Internet sites, nor can the phone company even provide for “preferred” service to certain locations (for instance, allowing for more bandwidth and better download speeds on some web pages but not others). The common carrier regulations that have applied to telephone networks (and, by extension to DSL Internet services) have thus ensured the free flow of information. Cable services, on the other hand, have never been regulated as common carriers. For instance, in the case of

¹¹⁷ *Declaratory Ruling*, 17 F.C.C.R. at 4798.

¹¹⁸ This means that the owner of the physical infrastructure (for instance, the telephone company in the case of phone lines) must permit others to access its network, and, once that is done, cannot restrict or otherwise inhibit the flow of information.

¹¹⁹ Consider, for example, construction of multiple privately owned roads from place to place. Such multiple routes promote efficiency of travel only if existing roads are overly congested. Conversely, it is actually inefficient to have several lightly used roads that connect two geographic points. Existing telecommunications networks are not saturated to the point that multiple redundant pathways are required to promote speed of communication.

¹²⁰ *Supra* note 88. AOL has essentially been forced to rely on consumer loyalty and desire for its unique services to compete in the cable modem Internet access market.

cable television, the cable company can choose which channels to offer to its subscribers. It can also elect to relegate certain networks to less desirable numeric locations, making it less likely that a viewer will tune into those channels. In the case of cable Internet services, the same principles apply. Unregulated cable Internet service providers are free to restrict the flow of information across their networks. It is certainly not clear then, that classification of cable Internet service providers as information service providers, which then exempts them from regulation, furthers a policy of promoting broadband access for all Americans.¹²¹

B. *Fallout from the Supreme Court's Brand X Decision*

¶34 At the time of the *Declaratory Ruling*, the FCC expressed intent to consider reclassification of other services such as DSL, presumably recognizing that differing classifications of similar, competitive services, was inherently unfair.¹²² Predictably, following the Supreme Court's *Brand X* ruling, the DSL providers lobbied hard for immediate reclassification (and thus deregulation). Barely a month after the *Brand X* ruling came down, they were successful, and the FCC issued a statement of intent to reclassify DSL services as "information services" within the meaning of the Telecommunications Act and thus release DSL providers from the regulatory restrictions under which they had been operating. This decision received mixed reviews, with some lauding the at-last level playing field between cable and DSL, but also expressing concern that *deregulation* of both would ultimately hurt the consumer.¹²³

¶35 Whether competition within the telecommunications market is more effectively achieved via regulation or non-regulation is an issue that has been and will continue to be debated. Many consumer groups advocate regulation as the way to achieve and economically efficient, fair marketplace, and to allow for true freedom of expression. Others argue that regulation which requires sharing of resources is contrary to the nature of fair property rights. The FCC's own inconsistencies in regulations of new technologies merely underscore the difficulty that even the agency telecommunications experts face in deciding these issues. The *Brand X* litigation could not have added clarity to that debate, regardless of its outcome. However, the *Brand X* decision did appear to strongly tip the balance in favor of non-regulation, particularly given the speed with which the FCC reacted in its reclassification of other Internet services (after having *not* acted for several years subsequent to the issue of the *Declaratory Ruling*). The intent of the Congress and the FCC's stated policy goals appear to reflect this preference to deregulation as well.¹²⁴

¹²¹ For a more in-depth discussion on open-access policy issues, see MARK COOPER, CONSUMER FEDERATION OF AMERICA, *THE PUBLIC INTEREST IN OPEN COMMUNICATION NETWORKS* (2004), <http://www.democraticmedia.org/issues/openaccess/OpenCommunicationsNetwork.pdf>.

¹²² Comment and Reply Comment Dates Established for Notice of Proposed Rulemaking in the Matter of Consumer Protection in Broadband Era, 20 F.C.C.R. 16366 (2005).

¹²³ See *FCC Shares Spoils of Brand X Victory with the Baby Bells: The Specter of Broadband Duopoly Underscores the Importance of New Principles of Internet Openness*, CENTER FOR DIGITAL DEMOCRACY, Aug. 5, 2005, <http://www.democraticmedia.org/news/FCCDSL.html> ("The 'good news' from today's broadband ruling by the FCC is that the 'playing field' for high-speed Internet service . . . will be perfectly level. The bad news is that in most communities, only two teams will be left standing to compete on that playing field.")

¹²⁴ See *Declaratory Ruling*, F.C.C.R. at 4840 ("Moreover, consistent with section 230(b)(2) of the Act, we

¶36 As new technologies emerge, the legislature, the courts, and the FCC will continue to face these classification issues. For instance, most wireless phone customers can now receive Internet services through their phones, which was something likely not contemplated at the time the *Brand X* litigation began several years ago. Presumably, since cable and wireline Internet service providers are both “information services” providers, the FCC would classify wireless in the same way. However, the story of *Brand X* and its ultimate outcome shows that the courts and the FCC have been reactive rather than proactive about addressing the regulatory issues surrounding new technologies.

VI. CONCLUSION

¶37 The *Brand X* decision did nothing to clarify any of the increasingly confusing law surrounding proper regulation of telecommunications and related services. Instead, *Brand X* further confused the issues and practically assured the court system of continuing litigation for many more years, both with respect to the *Chevron* inquiry and questions of administrative law as well as the specific and unique issues of telecommunications law. The Court may have been saved to some extent by the swiftness with which the FCC tried to bring its own rulings in line with the *Brand X* outcome, but the litigation over regulation of modern communications is far from over.

seek ‘to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.’”).