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David P. Manni

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NATIONAL CABLE & TELECOMMUNICATIONS ASS'N v. BRAND X INTERNET SERVICES: A WAR OF WORDS, THE EFFECT OF CLASSIFYING CABLE MODEM SERVICE AS AN INFORMATION SERVICE

I. INTRODUCTION

The Internet is the fastest emergent communications network of all time.¹ The Internet started as the ARPANET [Advanced Research Project Agency Net], a military communications devise that eventually evolved into the Internet we experience today.² Although the Internet was originally built for use by the scientific research community, it is currently dominated by the commercial sector.³

A majority of residential Internet users utilize their telephone lines to access the Internet via a modem which creates a dial-up connection.⁴ This type of connection is referred to as narrowband service.⁵ Because narrowband service has a low data transmission

1. See Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 930 (2001) ("The Internet is the fastest growing network in history. In its thirty years of existence, its population has grown a million times over.").

2. See SHARON K. BLACK, *TELECOMMUNICATIONS LAW IN THE INTERNET AGE* § 1.3.2 (Academic Press 2002) (describing evolution of Internet). The NSFNET was developed after the ARPANET. See *id.* The NSFNET provided a research computer network for projects funded by the National Science Foundation ("NSF"). See *id.* In 1992, "the World Wide Web technology was released . . ." *Id.* By 1995, "the NSFNET closed and the new Internet officially opened." *Id.*

3. See Press Release, UCLA Henry Samueli School of Eng'g and Applied Sci., *Internet Began 30 Years Ago at UCLA* (Jan. 6, 1999) (on file with author), available at <http://www.engineer.ucla.edu/stories/netis30.htm> (discussing origin and development of Internet). The Advanced Research Projects Agency ("ARPA") funded ARPANET. See *id.* It was developed to facilitate ARPA scientists' access to "the special capabilities that existed in the many unique computers that ARPA was supporting." *Id.* In the 1970s, the network consisted of 64 host computers. See *id.* That number expanded rapidly, and by 1999 there were over 50 million host computers. See *id.*

4. See ANGELE A. GILROY & LENNARD G. KRUGER, *BROADBAND INTERNET ACCESS: BACKGROUND AND ISSUES* 1 (Aug. 3, 2005) (describing Internet access). "The modem converts analog signals (voice) into digital signals that enable the transmission of 'bits' of data." *Id.* "The highest speed modem used with a traditional phone line . . . [is] a 56k modem . . ." *Id.* The 56k modem "offers a maximum data transmission rate of about 45,000 bits per second ("bps")." *Id.*

5. See *id.* (describing 56K connection as narrowband); In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable Modem and Other Facilities, 17 F.C.C.R. 4798, 4802 ¶ 9 n.19 (2002) [hereinafter *Declaratory Ruling*] (indicating "narrowband" refers to "Internet access service that is designed

rate, its limitations become apparent when attempting to access more sophisticated content on the World Wide Web.⁶ After dial-up narrowband service achieved widespread popularity, broadband Internet access became available.⁷ Broadband access refers to a set of technologies capable of delivering high-speed and high capacity Internet access over an “always on” connection.⁸

Currently, cable operators provide broadband Internet access using cable modem service, while telephone companies provide it in the form of digital subscriber line service (“DSL”).⁹ Telephone and cable companies quickly deployed broadband access because most homes already had telephone lines and cable wiring installed.¹⁰ Generally, cable and telephone companies follow two business models.¹¹ They either provide Internet access directly to the consumer themselves, or they contract with an independent Internet service provider (“ISP”) to deliver Internet access.¹² “[A]s of

to operate at speeds of less than 200 kilobits-per-second (“Kbps”) in both directions”).

6. See GILROY & KRUGER, *supra* note 4, at 1 (noting limitation of narrowband Internet access compared to broadband Internet access).

7. See *Declaratory Ruling*, 17 F.C.C.R. at 4802-03 ¶ 9 (noting sequence of Internet service deployment).

8. See *id.* at 4805 ¶ 10 (indicating broadband Internet service provides access to Internet at speeds significantly faster than telephone dial-up service). The Federal Communications Commission (“FCC”) defines high-speed Internet access generally as:

[A] service that “enables consumers to communicate over the Internet at speeds that are many times faster than the speeds offered through dial-up telephone connections” and that enables subscribers to “send and view content with little or no transmission delay, utilize sophisticated ‘real-time’ applications, and take advantage of other high-bandwidth services.”

Id. at 4799 ¶ 1 n.2 (referencing Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors to AOL Time Warner, Inc., Transferee, 16 F.C.C.R. 6547, 6572 ¶ 63 (2001)). An “always on” connection is a continuous connection meaning the user does not need to dial-up to access the Internet. See GILROY & KRUGER, *supra* note 4, at 1 (describing attributes of broadband access).

9. See *Declaratory Ruling*, 17 F.C.C.R. at 4802-03 ¶ 9 (describing primary methods for providing high-speed Internet access). Wireless and satellite technologies also provide broadband Internet access, but to a lesser extent. See *id.* at 4803 ¶ 9. Broadband Internet access provided by cable modem service utilizes the coaxial cable wires that also deliver cable television service. See GILROY & KRUGER, *supra* note 4, at 3 (“DSL is a modem technology that converts existing copper telephone lines into two-way high speed data conduits.”).

10. See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1124 (9th Cir. 2003) (indicating ease of deployment due to existing hardware connections to consumers’ homes), *rev’d sub nom.* *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2696 (2005).

11. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2696 (2005) (indicating existence of two possible business models).

12. See *id.* (describing business models). When cable and telephone companies contract with an independent ISP to deliver Internet access, the ISP leases

December 31, 2004, there were 37.9 million high-speed lines connecting homes and businesses to the Internet in the United States¹³ Currently, cable modem service is the most widely subscribed to technology for high-speed Internet access.¹⁴

Because broadband access supports faster connection speeds, it has the potential to change the Internet and “how it is used.”¹⁵ “[I]t is possible that many of the applications that will best exploit the technological capabilities of broadband, while also capturing the imagination of consumers, have yet to be developed.”¹⁶ The private sector primarily undertook the task of deploying technologies to provide broadband Internet access to consumers.¹⁷

Ever since high-speed Internet access became widely available, if and how these new technologies should be regulated has created controversy and uncertainty.¹⁸ In 1998, the Federal Communications Commission (“FCC”) classified DSL service as a “telecommunications service,” regulating it as a common carrier.¹⁹ In contrast,

their “transmission facilities.” See *id.* (noting that independent ISPs can lease existing “transmission facilities” to deliver Internet access).

13. GILROY & KRUGER, *supra* note 4, at 4. The 37.9 million high-speed lines represents “a growth rate of [seventeen percent] during the second half of 2004.” *Id.* (noting status of broadband development).

14. See INDUS. ANALYSIS AND TECH. DIV. WIRELINE COMPETITION BUREAU, FCC, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2004, 2 (July 2005) (indicating 13.8 million subscribers to DSL service and 21.4 million subscribers to cable modem service).

15. GILROY & KRUGER, *supra* note 4, at 2 (explaining why broadband is important). The authors list the following examples of the potential services and uses that broadband access can support:

For example, a two-way high speed connection could be used for interactive applications such as online classrooms, showrooms, or health clinics, where teacher and student (or customer and salesperson, doctor and patient) can see and hear each other through their computers. An “always on” connection could be used to monitor home security, home automation, or even patient health remotely through the web. The high speed and high volume that broadband offers could also be used for bundled services where, for example, cable television, video on demand, voice, data, and other services are all offered over a single line.

Id.

16. *Id.*

17. See *id.* at 4 (indicating private sector is financing and implementing deployment of broadband).

18. See Carl E. Kandutsch, *Brand X Decision: Questions and Opportunities, How Will Small Providers of Voice and Data Services Compete Without a Network?*, BROADBAND PROPS., Aug. 2005, at 48, 50 (describing two potential regulatory approaches: (1) regulation based on common carrier principles traditionally applied to telephone industry, or (2) deregulatory approach aimed at promoting capital investment necessary to deliver broadband to all Americans).

19. See In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24012, 24030-31, ¶¶ 35-37 (1998) [hereinafter *Wireline Order*] (classifying DSL service as telecommunications ser-

the FCC “declined to determine a regulatory classification for, or to regulate, cable modem service on an industry-wide basis.”²⁰ Because of the lacking regulatory guidance, courts were inconsistent in classifying Internet access via cable modem service.²¹ This created an inconsistent regulatory environment in which the regulation of high-speed Internet access differed depending on the platform used – DSL, cable modem service, or other – and a lack of clear guidance with respect to how cable modem service would or should be regulated.²²

In response to the inconsistency, the FCC issued a notice of inquiry to ascertain the appropriate framework for regulating cable modem service.²³ At the conclusion of its inquiry, the FCC entered the *Declaratory Ruling* concluding that cable modem service is an information service as defined by the Communications Act of 1934 (“Communications Act”) and, therefore, is not subject to Communication Act’s Title II common carrier obligations.²⁴ As a result,

vice, thus requiring telephone companies offering DSL service to make telephone lines used to transmit DSL service available to competing ISPs on nondiscriminatory, common-carrier terms). For a discussion of Title II’s (of the Communication Act’s) basic requirements, see *infra* notes 55-57 and accompanying text.

20. *Declaratory Ruling*, 17 F.C.C.R. 4798, 4800-01 ¶ 2 (2002) (providing background information regarding FCC action regarding cable modem service regulation); see *AT&T Corp. v. City of Portland*, 216 F.3d 871, 879 (9th Cir. 2000) (“Thus far, the FCC has not subjected cable broadband to any regulation, including common carrier telecommunications regulation.”); see also *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 338 (2002) (noting “the FCC . . . has reiterated that it has not yet categorized Internet service” in context of access provided by cable companies).

21. *Compare AT&T Corp.*, 216 F.3d at 880 (holding “transmission of Internet service . . . over cable broadband facilities is a telecommunications service under the Communications Act”), with *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000) (concluding cable modem service is cable service), and *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1277-78 (11th Cir. 2000) (concluding Internet service provided by cable companies is not cable service, and that Internet service is not telecommunications service).

22. See *Declaratory Ruling*, 17 F.C.C.R. at 4819 ¶ 32 (“The Communications Act does not clearly indicate how cable modem service should be classified or regulated; the relevant statutory provisions do not yield easy . . . answers . . . and the case law interpreting those provisions is extensive and complex.”). For examples and discussion of the varying treatment of cable modem service by the courts, see *infra* notes 89-129 and accompanying text.

23. See *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 F.C.C.R. 19287, 19293-308 ¶¶ 14-56 (2000) [hereinafter *Notice of Inquiry*] (outlining goal of inquiry and issues FCC sought comment on regarding regulation of cable modem service and its potential effect on other high-speed Internet access platforms).

24. See *Declaratory Ruling*, 17 F.C.C.R. at 4802 ¶ 7 (concluding that cable modem service, as presently offered, is “interstate information service” with no separate telecommunications service offering). For a discussion of the common carrier obligations, see *infra* notes 55-58 and accompanying text.

cable operators offering cable modem service did not have the same obligation as DSL providers to open their transmission facilities to competing ISPs.²⁵ The Ninth Circuit Court of Appeals vacated the *Declaratory Ruling* to the extent it concluded that cable modem service is not a telecommunications service.²⁶ In overriding the FCC's classification, the Ninth Circuit held *stare decisis* compelled adherence to its circuit precedent.²⁷ Although the FCC is the agency typically responsible for regulating cable modem services, in effect, the court made this important and complex policy decision instead.²⁸ Additionally, the Ninth Circuit's opinion raised

25. For a discussion of common-carrier obligations imposed on telecommunications service providers, see *infra* notes 55-59 and accompanying text.

26. See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003) (concluding *Declaratory Ruling* conflicted with their conclusion that cable modem service is, in part, telecommunications service), *rev'd sub nom.* *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

27. See *id.* at 1128-32 (explaining *AT&T Corp.* in detail and discussing reasoning for following Circuit precedent). The Ninth Circuit deferred to their holding in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), that cable modem service was a telecommunications service. See *id.* at 1132 (noting Ninth Circuit and Supreme Court precedent require adherence to *AT&T Corp.*). *AT&T Corp.* was decided before the FCC issued the *Declaratory Ruling* classifying cable modem service as an information service. See *Declaratory Ruling*, 17 F.C.C.R. at 4831 ¶¶ 56-58 (acknowledging and distinguishing Ninth Circuit's consideration of proper regulatory classification for cable modem service in *AT&T Corp.*).

28. See *Brand X Internet Servs.*, 345 F.3d at 1132 (vacating FCC conclusions in *Declaratory Ruling* to extent they conflicted with Ninth Circuit precedent). Section 151 of the Communications Act designates the FCC as the agency with authority to execute and enforce the provision of the Act with respect to wire and radio communication. 47 U.S.C. § 151 (2000) (pending legislation S. 1753, 109th Cong. (1st Sess. 2005)) (“[T]here is created a commission to be known as the ‘Federal Communications Commission,’ which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.”). Section 154(i), titled “Duties and Powers,” provides that “[t]he Commission [FCC] may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” *Id.* § 154(i) (2000). Section 157(a), titled “New Technologies and Services,” states that “[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public.” *Id.* § 157(a) (pending legislation S. 2256, 109th Cong. (2d Sess. 2006)). Further, section 706 of the Telecommunications Act of 1996 provides that:

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

Telecommunications Act of 1996, Pub. L. No. 104-104, Title VII, § 706(a), 110 Stat. 56, 153 (1996), *reprinted in* 47 U.S.C. § 157 notes at 121 (West 2000) [hereinafter Section 706]. Finally, Section 706(b) states if the FCC concludes that advanced telecommunications capability is not being deployed to all Americans in a

administrative law issues concerning when a court should defer to an agency interpretation of a statute it has authority to administer.²⁹ By resolving these issues, the Supreme Court in *National Cable & Telecommunications Ass'n v. Brand X Internet Services* took an important step in clarifying the direction that regulation of cable modem service will take and established a hierarchy for statutory interpretations when agencies and courts clash.³⁰

This Note examines the statutory construction of the Communications Act of 1934 ("Communications Act"), as amended by the Telecommunications Act of 1996 ("1996 Act"), and the effect of classifying cable modem service as an information service. Section II provides the factual setting in which the Supreme Court decided *National Cable and Telecommunications Association v. Brand X Internet Services*.³¹ Section III provides the legal backdrop for the opinion.³² This section also includes an overview of the relevant provisions of the Communications Act and 1996 Act,³³ an overview of the FCC's response to cable modem service³⁴ and a discussion of case law interpreting Internet service and cable modem service in the context of the Communications Act, as amended.³⁵ Additionally, section III provides an overview of the deferential standard used by courts when reviewing an agency's interpretation of a statute it has jurisdiction to administer.³⁶ Section IV outlines the Supreme Court's reasoning and holding, and provides a critical analysis of the opin-

reasonable and timely fashion, "it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.* § 706(b).

29. For a discussion of the deference given to agency interpretations of statutes, see *infra* notes 130-43 and accompanying text.

30. For a further discussion of the impact of *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, see *infra* notes 171-91 and accompanying text.

31. For a further discussion of the facts of *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, see *infra* notes 39-49 and accompanying text.

32. For a further discussion of the legal backdrop of *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, see *infra* notes 50-143 and accompanying text.

33. For a further discussion of the Communications Act and 1996 Act, see *infra* notes 50-66 and accompanying text.

34. For a further discussion of the FCC's response to cable modem service, see *infra* notes 67-88 and accompanying text.

35. For a further discussion of case law interpreting Internet service and cable modem service, see *infra* notes 89-129 and accompanying text.

36. For a further discussion of the *Chevron* doctrine and court deference to agency interpretations, see *infra* notes 130-43 and accompanying text.

ion.³⁷ Finally, section V discusses the potential impact of the “information service” classification.³⁸

II. FACTS

The regulation of broadband Internet access over cable modem service hinges on two categories of regulated entities as defined by the Communications Act, as amended by the 1996 Act: telecommunications carriers and information service providers.³⁹ “The [Communications] Act regulates telecommunications carriers, but not information-service providers, as common carriers” that are subject to mandatory requirements under Title II of the Communications Act.⁴⁰ Even though information service providers are not subject to mandatory common-carrier regulation under Title II, they are not totally unregulated because the FCC “has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications.”⁴¹

In September of 2000, the FCC began informal rule-making proceedings and issued a notice of inquiry to determine what type of regulatory treatment should apply to cable modem service.⁴² In

37. For a further discussion of the narrative analysis and critical analysis, see *infra* notes 144-91 and accompanying text.

38. For a further discussion of the potential impact of the “information service” classification, see *infra* notes 192-212 and accompanying text.

39. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2696 (2005) (noting relevance of telecommunications carriers and information service providers as defined in Communications Act, as amended); see also 47 U.S.C. § 153(20) (2000) (defining “information service”); 47 U.S.C. § 153(44) (2000) (defining “telecommunications carrier”).

40. See *Nat'l Cable & Telecomms. Ass'n*, 125 S. Ct. at 2696; see also 47 U.S.C. § 153(44) (2000) (“A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . .”).

41. *Nat'l Cable & Telecomms. Ass'n*, 125 S. Ct. at 2696 (citation omitted). “These two statutory classifications originated in the late 1970’s, as the Commission [FCC] developed rules to regulate data-processing services offered over telephone wires.” *Id.* At that time, the FCC differentiated between “basic” and “enhanced” services. See *id.* (noting FCC’s “regime” was called “*Computer II*”). Basic services were like standard telephone service, while enhanced services encompassed data processing services over telephone wires. See *id.* at 2696-97 (describing difference between *Computer II* classifications). The FCC defined these terms from the point of view of the end-user’s perception of the service being offered. See *id.* (explaining *Computer II* rules). The distinction between the two classifications turned on how the service and the customer-supplied information interacted. *Id.* at 2697 (describing and comparing differences between “basic” and “enhanced” services).

42. See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1125-26 (9th Cir. 2003), *rev'd sub nom.* *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005) (discussing substance of notice of inquiry). The FCC wanted to “determine what regulatory treatment, if any, should be accorded to cable modem

March of 2002, the FCC issued its *Declaratory Ruling* in which it “concluded that broadband Internet service provided by cable companies is an ‘information service,’ but not a ‘telecommunications service’ under the Communications Act”⁴³ The FCC concluded that:

[T]o the extent they provide [cable modem] service, cable operators would be subject to regulation not as cable service providers under Title VI of the [1996] Act, nor as common carriers under Title II, but rather as . . . information service [providers] under the less stringent provisions of Title I.⁴⁴

Several parties in different circuits petitioned for review of the *Declaratory Ruling*.⁴⁵ In April of 2002, all appeals were transferred to the Ninth Circuit and consolidated with *Brand X Internet Services*

service and the cable modem platform used in providing this service.” *Id.* at 1126 (citing In the Matter of Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities, 15 F.C.C.R. 19287, 19293 (2000)).

43. *Nat’l Cable & Telecomms. Ass’n*, 125 S. Ct. at 2697. The FCC issued the *Declaratory Ruling* “after receiving some 250 comments and meeting with a variety of industry representatives, consumer advocates, and state and local government officials” *Brand X Internet Servs.*, 345 F.3d at 1126. The FCC said it sought to resolve the controversy surrounding the regulatory treatment of broadband Internet access through cable modem service. See *Declaratory Ruling*, 17 F.C.C.R. 4798, 4799-800 ¶ 1 (2002) (noting purpose of inquiry).

44. *Brand X Internet Servs.*, 345 F.3d at 1126 (citations omitted) (noting effect of FCC’s conclusions and FCC request for comment regarding implications of their conclusions). To address the regulatory implications of the *Declaratory Ruling*, the FCC filed a notice of proposed rulemaking with the *Declaratory Ruling*. See *id.* (describing purpose). In the notice the FCC sought comments about:

(1) the implications of the classification for the Commission’s parallel rulemaking with respect to DSL service; (2) the scope of the Commission’s jurisdiction to regulate cable modem service, including whether there are any constitutional limitations on the exercise of that jurisdiction; (3) the need, if any, to require cable operators to provide access to competing ISPs; (4) the effects of the regulatory classification on the marketplace for and the continued deployment of broadband service; (5) “the role of state and local franchising authorities in regulating cable modem service”; and (6) “the relationship between our classification determination and statutory or regulatory provisions concerning pole attachments, universal service, and the protection of subscriber policy.”

Id. at 1126-27 (citations omitted).

45. See *id.* at 1127 (“Seven different petitions for review of the Commission’s ruling were filed in the Third, Ninth, and District of Columbia Circuits.”). The petitioners contended “that the FCC should have made an *additional* determination” after concluding that cable modem service is an information service. *Id.* Three groups emerged: one group asserted that cable modem service was an information service and a telecommunications service, another asserted that cable modem service was an information service and a cable service, and a third asserted that the information service classification should be applied to “DSL service provided by telephone companies.” *Id.* (listing petitioners’ contentions).

appeal.⁴⁶ In October of 2003, the Ninth Circuit issued its opinion in which it concluded that the court was bound by its circuit precedent in *AT&T Corp. v. City of Portland*,⁴⁷ which held that cable modem service is a “telecommunications service.”⁴⁸ The FCC appealed to the United States Supreme Court, which granted certiorari to “settle the important questions of federal law that these cases present.”⁴⁹

III. BACKGROUND

A) Classification of Cable Modem Service

i. Regulatory Authority Under the Communications Act

In 1934, Congress passed the Communications Act, which established the FCC “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges”⁵⁰ Title I of the Communications Act states that the Act “appl[ies] to all interstate and foreign communication by wire or radio”⁵¹ Congress created the FCC to act as the “‘single Government agency’ with ‘unified jurisdiction’ and ‘regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio,’” and as a result, was given broad authority.⁵² Thus, the FCC’s regulatory power is not limited by specific forms of communication described in the Communications Act.⁵³

46. See *id.* (noting Judicial Panel on Multidistrict Litigation transferred petitions to Ninth Circuit).

47. 216 F.3d 871 (9th Cir. 2000).

48. *Brand X Internet Servs.*, 345 F.3d at 1132 (concluding court bound by precedent established in *AT&T Corp.*); see also *Nat’l Cable & Telecomms. Ass’n*, 125 S. Ct. at 2698 (discussing *AT&T Corp.* holding).

49. *Nat’l Cable & Telecomms. Ass’n*, 125 S. Ct. at 2699; see *FCC v. Brand X Internet Servs.*, 543 U.S. 1018 (2004) (mem.) (granting certiorari).

50. 47 U.S.C. § 151 (2000) (pending legislation S. 1753, 109th Cong. (1st Sess. 2005)).

51. *Id.* § 152(a).

52. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (citations omitted).

53. See *id.* at 167-68 (noting broad authority of FCC). Regarding the FCC’s authority, the Supreme Court in *Southwestern Cable* stated:

Nothing in the language of § 152(a), in the surrounding language, or in the Act’s history or purposes limits the Commission’s authority to those activities and forms of communication that are specifically described by the Act’s other provisions. The section itself states merely that the “provi-

ii. *The Communications Act of 1934 and Telecommunications Act of 1996*

The Communications Act, as amended over time, established distinct regulatory frameworks for telephone companies and cable television companies.⁵⁴ Title II of the Communications Act set forth the regulations for telephone companies as common-carriers.⁵⁵ The Communications Act requires, inter alia, common carriers to provide service on a nondiscriminatory basis⁵⁶ at “just and reasonable” rates.⁵⁷ Cable companies providing cable services are

sions of [the Act] shall apply to all interstate and foreign communication by wire or radio * * * Similarly, the legislative history indicates that the Commission was given “regulatory power over all forms of electrical communication * * *” Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished “to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission,” that it conferred upon the Commission a “unified jurisdiction” and “broad authority.” Thus, “[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.” Congress in 1934 acted in a field that was demonstrably “both new and dynamic,” and it therefore gave the Commission “a comprehensive mandate,” with “. . . expansive powers. We have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over “all interstate * * * communication by wire or radio.”

Id. at 172-73 (penultimate ellipsis added) (citations omitted).

54. For a general discussion of the difference between regulation of telephone companies and cable companies, see *infra* notes 55-59 and accompanying text.

55. See Communications Act of 1934, ch. 652, Title II, 48 Stat. 1064, 1070-81 (1934) (codified as amended at 47 U.S.C. §§ 201-231 (2000)) (providing regulations for “common carriers”); see also 47 U.S.C. § 153(10) (2000) (“‘[C]ommon carrier’ or ‘carrier’ means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio . . . except where reference is made to common carriers not subject to this chapter . . .”).

56. See 47 U.S.C. § 202(a) (2000) (detailing requirements). Section 202(a) provides:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Id.

57. See 47 U.S.C. § 201(b) (2000). The relevant text of this section reads: “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . .” *Id.*

regulated under Title VI of the Communications Act as established by the Cable Communications Policy Act of 1984.⁵⁸ Further, cable operators providing cable service are explicitly exempted from common-carrier regulations.⁵⁹

In 1996, Congress passed the Telecommunications Act of 1996 “through which it sought to provide a ‘. . . framework’ designed to promote the ‘deployment of advanced telecommunications and information technologies to all Americans by opening up all telecommunications markets to competition.’”⁶⁰ The 1996 Act maintained the existing “common carrier obligations on providers of ‘telecommunications services’ but left providers of ‘information services’ subject to much less stringent regulation.”⁶¹

The Communications Act, as amended, “does not clearly indicate how cable modem service should be classified or regulated”⁶² The 1996 Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁶³ It defines “telecommunications” as “the transmission, between or among points specified by

58. See Cable Communications and Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 2780 (1984) (codified as amended at 47 U.S.C. §§ 521-522, 531-537, 541-549, 551-561 (2000)) (establishing, inter alia, policies and regulations for cable communications).

59. See 47 U.S.C. § 541(c) (2000) (pending legislation H.R. 2726, 109th Cong. (1st Sess. 2005)) (providing cable companies “shall not be subject to regulation as a common-carrier or utility by reason of providing any cable service”). “Cable service” is defined as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of use of such video programming or other programming service.” *Id.* § 522(6)(A),(B). “Video Programming” is defined to mean “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” *Id.* § 522(20). “[T]he term ‘other programming service’ means information that a cable operator makes available to all subscribers generally.” *Id.* § 522(14).

60. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1125 (9th Cir. 2003) (quoting H.R. REP. NO. 104-458, at 113 (1996) (Conf. Rep.)).

61. *Id.*; see *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2696 (2005) (noting FCC can use its Title I ancillary jurisdiction to impose additional regulatory obligations on information service providers). While “information service” providers are not regulated under Title II, the FCC has jurisdiction to regulate such services using its Title I authority. See *Nat’l Cable & Telecomms. Ass’n*, 125 S. Ct. at 2696.

62. *Declaratory Ruling*, 17 F.C.C.R. 4798, 4819 ¶ 32 (2002) (describing complexity in classifying cable modem service). In fact, in the *Declaratory Ruling*, the FCC noted that parties advocated for “several different legal classifications,” including “‘cable service,’ ‘information service,’ . . . a combination of ‘telecommunications service’ and information service, and ‘advanced telecommunications capability.’” *Id.* at 4819 ¶ 31 (citations omitted).

63. 47 U.S.C. § 153(46) (2000).

the user, of information of the user's choosing, without change in the form or content of the information as sent and received."⁶⁴ "Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"⁶⁵ The regulation of cable modem service turns on these definitions.⁶⁶

iii. *The FCC's Response to Cable Modem Service*

Opting to take a "hands off" approach, the FCC did not immediately categorize cable modem Internet service for regulatory purposes.⁶⁷ Pursuant to section 706 of the 1996 Act, however, the FCC engaged in several inquiries regarding the deployment of advanced telecommunications capability.⁶⁸ Following the first of these inquiries, the FCC concluded that "[a]t such an early stage of deployment to residential customers, it is difficult to reach any firm judgment. Nevertheless . . . the deployment of advanced telecommunications capability to all Americans appears, at present, to be proceeding on a reasonable and timely schedule."⁶⁹ The FCC conceded it based its conclusion on a "static snapshot taken at the pre-

64. *Id.* § 153(43).

65. *Id.* § 153(20).

66. *See Declaratory Ruling*, 17 F.C.C.R. at 4820 ¶ 34 (listing definitions of "telecommunications service," "telecommunications," and "information service" as "relevant statutory definitions").

67. *See Notice of Inquiry*, 15 F.C.C.R. 19287, 19288 ¶ 4 (2000) (noting FCC's previous "hands off" approach to high-speed services offered by cable operators). The FCC premised its regulatory restraint "in part, on the belief that 'multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers.'" *Id.* (citation omitted).

68. *See Telecommunications Act of 1996*, Pub. L. No. 104-104, Title VII, § 706(b), 110 Stat. 56, 153 (1996), *reprinted in* 47 U.S.C. § 157 notes at 121 (West 2000) (obligating FCC to inquire into availability of advanced telecommunications capability). Section 706(b), titled "Inquiry," obligates the FCC to regularly "initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans" *Id.* Further, section 706(b) requires the FCC to take immediate action if it concludes that advanced telecommunications services are not "being deployed to all Americans in a reasonable and timely fashion." *Id.*

69. In the *Matter of Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996*, 14 F.C.C.R. 2398, 2446 ¶ 91 (1999) [hereinafter *First 706 Inquiry*]. The FCC reached its conclusion by comparing advanced telecommunications deployment to previous deployments of original telephone, "over-the-air" black and white television, color television, and cellular service. *See id.* (referencing ¶¶ 31-32 where FCC indicated it would use previous deployments of original telephone, "over-the-air" black and white television, color television, and cellular service as models against which to compare deployment of broadband Internet access to residential consumers). The FCC noted that:

sent moment,” and would, therefore, take measures to ensure reasonable and timely deployment as the market develops.⁷⁰ After a second inquiry, the FCC again determined that, on the whole, deployment of advanced telecommunications capability to all Americans was proceeding in a “reasonable and timely fashion.”⁷¹ Following the second inquiry, the FCC decided to address the regulatory classification of cable modem service and issued the *Notice of Inquiry*.⁷² In the *Notice of Inquiry*, the FCC sought comment on whether it should classify “cable modem service and/or the cable modem platform as a cable service subject to Title VI; as a telecommunications service under Title II; as an information service subject to Title I; or some entirely different or hybrid service subject to multiple provisions of the [Communications] Act.”⁷³

375,000 residential [broadband] customers, or .4% residential penetration, at the end of the second calendar year of deployment is far more than the number of customers for the telephone, color television, and cellular service at the same stage in their deployment, and approximately the same penetration percentage as that of black-and-white television.

Id. at 2447 ¶ 92.

70. *Id.* at 2447 ¶ 93 (explaining limitation of analysis and “[e]nsuring that deployment is reasonable and timely as the market develops continues to be one of [the FCC’s] top priorities”). The FCC indicated that it would:

[E]xamine barriers to entry to determine whether such barriers inhibit firms’ ability to meet customer demand. Where immediate action is warranted, we are taking steps . . . to ensure that the deployment of broadband is reasonable and timely. We will also continue to monitor closely the deployment of broadband to all Americans, most specifically in future reports of this type.

Id.

71. In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Ams. in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996, 15 F.C.C.R. 20913, 20914 ¶ 1 (2000) [hereinafter Second 706 Inquiry] (concluding deployment proceeding in reasonable and timely fashion despite uneven deployment).

72. See *Notice of Inquiry*, 15 F.C.C.R. at 19287-89 ¶¶ 2, 4 (indicating purpose of inquiry to seek comment on whether “hands-off” approach remains correct policy and how FCC should introduce national policy framework for high-speed services). The FCC’s motivation to determine the appropriate regulatory classification of cable modem service was due in part to several federal court opinions which classified cable modem service in different ways. See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1125-26 (9th Cir. 2003) (discussing FCC’s *Notice of Inquiry*).

73. *Notice of Inquiry*, 15 F.C.C.R. at 19293 ¶ 15. “Cable service” is defined as, “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” 47 U.S.C. § 522(6) (2000). “Telecommunications service” is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” *Id.* § 153(46). Lastly, “information service” is defined as:

[T]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information

On March 15, 2002, the FCC issued its *Declaratory Ruling* and notice of proposed rulemaking.⁷⁴ In the *Declaratory Ruling*, the FCC classified cable modem service solely as an “interstate information service” and further clarified that cable modem service was neither a cable service nor a telecommunications service.⁷⁵ By classifying cable modem service as information service, the FCC precluded the mandatory application of the common carrier requirements imposed under Title II of the Communications Act.⁷⁶ The FCC first looked to the statutory definitions of “telecommunications service” and “information service,” which it concluded were based on the nature of the service offered to consumers.⁷⁷

For guidance with classifying cable modem service, the FCC looked to an earlier decision, the *Universal Service Report*,⁷⁸ in which the agency classified Internet access service as an information service.⁷⁹ In light of the FCC’s conclusion in the *Universal Service Re-*

via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Id. § 153(20).

74. See *Declaratory Ruling*, 17 F.C.C.R. 4798, 4798 (2002) (listing release date).

75. See *id.* at 4802 ¶ 7 (stating FCC’s conclusion); Steven Aronowitz, Brand X Internet Services v. FCC: *The Case of the Missing Policy Argument*, 20 BERKELEY TECH. L.J. 887, 893-94 (2005) (discussing FCC’s *Declaratory Ruling*). For definitions of “cable service” and “telecommunications service,” see *supra* notes 59, 63, and accompanying text. The FCC identified three core principles that they wanted to uphold during their consideration: to provide broadband Internet access to all Americans; minimize regulatory interference in the market and “remove regulatory uncertainty that . . . may discourage investment and innovation”; and “create a rational framework for the regulation of competing services” which utilize different platforms. See *Declaratory Ruling*, 17 F.C.C.R. at 4801-02 ¶¶ 4-6 (explaining principles guiding FCC’s consideration of proper regulation of cable modem service).

76. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2697 (2005) (indicating cable modem service is not subject to Title II common carrier obligations because it is classified as information service and not telecommunications service which is subject to Title II obligations).

77. See *Declaratory Ruling*, 17 F.C.C.R. at 4820-211 ¶¶ 34-35 (“None of the foregoing statutory definitions rests on the particular types of facilities used. Rather, each rests on the function that is made available.”).

78. In the *Matter of Fed.-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11501 (1998) [hereinafter *Universal Service Report*]. The purpose of the *Universal Service Report* was to advise Congress about the “implementation of certain provisions of the 1996 Act concerning the universal service system. It focused in part on the relationship between universal service and the explosive growth of Internet-based information services. The report specifically reserved the question of the statutory classification of cable modem service.” *Declaratory Ruling*, 17 F.C.C.R. at 4821 ¶ 36 n.141 (citing *Universal Service Report*, 13 F.C.C.R. 11501, 11535 n.140 (1998)).

79. See *Declaratory Ruling*, 17 F.C.C.R. at 4821 ¶ 36 (noting FCC findings in *Universal Service Report*). In the *Universal Service Report* the FCC explained that Internet access service is an information service because the provider “offers a single,

port, the FCC adopted the “end user” analysis and ruled that cable modem service, like Internet access service, is a single integrated service offering use of the Internet.⁸⁰ The FCC found that, even though the cable operator provides cable modem service over its own facilities, it “is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service.”⁸¹

The FCC explicitly rejected the idea that cable modem service offers a separate telecommunications service for purposes of regulation under the Communications Act.⁸² Instead, as noted above, the FCC determined that cable modem service is provided purely via telecommunications and that the end user is not offered telecommunications services separate from Internet access.⁸³ Important to

integrated service, Internet access, to the subscriber.” *Id.* (explaining FCC reasoning in *Universal Service Report* for concluding Internet access service is information service). The FCC noted further that the single integrated service combines several components which enabled end users (consumers) “to run a variety of applications,” which should not be considered as separate services with separate legal status. *See id.* (footnote omitted) (acknowledging that Internet access “combines computer processing, information provision, and computer interactivity with data transport”).

80. *See id.* at 4822 ¶ 38 (“Consistent with the analysis in the *Universal Service Report*, we conclude that the classification of cable modem service turns on the nature of the functions that the end user is offered.”). Based on the end user analysis, the agency stated specifically that, “[a]s currently provisioned, cable modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider’s facilities and to realize the benefits of a comprehensive service offering.” *Id.* at 4823 ¶ 38.

81. *Id.* at 4824 ¶ 41 (footnote omitted) (concluding fact that cable modem service is provided over cable operators’ own facilities is not enough, by itself, for FCC to conclude cable operators are offering telecommunications service to end users). The FCC found support for this distinction in the *Universal Service Report*, stating “[i]n the *Universal Service Report*, the [FCC] concluded that the Act’s ‘information service’ and ‘telecommunications service’ definitions establish mutually exclusive categories of service” *Id.* at 4823 ¶ 41. In the *Universal Service Report*, the FCC stated “when an entity offers transmission incorporating the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information’ . . . it offers an ‘information service’ even though it uses telecommunications to do so.” *Universal Service Report*, 13 F.C.C.R. at 11520 ¶ 39.

82. *See Declaratory Ruling*, 17 F.C.C.R. at 4823 ¶ 39 (“Cable modem service is not itself and does not include an offering of telecommunications service to subscribers.”).

83. *See id.* (noting cable modem service provides its service via telecommunications, which is inseparable from that service). The FCC notes that its conclusion is “[c]onsistent with the statutory definition of ‘information service’ [because] cable modem service provides [its] capabilities . . . ‘via telecommunications.’” *Id.* (citing 47 U.S.C. § 153(20)). For the definition of “information service,” see *supra* notes 65, 73, and accompanying text. The FCC stresses that “the Act distinguishes ‘telecommunications’ from ‘telecommunications service’” and that they have already recognized that all information service providers require the use of telecommunications to provide a connection for their customers. *See Declaratory Ruling*, 17

this determination is the FCC's finding that "[w]e are not aware of any cable modem service provider that has made a stand-alone offering of transmission for a fee directly to the public, or to such classes of users as to be effectively available directly to the public."⁸⁴

Further, the FCC rejected the contention that it should require cable modem service providers to create a stand-alone transmission service and offer it to ISPs.⁸⁵ The FCC responded that it has applied such a requirement exclusively to traditional wireline services and facilities like telephone companies.⁸⁶ The FCC stated they never applied such a requirement to information services provided over cable facilities and that they will not extend any such requirement.⁸⁷ Even in circumstances where cable modem providers also

F.C.C.R. at 4823, ¶ 40 (explaining distinction between "telecommunications" and "telecommunications service"). It is noted that while the transmission of information between the information service provider and their customers may be "telecommunications," that transmission is not necessarily a separate "telecommunications service." *Id.* For the definition of "telecommunications," see *supra* note 64 and accompanying text. For the definition of "telecommunications service," see *supra* note 63 and accompanying text.

84. *Declaratory Ruling*, 17 F.C.C.R. at 4823 ¶ 40 (referencing Communications Act, 47 U.S.C. § 153(46)) (explaining FCC is not aware of stand-alone offering of transmission and that they do not require such offering). This fact distinguishes cable modem service providers from common carriers who are subject to Title II obligations. See *id.* at 4825 ¶ 43 (noting traditional common carriers provide telecommunications service separate from their information service offering). Further, the FCC concluded that, even in instances where a cable modem service provider offers multiple ISPs, "the offering would be a private carrier service and not a common carrier service, because the record indicates that [the cable operator] determines on an individual basis whether to deal with particular ISPs and on what terms to do so." *Id.* at 4830 ¶ 54 (citations omitted).

85. See *id.* at 4824-25 ¶¶ 42-43 (discussing and rejecting commentator EarthLink's contention that cable modem service providers should be required to "create a stand-alone transmission service and offer it to ISPs and other information service providers . . . pursuant to the [C]omputer II requirements"). Generally, *Computer II* was part of "the [FCC's] develop[ment] [of] rules to regulate data-processing services offered over telephone wires." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2696 (2005). The "'Computer II' rules distinguished between 'basic' service (like telephone service) and 'enhanced' service (computer-processing service offered over telephone lines)," and defined both by reference to how the consumer viewed the offered service. *Id.* at 2996-97 (describing origins of statutory classifications "telecommunications carrier" and "information service providers"). "Basic service" and "enhanced service" are the historical counterparts to "telecommunications service" and "information service." See *id.* at 2697 (describing "telecommunications service" as analog to "basic service" and "information service" as analog to "enhanced service"). For more information about the *Computer II* regime, see generally In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384 (1980).

86. See *Declaratory Ruling*, 17 F.C.C.R. at 4825 ¶ 43 (discussing *Computer II* requirements in context of cable modem service).

87. See *id.* (declining to extend *Computer II*). The FCC remarked that "[commentators] invite[] us, in essence, to find a telecommunications service inside

offer telephone service which is traditionally a “telecommunications service” subject to Title II, the FCC noted it would waive the unbundling requirement to prevent uneven application to the limited cable modem providers who also offer telephone service, thereby encouraging cable companies to continue participating in the telephone service market.⁸⁸

iv. *Circuit Inconsistency*

Prior to the FCC issuing the *Declaratory Ruling*, courts treated cable modem service and Internet service inconsistently.⁸⁹ Part of the reason for this inconsistency was that the Communications Act, as amended, “does not deal [w]ith the Internet [or Internet access] in specific terms.”⁹⁰ In 2000, several circuits decided cases that provide examples of the different treatment given to cable modem service and Internet access provided by cable modem service.⁹¹

In *Gulf Power Co. v. FCC*,⁹² the Eleventh Circuit Court of Appeals held that “the 1996 Act does not authorize the FCC to regu-

every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act. Such radical surgery is not required.” *Id.*

88. *See id.* at 4825-26 ¶¶ 45-47 (discussing application of unbundling requirements to cable modem service providers who also offer telephone service). The FCC has “discretion to waive [a] requirement[] . . . where the particular facts would make strict compliance inconsistent with the public interest.” *Id.* at 4826 ¶ 45 (noting FCC may waive requirements if good cause is shown). In the context of cable operators, the FCC believes that requiring cable operators who offer telephone service in addition to cable modem service to unbundle their services would provide an incentive for those cable companies to stop offering telephone service. *See id.* at 4826 ¶ 47 (indicating that this result “would undermine the long-delayed hope of creating facilities based competition in the telephony marketplace and thereby seriously undermine the goal of the 1996 Act to open all telecommunications markets to competition”). Further, the FCC concluded that applying the *Computer II* regulations would also undermine the goals of Section 706 to facilitate the deployment of advanced telecommunications capability in a reasonable and timely fashion. *See id.* (explaining why FCC would waive *Computer II* in circumstances where cable operator also offers local exchange service).

89. For a discussion of this inconsistent treatment, see *infra* notes 92-129 and accompanying text.

90. Christopher E. Duffy, Note, *The Statutory Classification of Cable-Delivered Internet Service*, 100 COLUM. L. REV. 1251, 1263 (2000) (asserting that, with lack of specific provisions related to Internet, “information service” is most suitable classification for cable modem service).

91. For a discussion of these cases, see *infra* notes 92-129 and accompanying text.

92. 208 F.3d 1263, 1266 (11th Cir. 2000) (reviewing, inter alia, FCC’s authority to regulate pole attachments for Internet service under 1996 Act), *rev’d sub nom.* Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co., 534 U.S. at 327 (2002). Though *Gulf Power Co.* was reversed on appeal, the Supreme Court did not base its holding on the classification of Internet service, instead, it focused on who attached the cable to the pole. *See* Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co., 534 U.S. 327, 336-37 (2002) (declining to decide correct categorization of

late pole attachments for Internet service.”⁹³ In the 1996 Act, Congress authorized the FCC to establish a rent structure applicable to cable or telecommunications service providers who attach their cables to poles owned by power and telephone companies.⁹⁴ The 1996 Act only authorized rent structures for attachments providing cable or telecommunications services.⁹⁵ Therefore, “[f]or the FCC to be able to regulate the rent for an attachment that provides Internet service then, Internet service must qualify as either a cable service or a telecommunications service.”⁹⁶

Finding the FCC lacked authority over Internet service pole attachments, the Eleventh Circuit concluded that Internet service does not meet the definition of a “cable service.”⁹⁷ First, Internet service is outside the scope of what Congress intended “cable ser-

Internet services). Indeed, the Supreme Court reversed the Eleventh Circuit, stating that the provisions requiring the FCC to regulate the rates, terms, and conditions for pole attachments, which include any attachment by a cable television system, resolve the issue. *See id.* at 333 (addressing whether Communications Act applies to attachments providing high-speed Internet access commingled with cable television). The Supreme Court stated:

No one disputes that a cable attached by a cable television company, which provides only cable television service, is an attachment “by a cable television system.” If one day its cable provides high-speed Internet access, in addition to cable television service, the cable does not cease, at that instant, to be an attachment “by a cable television system.” The addition of a service does not change the character of the attaching entity – the entity the attachment is “by.”

Id.

93. *Gulf Power Co.*, 208 F.3d at 1278 (concluding Internet service does not satisfy the statutory definition of either “telecommunications service” or “cable service”).

94. *See id.* at 1276 (discussing regulation of rates for cable and telecommunications pole attachments).

95. *See id.* (discussing fee structures for pole attachments). The court in *Gulf Power Co.* noted that the 1996 Act requires the FCC to “establish two rates for pole attachments.” *Id.* (describing pole attachment rates under 1996 Act). One rate applies to “any pole attachment used by a cable television system solely to provide cable service.” 47 U.S.C. § 224(d)(3) (2000). The other applies to “charges for pole attachments used by telecommunications carriers to provide telecommunications services” *Id.* § 224(e)(1).

96. *Gulf Power Co.*, 208 F.3d at 1276. The Eleventh Circuit also stated that its interpretation of the 1996 Act led it to believe that only services which are purely cable service or telecommunications service trigger the rent scheme. *See id.* at 1276 n.29 (“The straightforward language of subsections (d) and (e) of [section 224 of the 1996 Act] directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized.”).

97. *See id.* at 1276 (“The 1996 Act allows the [FCC] to regulate the rates for cable service and telecommunications service; Internet service is neither.”).

vice” to cover.⁹⁸ Second, the FCC previously determined that Internet service was an information service.⁹⁹ Additionally, the court concluded that Internet service was not a “telecommunications service” and cited the FCC’s conclusion in its *Universal Service Report* that Internet service does not meet the definition of “telecommunications service.”¹⁰⁰

In contrast, the Fourth Circuit in *MediaOne Group, Inc. v. County of Henrico*¹⁰¹ affirmed an Eastern District of Virginia opinion, which invalidated a local ordinance that imposed open access requirements on cable modem service as a condition to approval of a franchise transfer.¹⁰² In affirming the district court, the Fourth Circuit implicitly concluded that cable modem service involved a telecommunications component.¹⁰³ In effect, the Fourth Circuit’s analysis suggested that cable modem service is a composite service consisting of several individual components.¹⁰⁴ The court concluded that the cable modem platform by itself fit the definition of “telecommunications.”¹⁰⁵ Ultimately, the Fourth Circuit held that the Communications Act preempted and superceded the local ordinance because its open access requirement was inconsistent with the Communications Act.¹⁰⁶

In contrast with both the Fourth and Eleventh Circuits is the Ninth Circuit’s treatment of cable modem service in *Brand X In-*

98. See *id.* at 1276-77 (illustrating difference between definition of “cable service” in 1978 legislation and 1996 Act and concluding that Congress did not intend scope of “cable service” definition to include services beyond traditional video base, which encompasses traditional video programming).

99. See *id.* at 1277 (noting FCC defined Internet service as information service in *Universal Service Report*).

100. See *id.* at 1277-78 (rejecting defining Internet service as telecommunications service for purposes of pole attachment rent).

101. 257 F.3d 356 (4th Cir. 2001), *aff’g* 97 F. Supp. 2d 712 (E.D. Va. 2000) (mem. opinion).

102. See *id.* at 359 (describing factual background to dispute).

103. See *id.* (“Henrico County’s open access provision violates the federal [sic] Communications Act by forcing MediaOne to provide its telecommunication facilities (its cable modem platform) to any ISP as a condition for the County’s approval of the transfer of control of the franchise.” (citations omitted)).

104. See *id.* at 363 (illustrating that “cable modem platform, separated from its Internet service component, is a telecommunications facility because it is a pipeline for telecommunications, that is, for ‘the transmission . . . of information of the user’s choosing, without change in the form or content’” (ellipsis in original) (quoting 47 U.S.C. § 153(43))).

105. See *id.* at 364 (concluding that MediaOne’s cable platform, separated from its Internet service component, is telecommunications because it fits within its statutory definition). For the definition of “telecommunications,” see *supra* note 64 and accompanying text.

106. See *MediaOne Group*, 257 F.3d at 365 (concluding that Communications Act preempts and supercedes local ordinance).

ternet Services v. FCC.¹⁰⁷ In this case, the Ninth Circuit decided whether its prior interpretation of the Communications Act controlled its review of the FCC's *Declaratory Ruling* regarding the classification of cable modem service.¹⁰⁸ The prior interpretation had occurred three years before in *AT&T Corp. v. City of Portland*.¹⁰⁹

The dispute in *AT&T Corp.* grew out of the merger of AT&T with Telecommunications, Inc. ("TCI").¹¹⁰ The City of Portland attempted to base its approval of the merger on the condition that AT&T provide open access to ISPs over its broadband cables in Portland.¹¹¹ AT&T offered cable modem Internet access as part of its @Home service.¹¹²

In determining whether the City of Portland could condition AT&T's cable service provision upon opening access to its cable broadband network, the Ninth Circuit evaluated how the Communications Act characterized the @Home service.¹¹³ As part of its analysis, the court made a distinction between the individual component activities of cable modem service.¹¹⁴ The court found that

107. 345 F.3d 1120 (9th Cir. 2003), *rev'd sub nom.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688 (2005).

108. *See id.* at 1123 ("We must decide whether our prior interpretation of the Telecommunications Act controls review of the [FCC's] decision to classify Internet service provided by cable companies exclusively as an interstate 'information service.'").

109. *See* 216 F.3d 871, 873 (9th Cir. 2000) (determining "whether a local cable franchising authority may condition a transfer of a cable franchise upon the cable operator's grant of unrestricted access to its cable broadband transmission facilities for Internet service providers other than the operator's proprietary service").

110. *See id.* at 874 (describing factual foundation of dispute). At the time, AT&T was the "nation's largest long distance telephone provider," and TCI was "one of the nation's largest cable television operators." *Id.* at 874 (describing companies). TCI operated in Portland and provided both traditional cable programming service and cable broadband internet access to its customers. *See id.* at 874-75 (describing TCI).

111. *See id.* at 875 (noting that intergovernmental agency recommended that Portland "approve the transfer of franchise control subject to an open access requirement"). As the local franchising authority, the City of Portland has approval power over sales of cable systems. *See* 47 U.S.C. § 537 (2000) (providing 120 day limit for franchising authority to approve sale or transfer of cable franchise). TCI's franchise agreement with Portland permitted the City of Portland to place certain conditions on any transfer of its cable system. *See AT&T Corp.*, 216 F.3d at 875 (quoting language of agreement between City of Portland and TCI).

112. *See AT&T Corp.*, 216 F.3d at 874 (describing @Home service and its offerings). AT&T's @Home service "bundles its cable conduit with Excite, an . . . [ISP] under an exclusive contract." *Id.* Additionally, @Home provides the ISPs' Internet access service with email accounts, a web site, search capabilities, and other proprietary content. *See id.* (describing relationship between @Home and Internet access).

113. *See id.* at 877-78 (analyzing @Home service under Communications Act).

114. *See id.* at 878 (discussing statutory treatment of @Home's Internet service components under Communications Act).

AT&T's broadband Internet access via @Home (its cable modem service) consisted of both a pipeline and the Internet access transmitted through the pipeline.¹¹⁵ The court concluded that the Internet access component was an "information service" and the pipeline component was a "telecommunications service."¹¹⁶ Thus, the Ninth Circuit held that cable modem service was both an information and telecommunications service.¹¹⁷ Based on these classifications, the court decided that the Communications Act prohibits local franchising authorities from regulating cable modem service because the transmission of Internet service over cable broadband facilities is a "telecommunications service" and was therefore outside the scope of their local authority.¹¹⁸

115. *See id.* (noting that "@Home controls all of the transmission facilities between its subscribers and the Internet" and that @Home functions as both ISP and telecommunications service provider).

116. *See id.* at 877-78 (discussing statutory classification of ISP offering Internet access and hardware connection providing data transmission).

117. *See AT&T Corp.*, 216 F.3d at 878 ("To the extent [AT&T's broadband cable service] @Home is a conventional ISP, its activities are that of an information service. . . . [T]o the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing telecommunications service as defined in the Communications Act."). Additionally, the court determined that @Home was not a cable service as defined in the Communications Act. *See id.* at 876.

118. *See id.* at 880 (stating holding). Section 541 of the Communications Act gives local franchising authorities regulatory power over cable services, not telecommunications service. *See id.* at 878 ("Subsection 541(b)(3) expresses both an awareness that cable operators could provide telecommunications services, and an intention that those telecommunications services be regulated as such, rather than as cable services."). Section 541(b)(3) reads:

(3)(A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services-

(i) such cable operator or affiliate shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services; and

(ii) the provisions of this subchapter shall not apply to such cable operator or affiliate for the provision of telecommunications services.

(B) A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or affiliate thereof.

(C) A franchising authority may not order a cable operator or affiliate thereof-

(i) to discontinue the provision of a telecommunications service, or

(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this subchapter with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by sections 531 and 532 of this title a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional net-

In *Brand X Internet Services*, the Ninth Circuit held that its prior interpretation in *AT&T Corp.* was binding and thus determinative.¹¹⁹ Therefore, the Ninth Circuit adopted its prior interpretation that cable modem service is both an “information service” and a “telecommunications service.”¹²⁰

The Ninth Circuit relied on two cases in determining *AT&T Corp.* was binding precedent: *Mesa Verde Construction Co. v. Northern California District Council of Laborers*,¹²¹ a Ninth Circuit case, and *Neal v. United States*,¹²² a Supreme Court case.¹²³ The Ninth Circuit rejected the argument that it was not bound by *AT&T Corp.* because *Mesa Verde* allowed the court to favor an agency interpretation if it was reasonable and consistent with the law.¹²⁴ The Ninth Circuit replied that “*Mesa Verde* [] clear[ly] mandate[d] that precedent can be disregarded in favor of a subsequent agency interpretation ‘only where the precedent constituted deferential review of [agency] decisionmaking.’”¹²⁵ According to the Ninth Circuit, the FCC’s argument failed because the FCC had previously declined to address the issue before the court, so they were not faced with “a case involving potential deference” to an agency interpretation.¹²⁶

works, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

47 U.S.C. § 541(b)(3) (2000).

119. See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003) (concluding that Ninth Circuit and Supreme Court precedent “requires our adherence to the interpretation of the Communications Act we announced in [*AT&T Corp.*]”), *rev’d sub nom.* *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

120. See *id.* (adopting prior interpretation of Communications Act as held in *AT&T Corp.*). The Ninth Circuit stated: “[In *AT&T Corp.*], we concluded that cable broadband service was . . . part ‘telecommunications service’ and part ‘information service.’” *Id.* Thus, the Ninth Circuit vacated the FCC’s *Declaratory Ruling* to the extent that its interpretation of the Communications Act conflicted with the Ninth Circuit’s interpretation illustrated in *AT&T Corp.* See *id.*

121. 861 F.2d 1124 (9th Cir. 1988), *amended and superseded by* 895 F.2d 516 (9th Cir. 1989).

122. 516 U.S. 284 (1996).

123. See *Brand X Internet Servs.*, 345 F.3d at 1132 (concluding *Mesa Verde* and *Neal* require adherence to *AT&T Corp.* precedent).

124. See *id.* at 1130-31 (discussing *Mesa Verde*). The FCC argued that *AT&T Corp.* was not binding because the Ninth Circuit “did not assert . . . that [the] construction of the [Communications Act]” was the only plausible reading. *Id.* at 1131.

125. *Id.* at 1131 (quoting *Mesa Verde*, 861 F.2d at 1136).

126. *Id.* (quoting *AT&T Corp.*, 216 F.3d at 876) (stating in *AT&T Corp.*, Ninth Circuit did not face dispute involving potential for deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). For a discussion of *Chevron*, see *infra* notes 130-36 and accompanying text. The FCC addressed the *AT&T Corp.* decision in the *Declaratory Ruling*. See *Declaratory Ruling*, 17 F.C.C.R.

Additionally, the Ninth Circuit interpreted *Neal v. United States* as holding that once a court determines a statute's meaning, it becomes the law against which subsequent agency decisions will be measured.¹²⁷ According to the Ninth Circuit's interpretation, they had the power to authoritatively determine the proper regulatory classification of cable modem service.¹²⁸ Although it set out an important regulatory definition, *Brand X* relied on precedent and avoided discussing "the policy implications of classifying cable modem service as both 'information service' and telecommunications service."¹²⁹

B) Deference to Agency Interpretation, the *Chevron* Two-Step

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court created a deferential standard to review an agency's interpretation of a statute within its jurisdiction to administer.¹³⁰

4798, 4831-32 ¶¶ 56-58 (2002) (interpreting scope of issue in *AT&T Corp.* in context of FCC's classification of cable modem service). The FCC stated:

While we are considering the broad issue of the appropriate national framework for the regulation of cable modem service, the . . . [*AT&T Corp.*] court considered a much narrower issue – whether a local franchising authority, whose authority was limited to cable service, had the authority to condition its approval of a cable operator's merger on the operator's grant of multiple ISP access.

Id. at 4831 ¶ 56. The FCC also noted that the Ninth Circuit's decision was based on a "less than comprehensive" record because the parties had not briefed the regulatory classification issue. *See id.* at 4831 ¶ 57. Further, the FCC noted that "[t]he Ninth Circuit could have resolved the narrow question before it by finding that cable modem service is not a cable service." *Id.* at 4831 ¶ 58. In *Brand X Internet Servs.*, the Ninth Circuit responded by rejecting the assertion that it did not have to reach the regulatory classification of cable modem service in *AT&T Corp.*; consequently the discussion of that issue is not dicta. *See Brand X Internet Servs.*, 345 F.3d at 1129-30 (asserting their discussion was not dicta because concluding cable broadband Internet service over cable broadband facilities is telecommunications service was essential to their holding).

127. *See Brand X Internet Servs.*, 345 F.3d at 1131-32 (interpreting *Neal v. United States*, 516 U.S. 284 (1996)).

128. *See id.* (explaining Ninth Circuit's rationale). The Ninth Circuit articulated:

Notwithstanding the Supreme Court's use of the term "we," there is nothing to suggest that *Neal's* rule should apply only when it is the Supreme Court . . . construing the statute in question, and the Court itself has never asserted that the power authoritatively to interpret statutes belongs to it alone.

Id.

129. Aronowitz, *supra* note 75, at 898; *see id.* at 900-01 (arguing *Brand X Internet Servs.* made wise policy choice with no policy analysis).

130. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984) (discussing standard for reviewing agency interpretation of statute it administers). *Chevron* addressed a challenge to an Environmental Protection Agency ("EPA") regulation defining the term "stationary source" as used in the Clean Air Act with respect to "regulating 'new or modified stationary sources' of

The Court held that ambiguities within a statute delegate the authority to the agency to fill the statutory gap in a reasonable fashion.¹³¹ The Court explained that filling these gaps involves difficult policy considerations better suited for agencies than for courts.¹³² A court must engage in a two-step analysis when determining whether an agency's construction receives deference.¹³³ First, the court must determine whether the statute is ambiguous on the issue in question.¹³⁴ If the statute is ambiguous then the court must de-

air pollution." *Id.* at 837. The court determined that the term "stationary source" was ambiguous because it was unclear if it referred to, for example, a single emitting source like a smoke stack or an entire facility comprised of several emitting sources. *See id.* at 859-63 (concluding that statutory language and legislative history are silent on issue before Court). Applying the deferential standard the Court establishes, the Supreme Court deferred to the EPA's construction and held that "the EPA's definition of the term 'source' is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth." *Id.* at 866.

131. *See id.* at 843-44 (describing agency authority to interpret and fill gaps in statutes which it administers). The Supreme Court explained:

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." If Congress has explicitly left a gap for the agency to fill, there is express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. (ellipsis in original) (citations omitted).

132. *See id.* at 865-66 (contrasting appropriateness of courts or agencies making policy choices). Elaborating, the Court stated:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id.

133. *See id.* at 842-43 (stating there is two step analysis to determine whether deference is given to agency's interpretation of statute it administers).

134. *See id.* at 842 ("First, always, is the question whether Congress has directly spoken to the precise question at issue."). The Court notes that after a court concludes the first step "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

termine whether the agency's interpretation is a "permissible construction of the statute."¹³⁵ As a result, if a statute is ambiguous and if the administering agency's interpretation is reasonable, *Chevron* requires a federal court to defer to the agency's construction, even if the agency's interpretation differs from the court's.¹³⁶

In *United States v. Mead Corp.*, the Supreme Court considered the limits of deference courts owed to agency interpretations under *Chevron*.¹³⁷ The *Mead* Court concluded that the applicability of *Chevron* depended on the scope of authority Congress delegates in the statute to the administering agency.¹³⁸ Accordingly, the *Mead* Court held that an agency interpretation of a statute receives *Chevron* deference when the interpretation is promulgated under congressionally delegated authority to make rules carrying the force of law.¹³⁹ An agency's power to engage in adjudication, notice-and-comment rule-making, or some other indication of a comparable congressional intent, denotes the delegation of appropriate authority.¹⁴⁰

135. *Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). According to the Supreme Court, after the second step, a court may "impose its own construction on the statute" only "in the absence of an administrative interpretation." *Id.* at 843.

136. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2699 (2005) (discussing *Chevron* doctrine). *Chevron* created a presumption that the responsible agency would resolve statutory ambiguities, and thus Congress "desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.* at 2700 (quoting *Smiley v. Citibank (S. Dakota) N.A.*, 517 U.S. 735, 740-41 (1996)).

137. See *United States v. Mead Corp.*, 533 U.S. 218, 218 (2001) (considering whether to apply *Chevron* deference to United States Customs Service tariff classifications). In *Mead*, the Court declined to extend *Chevron* deference to a tariff classification ruling by Customs Service. See *id.* at 231-33 (declining to extend *Chevron* deference). The Court reasoned that the Customs Service does not use notice-and-comment rule-making to issue tariff classifications, issues thousands of such classifications per year from different offices, does not treat the rulings as binding on third parties, and warns other importers against reliance on these decisions. See *id.* (articulating reasoning for not extending *Chevron* level deference to tariff classifications).

138. See *id.* at 227-31 (discussing Congress's delegation of powers to agencies and indicia of implicit or explicit intent to leave gaps to agency discretion).

139. See *id.* at 226-27 ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

140. See *id.* at 229-30 (noting congressional authorization to engage in process of rulemaking or adjudication is good indicator that deference is merited). The Court reasoned that it should be apparent from an "agency's generally conferred authority and other statutory circumstances that Congress would expect the agency

Nevertheless, the *Mead* Court did not strip all deference from an agency decision that does not qualify for *Chevron* deference.¹⁴¹ Such an agency decision will receive some deference given that agencies have specialized experience, access to more comprehensive information, and an “understanding[] of what a national law requires.”¹⁴² These interpretations that “lack the force of law” are “‘entitled to respect’ . . . to the extent that those interpretations have the ‘power to persuade.’”¹⁴³

IV. ANALYSIS

A. Narrative Analysis

In *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, the Supreme Court addressed the appropriate regulatory classification for broadband Internet service under the Communications Act, as amended by the 1996 Act.¹⁴⁴ Specifically, the Court reviewed the FCC’s conclusion that cable modem broadband Internet service provided by cable companies is an information service, as defined by the Communications Act, and therefore not subject to common-carrier regulations.¹⁴⁵ The Court held: 1) the *Chevron* doctrine applied to their analysis; 2) under *Chevron*, the FCC’s classification of cable modem broadband Internet service is a lawful construction of the Communications Act; and 3) the FCC’s

to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law” *Id.* at 229.

141. *See id.* at 234 (stating tariff classifications do not fall “outside the pale of any deference whatever its form . . .”).

142. *Mead*, 533 U.S. at 234 (citing *Skidmore v. Swift*, 323 U.S. 134, 139-40 (1944)) (noting some deference is still merited).

143. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore*, 323 U.S. at 140). In *Christensen*, the Supreme Court addressed arguments by petitioners and the United States that a Department of Labor opinion letter is entitled to *Chevron* deference. *See id.* at 586 (summarizing petitioners’ and United States’ contentions). The Court rejected this contention stating “[i]nterpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law - do not warrant *Chevron*-style deference.” *Id.* at 587.

144. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2696 (2005) (stating issue).

145. *See id.* at 2697-99 (stating FCC’s *Declaratory Ruling* is under review in this case); *Declaratory Ruling*, 17 F.C.C.R. 4798, 4802 ¶ 7 (2002) (“[W]e conclude that the cable modem service, as it is currently offered, is properly classified as an interstate information service, not as a cable service, and that there is no separate offering of telecommunications service.”). The Communications Act, as amended by the 1996 Act, imposes common-carrier requirements on telecommunications carriers but not on information service providers. *See Nat’l Cable & Telecomms. Ass’n*, 125 S. Ct. at 2696. For a discussion of the common-carrier requirements, see *supra* notes 55-57 and accompanying text.

decision to treat cable modem service differently from DSL was not arbitrary or capricious under the Administrative Procedure Act.¹⁴⁶

Justice Thomas, writing for the majority, first considered whether the *Chevron* doctrine should apply to the FCC's interpretation of "telecommunications service."¹⁴⁷ *Chevron* requires a federal court to accept the agency's interpretation if a statute is ambiguous and the administering agency interpretation is permissible under the statute.¹⁴⁸ The Court concluded that the *Chevron* doctrine should govern its review of the FCC's construction.¹⁴⁹ Explaining that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework," the Court rejected respondents' argument that the Commission's interpretation is inconsistent with past practice.¹⁵⁰

The Court additionally concluded that the Ninth Circuit erred when it declined to apply the *Chevron* doctrine, instead following Ninth Circuit precedent set forth in *AT&T Corp.*, which interpreted the Communications Act contrary to the FCC's interpretation.¹⁵¹ Specifically, the Court held that the Ninth Circuit erred by assuming its construction of the Communications Act in *AT&T Corp.* superceded the FCC's, "regardless of whether [*AT&T Corp.*] had

146. See *Nat'l Cable & Telecomms. Ass'n*, 125 S. Ct. at 2691, 2710, 2711 (stating separate holdings).

147. *Id.* at 2699 (noting first issue addressed).

148. For a discussion of the *Chevron* doctrine, see *supra* notes 130-36 and accompanying text.

149. See *Nat'l Cable & Telecomms. Ass'n*, 125 S. Ct. at 2699 (concluding *Chevron* applies to FCC's interpretation even if court disagrees). The Court noted that the FCC is the agency Congress delegated with the authority to "execute and enforce" the Communications Act, § 151, and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act § 201(b)." *Id.* (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999)).

150. *Id.* at 2699 ("Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act." (citing *Motor Vehicles Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57 (1983))). The Court explained if the agency adequately justifies its reversal of policy "change is not invalidating since . . . *Chevron* . . . leave[s] the discretion provided by the ambiguities of a statute with the implementing agency." *Id.* at 2699-700 (quoting *Smiley v. Citibank (S. Dakota) N.A.*, 517 U.S. 735, 742 (1996)).

151. See *id.* at 2699 (noting Ninth Circuit should have applied *Chevron*). The Ninth Circuit vacated the *Declaratory Ruling* to the extent it concluded that cable modem service was not a "telecommunications service" under the Communications Act. See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003) (acknowledging *Mesa Verde* and *Neal* "requires our adherence" to *AT&T Corp.*'s understanding of Communications Act), *rev'd sub nom.* *Nat'l Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005). In *AT&T Corp.*, the Ninth Circuit held that "cable broadband service was not a 'cable service' but instead was part 'telecommunications service' and part 'information service.'" *Id.*

held the statute to be unambiguous.”¹⁵² The Supreme Court explained that a “court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”¹⁵³ According to the Court, the Ninth Circuit incorrectly interpreted *Neal v. United States* as establishing that a “prior judicial construction of a statute” trumps “an agency’s contrary construction.”¹⁵⁴ The Ninth Circuit’s incorrect interpretation of *Neal* caused it to rely on its prior interpretation of the term “telecommunications service” in *AT&T Corp.*, instead of applying *Chevron*.¹⁵⁵

Once the Court established that the *Chevron* doctrine was the proper standard of review, it addressed whether the FCC’s construction of the definition of “telecommunications service” is a permissible reading of the Communications Act under *Chevron*.¹⁵⁶ The

152. *Nat’l Cable & Telecomms. Ass’n*, 125 S. Ct. at 2700 (noting Ninth Circuit’s reasoning was incorrect).

153. *Id.* According to the Court, *Chevron* established a presumption that Congress wanted agencies to initially resolve statutory ambiguities, and intended for agencies to possess “whatever degree of discretion the ambiguity allows.” *Id.* (quoting *Smiley*, 517 U.S. at 740-41). Further, the Court reasoned that allowing judicial precedent that did not hold the statute was unambiguous to “foreclose” an agency interpretation violates *Chevron*. *See id.* The Court explained that such a rule would result in a system where the determination whether an agency’s interpretation of an ambiguous statute is entitled to *Chevron* deference would depend on whose interpretation came first. *See id.* This result conflicts with the delegation of agency authority because an agency’s authority to interpret a statute “does not depend on the order in which the judicial and administrative constructions occur.” *Id.*

The dissent argued, however, that allowing an agency to override what a court believes is the best interpretation leaves judicial decisions susceptible to reversal by executive officers. *See id.* at 2719 (Scalia, J., dissenting). The majority responded by asserting that an agency’s decision to interpret an ambiguous statute differently from a court does not render the court’s holding legally wrong. *See id.* at 2701 (adding that court’s opinion as to best statutory interpretation is not binding). An agency has congressionally delegated authority to interpret the statutes it administers, therefore, agencies may choose different constructions. *See id.*

154. *Id.* at 2701 (indicating *Neal* established only that contrary agency construction is foreclosed only by judicial precedent holding statute to be unambiguous).

155. *See id.* (explaining Ninth Circuit’s misinterpretation of *Neal* resulted in misplaced reliance on Ninth Circuit precedent). The Ninth Circuit’s mistaken assumption led them to conclude that the interpretation of telecommunications service in *AT&T Corp.* controlled. *See id.* However, *AT&T Corp.* held only that their interpretation was the best interpretation, not the only permissible interpretation. *See id.*

156. *See id.* at 2702-04 (analyzing FCC’s interpretation of “telecommunications service”). The Court engaged in this analysis despite noting “it is not logically necessary for us to reach the question whether the Court of Appeals misapplied *Chevron* for us to decide whether the [FCC] acted lawfully.” *Id.* at 2702. The Court feared that upholding the *Declaratory Ruling* “without reaching the *Chev-*

Court ultimately concluded that the Communications Act is ambiguous concerning the definition of “telecommunications service” and that the FCC’s interpretation represents a permissible reading of the Communications Act.¹⁵⁷

The Court determined that the Communications Act is ambiguous as to whether cable companies “offer” telecommunications with cable modem service.¹⁵⁸ The Court concluded that the term “offer,” as used in the definition of “telecommunications service,” is ambiguous because it has two reasonable usages.¹⁵⁹ One interpretation is that cable companies offer consumers an “information service” via telecommunications; the other is that cable companies “offer” high-speed data transmission as a “stand-alone” input used to provide the information service.¹⁶⁰ The Court held that cable companies providing broadband cable modem service offer finished Internet service delivered via the discrete components composing this end product, which includes telecommunications data transmission.¹⁶¹ Because of the integrated nature of Internet service and its components, they “need not be described as distinct

ron point” would allow the Ninth Circuit to again strike down the FCC’s rule based on *AT&T Corp.* See *id.* The Court explained that their conclusion that it is reasonable for the FCC to interpret the Communications Act to classify cable modem service solely as an information service leaves intact the holding in *AT&T Corp.* that the FCC’s interpretation is not the best reading of the statute. See *id.*

157. See *Nat’l Cable & Telecomms. Ass’n*, 125 S. Ct. at 2702 (stating that FCC’s interpretation is permissible at both steps of *Chevron’s* two-part analysis).

158. See *id.* at 2704-08 (analyzing “offer” in common usage and legislative history contexts).

159. See *id.* at 2704 (explaining that “offer” as used in definition of “telecommunications service” can reasonably be read to mean two different things). For the definition of “telecommunications service,” see *supra* note 63 and accompanying text.

160. See *id.* (distinguishing between two interpretations of “offer”). For a definition of “information service,” see *supra* notes 65, 73, and accompanying text. The court analogized the distinction as follows:

One might well say that a car dealership “offers” cars, but does not “offer” the integrated major inputs that make purchasing the car valuable, such as the engine or the chassis. It would, in fact, be odd to describe a car dealership as “offering” consumers the car’s components in addition to the car itself. Even if it is linguistically permissible to say that the car dealership “offers” engines when it offers cars, that shows, at most, that the term “offer,” when applied to a commercial transaction, is ambiguous about whether it describes only the offered finished product, or the product’s discrete components as well. It does not show that no other usage is permitted.

Nat’l Cable & Telecomms. Ass’n, 125 S. Ct. at 2704.

161. See *Nat’l Cable & Telecomms. Ass’n*, 125 S. Ct. at 2704-05 (explaining it is reasonable to describe finished cable modem service experienced by consumer as single integrated offering).

'offerings.'¹⁶² The dissent responded that the high-speed transmission component necessary to provide broadband cable modem service is necessarily "offered" with the Internet service.¹⁶³ The majority rejected this argument, stating the issue is whether the products are functionally integrated or functionally separate, which they believe depends "on the factual particulars of how Internet technology works and how it is provided"¹⁶⁴ Therefore, the Court concluded, "[b]ecause the term 'offer' can sometimes refer to a single, finished product and sometimes to the 'individual components in a package being offered' . . . the statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering."¹⁶⁵

In the last step of the *Chevron* analysis, the Court concluded the FCC's construction was a reasonable policy choice and therefore a permissible reading of the Communications Act.¹⁶⁶ The Court reasoned that, from the end-users' perspective (i.e., a consumer), the service that Internet providers offer is access to the Internet, not a transparent ability to transmit information as is the case when providing a telecommunications service.¹⁶⁷ Hence, the FCC's classifica-

162. *Id.* at 2705 (explaining that it is "no misuse of language" to state that cable companies do not offer each individual component part of Internet access, even though each is essential to providing Internet access). The Court stated that, "[i]n the telecommunications context, it is at least reasonable to describe cable companies as not 'offering' each [individual] input necessary for Internet access to the consumer." *Id.* at 2705 (explaining that transmission component of cable modem service is sufficiently integrated with finished service).

163. *See id.* at 2714-15 (Scalia, J., dissenting) ("Despite the Court's mighty labors to prove otherwise, the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being an offer" (citations omitted)).

164. *Id.* at 2705 (describing majority's position regarding how "functionally integrated" versus "functionally separate" should be resolved). In the *Universal Service Report*, the FCC recognized that it is not always clear whether a company is providing a single service, or two distinct services, one of which is a telecommunications service. *See Universal Service Report*, 13 F.C.C.R. 11501, 11530 ¶ 60 (1998) (discussing complexity in determining whether "telecommunications" and "information service" are mutually exclusive categories when offered by facilities based providers (referencing Indep. Data Commc'ns Mfrs. Ass'n, Inc., Petition for Declaratory Ruling that AT&T's Interspan Frame Relay Serv. Is a Basic Serv, Mem. Opinion and Order, 10 F.C.C.R. 1317, 13722-23, ¶¶ 40-46 (1995))).

165. *Nat'l Cable & Telecomms. Ass'n*, 125 S. Ct. at 2705 (noting this ambiguity "leaves federal telecommunications policy in this technical and complex area to be set by the [FCC]").

166. *See id.* at 2708-10 (concluding FCC's construction maintains current regulatory structures and is consistent with Supreme Court's understanding of how Internet works).

167. *See id.* at 2710 (noting that from end-users perspective, Internet access is not merely transparent ability to transmit information because it allows users to interact with Internet content).

tion of cable modem Internet access is not unreasonable just because accessing the Internet via a cable modem utilizes telecommunications components.¹⁶⁸

Finally, the Court rejected respondent MCI's argument that the FCC's treatment of cable modem service providers is an "arbitrary and capricious" deviation of agency policy under the Administrative Procedure Act because it is inconsistent with its treatment of DSL service.¹⁶⁹ The Court rejected this argument, noting the FCC provided a reasoned explanation for treating cable modem service differently than DSL service.¹⁷⁰

168. *See id.* at 2705 (concluding it is reasonable to describe offering Internet access and its transmission component as single integrated offering).

169. *See id.* at 2710 (concluding FCC provided reasonable explanation for different treatment). Administrative Procedure Act section 706(2)(a) reads as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

....

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

5 U.S.C. § 706(2)(a) (2000). MCI argued that when local telephone companies began offering Internet access via DSL technology in addition to telephone service, the FCC required them to make the lines used to transmit DSL service available to competing ISPs on nondiscriminatory, common-carrier terms. *See Nat'l Cable & Telecomms. Ass'n*, 125 S. Ct. at 2710 (describing MCI's argument). MCI claimed "the Commission's [FCC's] decision not to regulate cable companies similarly under Title II is inconsistent with its DSL policy." *Id.*

170. *See Nat'l Cable & Telecomms. Ass'n*, 125 S. Ct. at 2711 (accepting FCC's explanation that different treatment is result of different market conditions). The FCC explained that the reason for regulating DSL service under the common-carrier scheme was that at that time telephone wires were "the primary, if not exclusive, method" used by ISPs to connect their customers to the Internet. *See id.* (citing *Declaratory Ruling*, 17 F.C.C.R. 4798, 4825 ¶ 44 (2002)) (describing FCC's reasoning). In contrast, the FCC concluded that changed market conditions warranted different treatment of "facilities-based cable companies" providing cable modem service. *See id.* (describing reasoning behind different regulatory treatment of cable modem Internet service). Currently, high-speed Internet access is "evolving [on several] electronic platforms." *Id.* (citing *Declaratory Ruling*, 17 F.C.C.R. at 4802 ¶ 6) (noting various platforms capable of delivering high-speed Internet access). As a result, the FCC concluded that "'broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.'" *Id.* (quoting *Declaratory Ruling*, 17 F.C.C.R. at 4802 ¶ 5). The Court declined to address the argument that the FCC's justification for exempting cable modem service from common carrier regulation applies equally to DSL providers. *See id.* (explaining court need not address issue because it is for FCC to reconsider).

B. Critical Analysis

Although *National Cable & Telecommunications Ass'n* addressed a telecommunications issue, it is an exercise in administrative law.¹⁷¹ The Court addressed the proper regulatory classification of broadband cable Internet service under the Communications Act through the application of the *Chevron* doctrine.¹⁷²

Despite the Ninth Circuit's refusal to apply the *Chevron* doctrine, the Supreme Court correctly concluded that *Chevron* did apply.¹⁷³ The Supreme Court faced a challenge to an interpretation of a statutory definition proffered by the agency with jurisdiction to administer the applicable statute.¹⁷⁴ Additionally, the FCC has explicit authority to promulgate rules and regulations that have the force of law, and it acted within that power when it issued the *Declaratory Ruling*.¹⁷⁵

Consistent with the principles of *Chevron*, the Court rejected the argument that *Chevron* does not apply when an agency action conflicts with past practice.¹⁷⁶ *Chevron* dictates that an agency's interpretation of ambiguities in a statute it administers receives deference, period.¹⁷⁷ Much of the support for agency deference derives from an agency's position to weigh competing policy considerations in light of "everyday realities."¹⁷⁸ This statement contemplates that

171. See *Nat'l Cable & Telecomms. Ass'n*, 125 S. Ct. at 2699-712 (demonstrating statement by engaging in *Chevron* analysis).

172. See *id.* (deferring to FCC interpretation after applying *Chevron* analysis).

173. Compare *Nat'l Cable & Telecommunications Ass'n*, 125 S. Ct. at 2699 (concluding *Chevron* applied to FCC's interpretation of "telecommunications service"), with *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1132 (concluding circuit precedent controlled), *rev'd sub nom.* *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

174. See 47 U.S.C. § 151 (2000) (pending legislation S. 1753, 109th Cong. (1st Sess. 2005)) (granting power to FCC to administer Communications Act); 47 U.S.C. § 154(i) (2000) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

175. See *Declaratory Ruling*, 17 F.C.C.R. 4798, 4855 ¶ 115 (2002) (citing provisions which grant statutory authority to FCC for actions taken in *Declaratory Ruling*). These two factors satisfy the *Mead* doctrine which limits the scope of *Chevron's* applicability. For a discussion of *Mead*, see *supra* notes 137-42 and accompanying text.

176. See *Nat'l Cable & Telecommunications Ass'n*, 125 S. Ct. at 2699-700 (rejecting respondents' argument against applicability of *Chevron*).

177. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (describing *Chevron's* two part test). For a further discussion of *Chevron*, see *supra* notes 130-36 and accompanying text.

178. See *Chevron*, 467 U.S. at 865-66 (describing agency as appropriate body to make policy determinations). Further, the *Chevron* Court noted that an agency could "rely upon the incumbent administration's views of wise policy to inform its judgments." *Id.* at 865.

agency policy, and therefore action in conformity therewith, will shift as everyday realities change and potentially conflict with previous practice.¹⁷⁹ Indeed, in *Chevron* the Court deferred to an EPA interpretation of the Clean Air Act which reversed its previous position.¹⁸⁰

The dissent takes issue with the majority's conclusion that the term "offer," as used in the definition of "telecommunications service," is ambiguous.¹⁸¹ Both sides phrase the debate in terms of whether the products at issue are functionally integrated or functionally separate.¹⁸² The dissent focuses on the consumers' view, which Justice Scalia assessed by asking "what other products cable-modem service substitutes for in the marketplace."¹⁸³ In Justice Scalia's view, cable modem service replaces dial-up or DSL service so the consumer perceives it in the same way as those services.¹⁸⁴ Therefore, he reasons that because dial-up and DSL service require a customer to purchase both a physical connection and an ISP to access the Internet, consumers necessarily view cable modem service as offering a physical connection to the Internet separate from any computing functionality.¹⁸⁵ As a result, cable modem service

179. *See id.* at 865-66 (acknowledging that as members of executive branch it is appropriate for agencies to "resolv[e] . . . competing interests . . . in light of everyday realities"). The Court in *Chevron* noted that "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64.

180. *See id.* at 857-58 (discussing change in EPA interpretation resulting from new administration taking office).

181. *See Nat'l Cable & Telecomms. Ass'n*, 125 S. Ct. at 2713 (Scalia, J., dissenting) (arguing that FCC's interpretation of Communications Act is "implausible"). Justice Scalia stated, "[t]he first sentence of the FCC ruling under review reads as follows: 'Cable modem service provides high-speed access to the Internet, as well as many applications or functions that can be used with that access, over cable system facilities.'" *Id.* (quoting *Declaratory Ruling*, 17 F.C.C.R. 4798, 4799 ¶ 1 (2002)). Justice Scalia asserted that the analytic problem is not what the term "offer" means, but the identity of what is being offered. *See id.* at 2714. Justice Scalia believes the relevant question is "whether the individual components in a package . . . possess sufficient identity to be described as separate objects of the offer, or whether they have been so changed by their combination with the other components that it is no longer reasonable to describe them in that way." *Id.* Ultimately, Justice Scalia concluded that the telecommunications component of cable modem service "retains such ample independent identity that it must be regarded as being an offer." *Id.* at 2714-15.

182. *See id.* at 2705, 2714 (noting majority and dissenting opinions defining issue as whether product is functionally integrated or separate).

183. *Id.* at 2715 (analyzing replacement products for cable modem service).

184. *See id.* (distinguishing functional operation of DSL and dial-up from cable modem service, and asserting customers view them similarly).

185. *See id.* (describing consumers' perception of broadband Internet access platforms).

necessarily “offers” “telecommunications” and is a “telecommunications service” under the language of the statute.¹⁸⁶

In response, the majority notes the dissent’s analysis underscores the ambiguity it described because the term “offer” can refer to either an integrated finished product or a package of functionally separate components.¹⁸⁷ The majority states the question turns “not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the [FCC] to resolve in the first instance.”¹⁸⁸

The majority’s position here is more persuasive because it recognizes that the agency, and not the courts, should resolve the issue.¹⁸⁹ As the majority noted, because the term “offer” can mean two different things, “the [Communications Act] fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering.”¹⁹⁰ Consequently, the FCC has the responsibility of resolving this ambiguity, and that resolution deserves deference under *Chevron* if it is a permissible construction.¹⁹¹

V. IMPACT

The Supreme Court’s reversal of the Ninth Circuit’s decision and conclusion that cable modem service is an “information service” revives the FCC’s *Declaratory Ruling*.¹⁹² The Supreme Court also affirmed the FCC’s authoritative role to interpret laws within its area of expertise.¹⁹³ According to *Chevron*, the agency is the appro-

186. See *Nat’l Cable & Telecomms. Ass’n*, 125 S. Ct. at 2718 (“After all is said and done . . . it remains perfectly clear that someone who sells cable-modem service is ‘offering’ telecommunications.”).

187. See *id.* at 2705 (addressing dissents analysis).

188. *Id.*

189. See *id.* at 2712 (concluding questions resolved in *Declaratory Ruling* are “technical, complex, and dynamic” (quoting *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.* 534 U.S. 327, 339 (2002))). Thus “[t]he [FCC] is in a far better position to address these questions than we are.” *Id.*

190. *Id.* at 2705.

191. For a discussion of *Chevron*’s presumption in favor of agency’s filling statutory ambiguities, see *supra* notes 130-36 and accompanying text.

192. See *Nat’l Cable & Telecomms. Ass’n*, 125 S. Ct. at 2712 (reversing Ninth Circuit decision vacating *Declaratory Ruling* to extent it classified cable modem service as “information service”).

193. See *id.* (“Nothing in the Communications Act or the Administrative Procedure Act makes unlawful the Commission’s use of its expert policy judgment to resolve these difficult questions.”); see also Kandutsch, *supra* note 18, at 48 (asserting real significance is in upholding FCC’s authority to interpret statutes it administers). For a further discussion of *Chevron* and an agency’s role in interpreting statutes it administers, see *supra* notes 130-36 and accompanying text.

priate body to make policy choices when interpreting statutes under its jurisdiction.¹⁹⁴ This principle is important here because the FCC formulates a regulatory scheme to account for future broadband technologies while fulfilling its statutory obligations.¹⁹⁵

The revival of the *Declaratory Ruling* also means that cable operators providing Internet access via cable modem service will not be subject to Title II obligations.¹⁹⁶ This affirmation of the FCC's deregulatory approach implies that the owners of broadband infrastructure maintain control of their networks because they do not *have* to share their infrastructure.¹⁹⁷ Conversely, independent, unaffiliated ISPs lose because they require these same infrastructures to deliver their services to consumers in the marketplace.¹⁹⁸ Because ISPs can no longer rely on the possibility that cable modem service providers will be subject to open access to the facilities they require, they lose significant bargaining power when negotiating broadband carriage agreements with cable operators and telephone companies.¹⁹⁹

One commentator suggests this result returns balance to the marketplace.²⁰⁰ It is argued that if the Supreme Court had affirmed the Ninth Circuit, resulting in open access requirements for cable modem providers, it would result in a "government-mandated advantage in what would otherwise be a market-based negotiation."²⁰¹ The commentator further argues that because ISPs, like

194. For an explanation of *Chevron* and an agency's role in interpreting statutes it administers, see *supra* notes 130-36 and accompanying text.

195. See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1125 (9th Cir. 2003) (noting that 1996 Act was enacted to deal with emerging technologies). The Ninth Circuit said, "Congress has addressed the burgeoning market for advanced computer services in the Telecommunications Act of 1996." *Id.* (citations omitted). The 1996 Act sought to "provide a 'pro-competitive, de-regulatory national policy framework,' designed to promote the 'deployment of advanced telecommunications and information technologies to all Americans by opening all telecommunications markets to competition.'" *Id.* (quoting H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.)).

196. See *Declaratory Ruling*, 17 F.C.C.R. 4798, 4802 ¶ 7 (2002) (classifying cable modem service as "interstate information service").

197. See *Kandutsch*, *supra* note 18, at 48 (asserting primary beneficiaries are cable companies who do not need to share their broadband infrastructure).

198. See *id.* (asserting ISPs lose out because they are dependent on ability to lease existing facilities to sell their services to consumers).

199. See *id.* (asserting ISPs bargaining position is weakened).

200. See Sonia Arrison, *Commentary: X Marks the Start of Broadband Reform*, TECHNEWSWORLD, July 1, 2005, <http://www.technewsworld.com/story/44319.html> (opining Supreme Court decision is "good for consumers" and will result in "much-needed" broadband policy reform).

201. *Id.* (asserting "when government starts picking winners and losers in the marketplace, consumers suffer").

Brand X, are re-sellers of cable service and do not own lines, they do not actually introduce more competition into the broadband marketplace.²⁰²

In addition, classifying cable modem service as an information service appears to limit the scope of local regulatory authority over such services.²⁰³ For example, regulatory requirements and fees that local franchising authorities impose on cable operators apply only to cable service.²⁰⁴ Moreover, the jurisdiction of local franchise authority does not appear to extend to “video programming or other information services.”²⁰⁵

Local franchising authorities in many communities have attempted to place conditions on cable franchise grants.²⁰⁶ A limitation on local authority would place regulatory jurisdiction over cable broadband Internet service solely in the FCC’s hands, who could then determine nationally whether to pursue open access policies for cable modem service.²⁰⁷ By centralizing power with the FCC, it can formulate and proceed with a uniform regulatory ap-

202. *See id.* (arguing it appears ISPs create competition because to most people the “retail v. ownership structure is unclear” in broadband market). The commentator also notes that the FCC’s recent proceedings to reclassify DSL as an information service are “encouraging” for what is currently a “regulatory . . . mess . . . from the standpoint of a ‘level playing field.’” *Id.* Another commentator even states that ISPs have limited relevance in the broadband context because users connect directly to the Internet without any need for an ISP (in contrast to dial-up service). *See* Kandutsch, *supra* note 18, at 48 (noting questionable relevance of ISPs in broadband era).

203. *See* Aronowitz, *supra* note 75, at 903 (“LFAs negotiate rates and service improvements before granting cable providers access to the local market. But . . . LFAs are not authorized to negotiate terms for cable Internet access because cable modem service is not a cable service, and is therefore not subject to the LFA authority.”).

204. *See, e.g.*, 47 U.S.C. § 542(b) (2000) (setting franchise fees imposed on cable operators as percentage of revenue derived from providing “cable services”).

205. *Id.* § 544(b)(1) (defining scope of local franchise authorities jurisdiction). This section provides that:

In the case of any franchise granted after the effective date of this subchapter, the franchising authority, to the extent related to the establishment or operation of a cable system –

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 546 of this title), may establish requirements for facilities and equipment, but may not, except as provided in subsection (h) of this section, establish requirements for video programming or other information services[]

Id. Further, the exception for subsection (h) applies to a notice requirement for changes “in channel assignment or in the video programming service provided over any such channel.” *Id.* § 544(h).

206. *See* Duffy, *supra* note 90, at 1261 (listing areas across nation that mandated open access requirements as part of AT&T merger approval process).

207. *See id.* at 1277-80 (asserting secondary effect of information service classification is avoidance of situation in which cable modem service providers would

proach, instead of patchwork regulations that change at geographic boundaries.²⁰⁸ As the broadband market develops, “the FCC should maintain the authority to address novel questions, not municipalities that deal with such issues only on an ad hoc basis.”²⁰⁹

Remaining unanswered is whether or not the FCC can or will impose regulatory requirements on cable modem service pursuant to its Title I ancillary jurisdiction.²¹⁰ The Supreme Court expressly acknowledged the existence of this authority and that the FCC “remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.”²¹¹ In fact, in the *Declaratory Ruling*, the FCC indicated it was continuing to examine the extent to which Title I authority should be exercised to regulate facilities based providers of interstate information services.²¹²

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potentially be “subject to highly divergent regulations from one community to the next”).

208. *See id.* at 1277-78 (noting chaos would ensue if each of 30,000 individual local franchising authorities had its own regulatory structure for broadband (citing William Kennard, Chairman Fed. Comm’n, Speech before the Nat’l Cable Television Ass’n: The Road Not Taken: Building a Broadband Future for America, Remarks Before the National Cable Television Association, (June 15, 1999), available at <http://www.fcc.gov/Speeches/Kennard/spwek921.html>)).

209. *Id.* at 1255 (asserting that granting jurisdiction to FCC has benefits “beyond the . . . fact that the Communications Act counsels such a result”).

210. *See Declaratory Ruling*, 17 F.C.C.R. 4798, 4842 ¶ 77 (2002) (“Given our classification [o]f cable modem service as an interstate information service, we now seek comment on whether the [FCC] should exercise its Title I authority here with regard to the provision of cable modem service.”).

211. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2708 (2005) (noting FCC’s authority to continue regulation of cable modem service providers under Title I). The Court addressed this in response to Respondents’ argument that the Communications Act requires regulating cable companies as common-carriers because similar to telephone companies who offer Internet access cable companies own the facilities they use to provide cable modem service. *See id.* at 2707-08. The court disagreed noting that the differential treatment resulted from a policy choice by the FCC, not the language of the Communications Act. *See id.* at 2708.

212. *See Declaratory Ruling*, 17 F.C.C.R. at 4842 ¶¶ 78-79 (requesting comment related to extent to which FCC should exercise Title I authority and any explicit statutory provisions or expressions of Congressional goals that would be furthered by exercise of Title I authority).

