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# Brand X and the Wireline Broadband Report and Order: The Beginning of the End of the Distinction Between Title I and Title II Services

J. Steven Rich

*Paul, Hastings, Janofsky & Walker LLP*

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# ***Brand X and the Wireline Broadband Report and Order: The Beginning of the End of the Distinction Between Title I and Title II Services***

**J. Steven Rich\***

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\*J. Steven Rich is an associate in the Telecommunications Practice Group in the Washington, D.C. office of Paul, Hastings, Janofsky & Walker LLP. Mr. Rich received his J.D., *cum laude*, from the Indiana University School of Law-Bloomington in 1998 and received his B.A., *cum laude*, from Missouri State University. The Author wishes to thank Tara K. Giunta of Paul, Hastings, Janofsky & Walker LLP for her comments on this Article, as well as her ongoing support and guidance. The Author accepts full responsibility for all errors or omissions contained herein. The views expressed in this Article are the Author's own and do not necessarily reflect those of the firm or its clients.

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## I. INTRODUCTION

At the time of writing this Article in early fall 2005, the ink is barely dry on the Supreme Court's decision in *Brand X*, in which the Court upheld a 2002 ruling by the Federal Communications Commission ("FCC" or "Commission") that cable modem service is properly classified as an information service and does not involve a separate offering of telecommunications service.<sup>1</sup> However, both houses of Congress and the FCC have already reacted in the form of proposed legislation<sup>2</sup> and a *Report and Order*,<sup>3</sup> respectively, in an effort to expand the deregulatory approach taken by the Commission in its *Declaratory Ruling* on cable modem service,<sup>4</sup> which the Supreme Court upheld.<sup>5</sup>

This Article will examine the development of the FCC's distinction between common carrier services regulated pursuant to Title II of the Communications Act of 1934, as amended ("Act"), and those regulated—if at all—pursuant to the Commission's ancillary jurisdiction under Title I of the Act.<sup>6</sup> This Article will trace the evolution of this distinction from the *Computer Inquiry*<sup>7</sup> line of decisions through the *Stevens Report*,<sup>8</sup> the Telecommunications Act of 1996,<sup>9</sup> *Brand X*,<sup>10</sup> and the recent *Wireline Broadband Report and Order*.<sup>11</sup> This Article will conclude that the

1. Nat'l Cable & Telecomm. Ass'n v. *Brand X* Internet Serv., 125 S. Ct. 2688, 2706–08 (2005).

2. See *Ensign Bill*, *infra* Part IV.C.

3. See *Wireline Broadband Report and Order*, *infra* Part IV.B.

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

5. *Brand X*, 125 S. Ct. 2688, 2702.

6. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.).

7. Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, *Tentative Decision*, 28 F.C.C.2d 291, para. 20 (1970) [hereinafter *Computer I Tentative Decision*], modified by *Final Decision and Order*, 28 F.C.C.2d 267 (1971).

8. Federal-State Joint Board on Universal Service, *Report to Congress*, 13 F.C.C.R. 11501 (1998) [hereinafter *Stevens Report*].

9. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

10. *Brand X*, 125 S. Ct. 2688.

11. Appropriate Framework for Broadband Access to the Internet over Wireline

*Wireline Broadband Report and Order* may be vulnerable to reversal on appeal and will suggest some of the policy considerations that the Commission may wish to consider if this order is remanded.

## II. EVOLUTION OF THE BOUNDARIES BETWEEN REGULATED AND UNREGULATED SERVICES

### A. *Basic Versus Enhanced Services: The Computer Inquiry Line of Decisions*

Nearly forty years ago, the FCC first faced the issue of whether and how to regulate the provision of data processing services by common carriers. The Commission recognized, even at that time, that applying traditional economic regulation to data processing services might stifle the growth of the then-nascent computer industry.<sup>12</sup> In fact, as early as 1970, the FCC found in the *Computer I* proceeding that “the offering of data processing services is essentially competitive and that, except to the limited extent hereinafter set forth, there is no public interest requirement for regulation . . . of such activities.”<sup>13</sup> At the same time, the Commission also recognized that, given the growing interdependence of telecommunications and data processing, control by regulated common carriers over bottleneck facilities could give such entities an opportunity to cross-subsidize their services, thereby gaining an unfair advantage in the data processing industry.<sup>14</sup>

As a result of its concerns regarding cross-subsidy and unfair competition, the FCC undertook in *Computer I* what would today— notwithstanding the Commission’s statement in the above paragraph—hardly be considered “limited” regulation of data-processing activities by common carriers. Under the rules adopted in *Computer I*, the FCC elected to forbear from regulating data-processing services and to allow common carriers<sup>15</sup> to provide such services through affiliates.<sup>16</sup> However, such affiliates were subject to rigid structural separation requirements and were

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Facilities; Universal Services Obligations of Broadband Providers, *Report and Order and Notice of Proposed Rulemaking*, FCC 05-150, <http://ftp.fcc.gov/FCC-05-150A1.pdf> [hereinafter *Wireline Broadband Report and Order*].

12. *E.g.*, *Computer I Tentative Decision*, *supra* note 7, para. 23.

13. *Id.* para. 20.

14. *Id.* para. 25.

15. This true except for AT&T and its affiliates, which the FCC concluded were prohibited by a consent judgment from entering into the data processing industry. *Id.* para. 24 (citing *United States v. Western Electric Co.*, consent judgment, 13 RR 2143, 1956 Trade Cas. 71, 134 (D.N.J. 1956)).

16. *Id.* paras. 36–37.

strictly prohibited from providing services to affiliated common carriers, even on an arm's-length basis.

The Commission distinguished regulated communications services from unregulated data processing services by defining data processing as "[t]he use of a computer for the processing of information as distinguished from circuit or message-switching."<sup>17</sup> "Processing involves the use of the computer for operations which include, *inter alia*, the functions of storing, retrieving, sorting, merging and calculating data, according to programmed instruction."<sup>18</sup> Anticipating that both common carriers and providers of data processing services would provide hybrid services containing elements of communications and data processing, the Commission adopted a test for hybrid services that focused on the dominant characteristic of the overall package offering. Where a package consisting primarily of data-processing features contained communications elements that were "an integral part of and as an incidental feature" of the data processing, then the Commission determined that forbearance was appropriate with respect to the entire service.<sup>19</sup> Conversely, the FCC found that hybrid services that were "essentially communications" should be subject to Title II regulation.<sup>20</sup>

By the late 1970s, technological advances in the computer industry had significantly blurred the boundaries drawn in *Computer I*. In particular, computing applications no longer resided exclusively on large mainframe computers, but also ran on mini- and microcomputers that allowed the decentralization of data processing operations.<sup>21</sup> In light of such developments, the FCC undertook the *Computer II* proceeding to reevaluate its regulatory framework governing the provision of computer processing services via common carrier telecommunications facilities.<sup>22</sup>

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17. *Id.* para. 15(a).

18. *Computer I Tentative Decision, supra* note 7, para. 15(a).

19. Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, *Final Decision and Order*, 28 F.C.C.2d 267, para. 31 (1971).

20. *Id.* para. 32.

21. See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384, para. 1 (1980) [hereinafter *Computer II Final Decision*] (observing that "dramatic advances" in technology had "permitted fabrication of mini-computers, microcomputers, and other special purpose devices" that were capable of duplicating many capabilities previously available only on large, centralized computer systems), *modified on recon., Memorandum Opinion and Order*, 84 F.C.C.2d 50 (1980) [hereinafter *Computer II Reconsideration Order*], *further modified, Memorandum Opinion and Order on Further Reconsideration*, 88 F.C.C.2d 512 (1981), *aff'd sub nom., Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

22. *Computer II Final Decision, supra* note 21, para 1.

In *Computer II*, while the Commission retained the notion of distinguishing between regulated, traditional common carrier services and unregulated computer processing services, it developed what was, at the time, a more workable distinction between the two. It defined “basic service” as “the common carrier offering of transmission capacity for the movement of information.”<sup>23</sup> On the other hand, “enhanced service combine[d] basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.”<sup>24</sup> Put differently, the provision of the “pipe” by a common carrier would be subject to Title II regulation while applications carried over such pipe would not.

In *Computer II*, the FCC abolished the requirement that common carriers form separate subsidiaries for the provision of enhanced services except with respect to AT&T, which the Commission found to pose a substantial threat to competition.<sup>25</sup> The Commission also found that AT&T’s offering of enhanced services and customer premises equipment through a structurally separate subsidiary would not violate the 1956 *Western Electric* consent decree.<sup>26</sup> In the Third Computer Inquiry, the FCC replaced its structural separation requirements with nonstructural safeguards, such as comparably efficient interconnection, open network architecture, and nondiscrimination requirements.<sup>27</sup>

## B. *The Telecommunications Act of 1996*

Section 8(b) of the Telecommunications Act of 1996 (“1996 Act”) added several key definitions to Section 3 of the Communications Act of 1934. While the fundamental distinctions between enhanced services and basic services remained, these terms were replaced with information services and telecommunications services, respectively. These terms derive from, and closely track, the definitions contained in the *Modification of*

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23. *Id.* para. 5.

24. *Id.*

25. *Id.* para. 12. Note that in the *Computer II Final Decision*, the FCC applied the structural separation requirements to both GTE and AT&T. However, the Commission decided upon reconsideration that the costs of these requirements outweighed their benefits with respect to GTE and retained structural separation requirements only for AT&T. *Computer II Reconsideration Order*, *supra* note 21, para. 66.

26. *Computer II Final Decision*, *supra* note 21, para. 13.

27. Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 F.C.C.2d 958, paras. 3–6 (1986), *vacated and remanded*, 905 F.2d 1217 (9th Cir. 1990), *remanded to* 118 P.U.R.4th 419 (1990).

*Final Judgment* that governed the Bell Operating Companies in the aftermath of the breakup of the former AT&T monopoly.<sup>28</sup>

First, the 1996 Act defined "information service" as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information 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."<sup>29</sup> The 1996 Act's legislative history shows that Congress did not contemplate a radical change in the way in which the Commission distinguishes between services that are subject to Title II regulation and those that are not. To the contrary, the Conference Committee stated that new subsection (pp) of the 1996 Act "defines 'information service' similar to the . . . Commission definition of 'enhanced services.' The Senate intends that the Commission would have the continued flexibility to modify its definition and rules pertaining to enhanced services as technology changes."<sup>30</sup>

The 1996 Act defined "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."<sup>31</sup> The 1996 Act in turn defined the term "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."<sup>32</sup> The

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28. *United States v. AT&T*, 552 F. Supp. 131, 335-38 (D.D.C. 1982) [hereinafter *Modification of Final Judgment*], *aff'd sub nom.*, 460 U.S. 1001 (1983).

29. Compare 47 U.S.C. § 153(20) (2000), with *Modification of Final Judgment*, which defines "information service" as:

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service 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.

*Modification of Final Judgment*, *supra* note 28, at 335.

30. JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. REP. NO. 104-458 (1996) (Conf. Rep.), [www.vortex.com/privacy/tel-96.rpt](http://www.vortex.com/privacy/tel-96.rpt) [hereinafter JOINT EXPLANATORY STATEMENT].

31. Compare 47 U.S.C. § 153(46) (2000), with *Modification of Final Judgment*, at 337 (defining "telecommunications service" as "the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities.").

32. Compare 47 U.S.C. § 153(43) (2000), with *Modification of Final Judgment*, which defines "telecommunications" as:

the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of electromagnetic transmission . . . including all

Conference Committee intended the definition of “telecommunications service” to include “commercial mobile service (‘CMS’), competitive access services, and alternative local telecommunications services to the extent that they are offered to the public or to such classes of users as to be effectively available to the public.”<sup>33</sup> Notably, the examples cited by the Conference Committee are all services that either provide, or substitute for, access to the public switched telephone network (“PSTN”).

The Conference Committee also indicated that Congress intended the definition of “telecommunications service” to include only “those services and facilities offered on a ‘common carrier’ basis . . . .”<sup>34</sup> This statement, together with the above list of examples of telecommunications services, shows the following: (1) Congress intended telecommunications services to be the equivalent of basic services under *Computer II*; and (2) Congress envisioned that this term would describe only services provided by entities already subject to Title II regulation or those that choose to act as a common carrier.

### III. INITIAL DIVERGENT TREATMENT OF BROADBAND INTERNET ACCESS SERVICES

#### A. *The Stevens Report*

Over the years, communications services in the United States have evolved from a luxury good to an essential service. During the course of this evolution, the Commission developed policies and regulations designed to assure that even the poorest citizens had access to telecommunications services. The 1996 Act sought to replace the myriad, implicit forms of universal service support that existed at the time with a mechanism that would be explicit, competitively neutral, and able to withstand the local competition that was envisioned in the 1996 Act. As universal service contributions under the 1996 Act were to be payable only with respect to telecommunications, in 1997 Congress required that the FCC issue a report to Congress describing the effect of certain new definitions contained in the 1996 Act on universal service support.<sup>35</sup>

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instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.

*Modification of Final Judgment, supra* note 28, at 336–37.

33. JOINT EXPLANATORY STATEMENT, *supra* note 30.

34. *Id.*

35. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 623, 111 Stat. 2440, 2521–22 (1998).



The FCC responded to its congressional mandate in 1998 with what is popularly known as the *Stevens Report*.<sup>36</sup> In addressing the definitional issues, the Commission first found that Congress intended information services and telecommunications services to be mutually exclusive terms. The Commission disagreed with the position advanced by Senators Stevens and Burns that the term "telecommunications carrier" includes "anyone engaged in the transmission of 'information of the user's choosing,'"<sup>37</sup>

The text of the 1996 Act provided part of the basis for the Commission's determination that information service and telecommunications service are mutually exclusive categories. If a service provider offers telecommunications (i.e., "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received . . . ."<sup>38</sup>), the Commission reasoned that such a service must necessarily exclude the provision of an information service, since an information service by definition includes some "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and [such term] includes electronic publishing . . . ."<sup>39</sup> Further, the definition of information service states that such a service is provided via telecommunications, suggesting that telecommunications services are distinguishable from information services.

The Commission also examined the legislative history and concluded that the drafters of the House and Senate bills had viewed telecommunications and information services as mutually exclusive.<sup>40</sup> Notably, earlier versions of the House bill and the Senate Report had explicitly stated that the term telecommunications service excludes information services.<sup>41</sup> While Senators Stevens and Burns attached a great deal of weight to the fact that this language had been deleted in later versions of the respective documents, the Commission found that the Senate Report omitted this language because of a manager's amendment that was "intended to clarify that carriers of broadcast or cable services are not intended to be classed as common carriers under the Communications Act to the extent they provide broadcast services or cable services."<sup>42</sup> Numerous other senators supported the Commission's view that Congress

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36. *Stevens Report*, *supra* note 8.

37. *Id.* para. 35. (citation omitted).

38. *Id.*

39. *Id.* para. 30.

40. *Stevens Report*, *supra* note 8, para. 44.

41. *Id.*

42. *Id.* (citations omitted).

had intended telecommunications services and information services to be mutually exclusive.<sup>43</sup> Finally, the Commission observed, in what was perhaps the strongest justification for its interpretation, that the *Computer II* framework had been in place for sixteen years at the time the 1996 Act was adopted and that the interpretation advanced by Senators Stevens and Burns would result in a greatly increased level of regulation on services theretofore unregulated.<sup>44</sup> In light of the procompetitive, deregulatory goals espoused by the 1996 Act, such a reading of Congress's intent would be at best a strained interpretation, and at worst, completely at odds with the 1996 Act's purpose.

### *B. The Advanced Services Memorandum Opinion and Order*

In 1998, the Commission issued the *Advanced Services Memorandum Opinion and Order* in response to six petitions proposing actions the Commission could take to speed the deployment by wireline carriers of advanced services such as digital subscriber line ("DSL")-based Internet access.<sup>45</sup> The Commission noted the goals of Congress with respect to the 1996 Act, such as encouraging innovation and investment and opening markets to competition. It indicated that it was adopting the *Advanced Services Memorandum Opinion and Order* in furtherance of these goals.<sup>46</sup>

Before the Commission could address the issue of what statutory obligations would apply to the provision of "advanced services," which the Commission defined as "wireline, broadband telecommunications services, such as services that rely on digital subscriber line technology . . . and packet-switched technology," the Commission first had to address the proper regulatory classification of advanced services.<sup>47</sup> The Commission observed that its application of the 1996 Act's definitions would determine the statutory obligations to which advanced services would be subject.<sup>48</sup>

The Commission concluded that "advanced services are telecommunications services," noting that it had repeatedly found specific packet-based services to be basic services (i.e., pure transmission

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43. *Id.* paras. 37–38.

44. *Id.* paras. 45–46.

45. Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 F.C.C.R. 24011 (1998) [hereinafter *Advanced Services Memorandum Opinion and Order*]. The following entities filed the petitions that led to the adoption of the *Advanced Services Memorandum Opinion and Order*: Bell Atlantic Corp.; U S WEST Comm., Inc.; Ameritech Corp.; Alliance for Public Tech.; Ass'n for Local Telecomm. Serv. ("ALTS"); and, Southwestern Bell Tel. Co., Pacific Bell, and Nevada Bell (filing jointly). *Id.*

46. *Id.* paras. 1–2.

47. *Id.* para. 3 (citations omitted).

48. *Id.* para. 35.

services).<sup>49</sup> In support of its conclusion, the Commission observed that DSL and packet switching are “simply transmission technologies” and briefly summarized its treatment of transmission services as basic services under the *Computer Inquiry* line of decisions.<sup>50</sup> The Commission further explained that it had previously found the 1996 Act’s definitions of telecommunications services and information services to be equivalent to the *Computer II* definitions of basic services and enhanced services, respectively.<sup>51</sup>

The Commission found that “[a]n end-user may utilize a telecommunications service together with an information service, as in the case of Internet access.”<sup>52</sup> However, the Commission also determined that it would treat these services separately (i.e., the DSL-enabled transmission path would be regulated as a telecommunications service, and the Internet access would be an information service).<sup>53</sup> The Commission explicitly acknowledged its determination in the *Stevens Report* that the terms telecommunications service and information service are mutually exclusive,<sup>54</sup> strongly suggesting that the Commission saw no conflict between this finding and the notion that a service package including both transmission and Internet access could be viewed as containing two separate and distinct services.

The Commission’s decision in the *Advanced Services Memorandum Opinion and Order* to classify DSL as a telecommunications service closely followed the reasoning of its *Computer Inquiry* decisions and did not generate substantial controversy at the time. For example, neither the petitioners nor any of the commenters challenged the Commission’s finding that DSL service was properly classified as a telecommunications service.<sup>55</sup> Moreover, none of the Commissioners who took part in the decision questioned this finding.<sup>56</sup>

In its four subsequent orders in the *Advanced Services* proceeding, the Commission did not question its decision to classify DSL service as a

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49. *Id.*

50. *Advanced Services Memorandum Opinion and Order*, *supra* note 45, para. 35.

51. *Id.* para. 35 n.56.

52. *Id.* para. 36.

53. *Id.* (citations omitted).

54. *Id.* para. 34 n.50.

55. *Id.* para. 36 (citation omitted).

56. *See id.* at 24117–22 (concurring statements of Comm’rs Ness, Tristani, and Powell); *see also* Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Order on Remand*, 15 F.C.C.R. 385 (1999) (Comm’r Harold Furchtgott-Roth, approving in part & dissenting in part) (disagreeing with classification of advanced service as “telephone exchange service,” but not questioning the decision to classify such service as a “telecommunications service”) [hereinafter *Advanced Services Remand Order*].

telecommunications service.<sup>57</sup> To the contrary, in the *Advanced Services Remand Order*, the Commission expressly affirmed its prior conclusion that DSL services constitute telecommunications services.<sup>58</sup>

### C. The Declaratory Ruling on Cable Modem Service

Section 706 of the 1996 Act directed the Commission to initiate a notice of inquiry within 30 months of the enactment of the 1996 Act, and regularly thereafter, concerning the deployment of advanced telecommunications capabilities in the United States.<sup>59</sup> In response to its statutory mandate, the Commission released its *First Section 706 Inquiry* in 1998 and raised the issue of what regulatory treatment should apply to cable modem service.<sup>60</sup> While the issue arose several times from 1999 to 2000, the Commission did not adopt a regulatory classification for cable modem service that would apply on an industry-wide basis.<sup>61</sup> In 2000, following its *Second Section 706 Inquiry*,<sup>62</sup> the Commission decided that it must address the appropriate classification of cable modem service and released a *Notice of Inquiry* the same year that sought information concerning this service.<sup>63</sup> Two years after issuing the *Notice of Inquiry* regarding cable modem service, the Commission released its *Declaratory Ruling* for the purpose of resolving the status of this service under the Act and determining how to regulate cable modem service, if at all.<sup>64</sup> The Commission stated that three principles guided it in reaching its conclusions: (1) “encourag[ing] the ubiquitous availability of broadband to

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57. See Deployment of Wireline Services Offering Advanced Telecommunications Capability, *First Report and Order and Further Notice of Proposed Rulemaking*, 14 F.C.C.R. 4761 (1999); Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Second Report and Order*, 14 F.C.C.R. 19237 (1999); Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Third Report and Order*, 14 F.C.C.R. 20912 (1999); *Advanced Services Remand Order*, *supra* note 56.

58. *Advanced Services Remand Order*, *supra* note 56, at 388.

59. Telecommunications Act of 1996, Pub. L. No. 104-104, § 706(b), 110 Stat. 56, 153 (1996).

60. See Inquiry Concerning the Deployment of Adv. Telecomm. Capability to All Americans in a Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Notice of Inquiry*, 13 F.C.C.R. 15280, paras. 4–8 (1998).

61. See *Declaratory Ruling*, *supra* note 4, para. 2.

62. See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Second Report*, 15 F.C.C.R. 20913 (2000).

63. Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities, *Notice of Inquiry*, 15 F.C.C.R. 19287, para. 1 (2000).

64. See *Declaratory Ruling*, *supra* note 4, para. 1.

all Americans"; (2) allowing "broadband services [to] exist in a minimal regulatory environment that promotes investment and innovation in a competitive market"; and (3) "seek[ing] to create a rational framework for the regulation of competing services that are provided via different technologies and network architectures."<sup>65</sup>

The Commission devoted a great deal of attention in the *Declaratory Ruling* to the commercial arrangements between and among cable system operators and Internet Service Providers ("ISPs"), noting that some cable operators have historically chosen to make capacity available to unaffiliated ISPs while others have not.<sup>66</sup> The Commission also described the various functions that cable operators often include in their service offerings, such as "protocol conversion, IP address number assignment, domain name resolution through a domain name system ("DNS"), network security, and caching."<sup>67</sup> After applying the relevant statutory definitions to its understanding of the commercial arrangements for and technical elements of cable modem service, the FCC determined that "cable modem service as currently provided is an interstate information service, not a cable service, and that there is no separate telecommunications service offering to subscribers or ISPs."<sup>68</sup>

The Commission's finding that Internet access provided to end-user consumers via cable modem service constitutes an information service did not engender much controversy. Such services clearly consist of more than the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."<sup>69</sup> Rather, the DNS services, protocol conversion, and other elements of cable modem service offer a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information."<sup>70</sup>

However, the Commission's determination that cable modem service does not involve a separate offering of telecommunications service was, and is, controversial. With respect to the cable modem service offered to end-user customers, the Commission found that the transmission capacity—the portion of cable modem service that can be considered

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65. *Id.* paras. 4–6.

66. *See generally id.* paras. 15–30 (showing that cable operators such as AOL Time Warner, Comcast, and AT&T had followed a multiple-ISP approach despite greater technical complexities in doing so, while Cox, Charter, and Cablevision each followed a business model involving the use of only one ISP).

67. *Id.* para. 17.

68. *Id.* para. 33.

69. 47 U.S.C. § 153(43) (2000).

70. 47 U.S.C. § 153(20) (2000).

telecommunications—is not separately offered and that this pipe therefore does not meet the statutory definition of telecommunications service.<sup>71</sup> As for the offering of pure transmission capacity on a wholesale basis to unaffiliated ISPs, the Commission noted that the cable operators making such capacity available had decided to deal with particular ISPs on an individual basis and therefore had determined on a case-by-case basis the terms on which they would deal with such ISPs.<sup>72</sup> In light of the FCC's interpretation of telecommunications service as equivalent to a common carrier service—which had been upheld by the U. S. Court of Appeals for the D. C. Circuit—the Commission found that, to the extent cable operators were making transmission capacity available to unaffiliated ISPs, they were not offering it to the public, but rather were doing so on a private carrier basis.<sup>73</sup>

The Commission's conclusion regarding the regulatory classification of cable modem service as provided to subscribers was more consistent with both *Computer II* and the 1996 Act. For example, an enhanced service under *Computer II* necessarily combined a basic service with computer processing.<sup>74</sup> Moreover, the Commission noted that under the 1996 Act, an information service is by definition provided via telecommunications.<sup>75</sup> The decision to classify cable modem service as an information service finds further support in the Commission's previous finding that information services and telecommunications services are mutually exclusive categories, as well as the fact that the Commission had never applied Title II regulation to cable operators.

Alternatively, the Commission's finding that the offering of transmission capacity to unaffiliated ISPs is not a telecommunications service is somewhat more difficult to justify. In many respects, such a service closely resembles the offering of capacity on the network of a wireline carrier. Moreover, there is clearly a tautological element in the Commission's reasoning. The Commission found that cable modem service was not properly classified as a telecommunications service largely due to the fact that the service was not provided on a common carrier basis.<sup>76</sup> In

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71. *Declaratory Ruling*, *supra* note 4, paras. 39–40.

72. *Id.* para. 55.

73. *Id.*; *see also* *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999).

74. *See supra* Part II.A. One distinction between services provided under the *Computer II* rules and cable modem service, which is not trivial, is that the enhanced service provider would not normally be a facilities-based carrier, but would instead lease capacity from AT&T for the purpose of selling value-added services. *See Brand X*, 125 S.Ct. at 2716–17 (Scalia, J., dissenting).

75. *Declaratory Ruling*, *supra* note 4, para. 39 (citations omitted).

76. *See Brand X*, 125 S.Ct. at 2714–18, n.7 (Scalia, J., dissenting).

so doing, the Commission reacted more to the business decisions the cable companies had already made and relationships those companies had already formed, than it focused on whether or not policy considerations warranted imposing Title II regulation on cable operators.

Notwithstanding the above weakness underlying the Commission's reasoning in the *Declaratory Ruling*, there are at least two reasons why the Commission was correct in its result. First, Title II regulation was intended from the beginning to govern traditional, monopolistic, wireline telephone companies. Despite the fact that cable modem service was becoming available on a commercial basis by late 1996,<sup>77</sup> nothing in the 1996 Act suggests that Congress intended to apply common carrier regulation to cable operators. Second, and more importantly, legal precedent enshrines the principle that a service provider is only a common carrier if it either chooses to hold itself out to the public as such or if it is under a legal obligation to do so.<sup>78</sup> Consequently, since the Commission determined that cable operators had not held themselves out to the public as common carriers and also found no legal obligation for cable operators to act as common carriers, it acted consistently with *NARUC I* in reaching its conclusion that transmission capacity for cable modem service is not a telecommunications service because it is not provided on a common carrier basis.<sup>79</sup>

#### IV. BRAND X AND IMMEDIATE AFTERMATH

##### A. *The Decisions*

##### 1. Court of Appeals Decision

Brand X Internet Services and other ISPs appealed the *Declaratory Ruling*, arguing that cable modem service comprises both a telecommunications service component and an information service component.<sup>80</sup> A three-judge panel of the Ninth Circuit Court of Appeals agreed with the appellants, finding that the Court's prior interpretation of the 1996 Act controlled its review of the *Declaratory Ruling*.<sup>81</sup>

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77. See Cable Digital News, Cable Modem Info Center, <http://www.cabledigitalnews.com/cm/cmic1.html> (last visited Mar. 14, 2006).

78. See National Ass'n of Reg. Utils. Comm'rs v. FCC, 525 F.2d 630, 640 (D.C. Cir.), *superceded by statute as recognized by* 78 F.3d 842 (2d Cir. 1996).

79. See *Declaratory Ruling*, *supra* note 4, para. 55 (explaining the historic distinction between common carriage and private carriage, and finding that AOL Time Warner was "determining on an individual basis whether to deal with any particular ISP and [was] in each case deciding the terms on which it [would] deal with any particular ISP.").

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

81. *Id.* at 1132.

The court of appeals had previously addressed the issue of how to classify cable modem service in *AT&T Corp. v. City of Portland*, which it decided in 2000 in the absence of any definitive FCC pronouncements on the subject.<sup>82</sup> The *Portland* decision addressed the issue of whether local cable franchising boards could require AT&T to provide open access to its broadband facilities as a condition of local approval of the AT&T and TCI merger. The local authorities had premised their actions on the position that cable modem service is a cable service.<sup>83</sup> The court of appeals noted that a cable service under the 1996 Act is a one-way transmission of programming to subscribers generally and found that cable modem service did not fit this description; therefore, local authorities could not directly regulate cable modem service through their franchising authority.<sup>84</sup> The court went on to find that the pipeline provided by the cable modem operators was a telecommunications service and that the Internet access was an information service.<sup>85</sup> Because Section 541(b)(3)(B) of the 1996 Act provides that a franchising authority may not impose any requirement that has the effect of limiting the provision of telecommunications by a cable operator, the court concluded that the local franchise authorities were prohibited from conditioning the franchise transfer on AT&T's provision of open access to its broadband network.<sup>86</sup> In its decision, the court of appeals first described the *Portland* decision in detail and stated that its determination of the proper regulatory classification of cable modem service had been necessary to that decision, so the classification has precedential value.<sup>87</sup> In considering whether the *Declaratory Ruling* had any effect on the validity of its holding in *Portland*, the court noted that only an en banc panel would have the authority to issue a decision that overruled the precedent set in *Portland*.<sup>88</sup>

The court of appeals relied on its 1988 decision *Mesa Verde Construction Co. v. Northern California District Council of Laborers* in addressing the proper weight to give to the FCC's decision.<sup>89</sup> In *Mesa Verde*, the court had held that "if a panel finds that an [agency] interpretation of [its statute] is reasonable and consistent with [the law], the panel may adopt that interpretation even if circuit precedent is to the

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

83. *Id.* at 875.

84. *Id.* at 876–77.

85. *Id.* at 878.

86. *See id.* at 878–79.

87. *Brand X*, 345 F.3d at 1130.

88. *Id.*

89. *Id.* (citing *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988)).



contrary.”<sup>90</sup> However, the Court had also qualified the holding in *Mesa Verde* by stating that an earlier panel decision could only be disregarded “where the precedent constituted deferential review of [agency] decisionmaking.”<sup>91</sup> The court in *Portland* was not faced with an agency’s construction of a statute that could require deference under the *Chevron* doctrine.<sup>92</sup> Rather, the court had to interpret what the court considered the plain language of the statute. The *Brand X* court found that *Mesa Verde* did not apply and that the court was therefore bound to follow *Portland*.<sup>93</sup> Accordingly, the court of appeals vacated the FCC’s determination that cable modem service was not a telecommunications service.

## 2. Supreme Court Decision

The Supreme Court released its eagerly anticipated *Brand X* decision in late June 2005. In a 6–3 opinion written by Justice Thomas, the Court disagreed with the Ninth Circuit’s application of the *Chevron* doctrine.<sup>94</sup> The Court overturned the court of appeals decision, holding that the *Declaratory Ruling* was a lawful construction of the 1996 Act under *Chevron* and the Administrative Procedure Act.<sup>95</sup>

The Court first examined the question of whether it should apply the *Chevron* doctrine to its review of the *Declaratory Ruling*. While the court of appeals had found that its interpretation of the 1996 Act in *AT&T Corp. v. City of Portland* trumped the FCC’s later interpretation in the *Declaratory Ruling*, the Court noted that nothing in *Portland* indicated that the court of appeals had found the statute unambiguous.<sup>96</sup> Observing that “*Chevron*’s premise is that it is for agencies, not courts, to fill statutory gaps,” the Court found that the court of appeals had erred in finding that *Portland* foreclosed the FCC from interpreting an ambiguous statute and that the court of appeals should instead have applied a deferential *Chevron* analysis to the *Declaratory Ruling*.<sup>97</sup>

Having determined that the *Chevron* framework applied to its review of the *Declaratory Ruling*, the Court then turned to the two-step procedure established by *Chevron*. The first part of the *Chevron* test is whether Congress has “directly address[ed] the precise question at issue.”<sup>98</sup> In

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90. *Mesa Verde*, 861 F.2d at 1136.

91. *Id.*

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

93. *Brand X*, 345 F.3d at 1131.

94. *Brand X*, 125 S.Ct. at 2699–2702.

95. *Id.* at 2695.

96. *Id.* at 2701–02.

97. *Id.* at 2700–01.

98. *Id.* at 2702 (quoting *Chevron*, 467 U.S. at 843).

applying this part of the *Chevron* analysis to the *Declaratory Ruling*, the Court found that “[t]he term ‘offer’ as used in the definition of telecommunications service . . . is ambiguous” because this definition does not clearly indicate whether a company that offers an integrated broadband Internet service is thereby offering a telecommunications service or is merely using telecommunications.<sup>99</sup> The Court looked to the language of the 1996 Act and the ordinary usage of the word “offer” in reaching this conclusion.<sup>100</sup> Further, the Court found that “[t]he Commission’s traditional distinction between basic and enhanced service also supports the conclusion that the Communications Act is ambiguous about whether cable companies ‘offer’ telecommunications with cable modem service” and noted that expanding Title II regulation to cover cable operators would have effected a major shift in Commission policy.<sup>101</sup>

In the second step of the *Chevron* analysis, a court defers to the agency’s interpretation if that construction is “a reasonable policy choice for the agency to make.”<sup>102</sup> The Court found that the Commission had acted reasonably and rejected the two central arguments made by the respondents. First, the Court found that the Commission’s interpretation of the 1996 Act would not allow communications providers to evade common carrier regulation simply by bundling a telecommunications service with an information service, despite the respondents’ arguments to the contrary.<sup>103</sup> The Court also concluded that the Commission had acted reasonably in finding that cable modem service is more than a transparent transmission path from an end-user perspective, and the Court noted the various functions provided by cable operators through a cable modem service, particularly DNS service.<sup>104</sup>

Finally, after completing the above *Chevron* analysis, the Court addressed the issue of whether the Commission’s decision to classify cable modem service differently from DSL service was “arbitrary and

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99. *Brand X*, 125 S.Ct. at 2704 (citations omitted). Justice Scalia strongly disagreed with the majority’s reasoning on this point and in a well-reasoned dissent argued that [t]he relevant question is whether the individual components in a package being offered still 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.* at 2714 (Scalia, J. dissenting). However, while Justice Scalia’s argument is persuasive, the fact that nine Supreme Court justices could not agree on the proper interpretation of the 1996 Act in itself supports the notion that the statute is ambiguous.

100. *Id.* at 2704–05.

101. *Id.* at 2706–07 (citations omitted).

102. *Id.* at 2702 (quoting *Chevron*, 467 U.S. at 845).

103. *Id.* at 2708.

104. *Id.* at 2709–10.

capricious” as respondent MCI had argued.<sup>105</sup> The Court stated that “the Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change.”<sup>106</sup> Finding that the Commission had chosen to classify DSL service as a telecommunications service rather than an information service “based on . . . history, rather than on an analysis of contemporaneous market conditions,”<sup>107</sup> the Court found “nothing arbitrary about the Commission’s providing a fresh analysis” with respect to the cable industry.<sup>108</sup> However, the Court cautioned that it was expressing “no view on how the Commission should, or lawfully may, classify DSL service.”<sup>109</sup>

### B. *The Wireline Broadband Report and Order*

After the Supreme Court released the *Brand X* decision, the Commission immediately turned its attention to the issue of whether DSL service, the primary broadband alternative to cable modem service, also should be classified as an information service. The FCC had tentatively concluded in 2002 that DSL service should be so classified, but had not acted on its *Notice of Proposed Rulemaking*<sup>110</sup> in that proceeding pending resolution of the legal challenges to the *Declaratory Ruling*.<sup>111</sup> In August 2005, the Commission released the *Wireline Broadband Report and Order*, in which it adopted its previous, tentative conclusion that DSL service is appropriately classified as an information service.<sup>112</sup>

The Commission had little difficulty finding that DSL is an “information service.”<sup>113</sup> Specifically, the Commission found that DSL service involves “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . .”<sup>114</sup> The Commission had made the same finding in the *Declaratory Ruling*<sup>115</sup> with respect to cable modem service, a conclusion that was not challenged in *Brand X*. As the

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105. *Brand X*, 125 S.Ct. at 2710.

106. *Id.*

107. *Id.* at 2711.

108. *Id.*

109. *Id.*

110. See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Notice of Proposed Rulemaking*, 17 F.C.C.R. 3019 (2002).

111. *Declaratory Ruling*, *supra* note 4.

112. *Wireline Broadband Report and Order*, *supra* note 11.

113. See *id.* paras. 12–17.

114. *Id.* para. 13.

115. See *supra* Part III.C; see also *Declaratory Ruling*, *supra* note 4, at 4821–22; *Brand X*, 125 S.Ct. at 2711 (noting that the Commission’s finding that cable modem service is an “information service” was not challenged).

characteristics of cable modem service that resulted in its classification as an information service are virtually indistinguishable from the characteristics of DSL service from a functional, end-user perspective, it is unlikely that this portion of the *Wireline Broadband Report and Order* will cause much controversy.

However, the key conclusion of the *Wireline Broadband Report and Order* is as controversial, or more so, than the *Declaratory Ruling*. Relying primarily on changed marketplace conditions, most notably the advent of intermodal competition, the Commission held that wireline carriers will no longer be required to “separate out the underlying transmission from wireline broadband Internet access service and offer it on a common carrier basis.”<sup>116</sup> Rather, the Commission concluded that carriers should be able to choose when to offer broadband transmission capacity and have a one-year transition period to decide whether to offer such capacity on a private carrier basis (i.e., not subject to Title II regulation) or as a common carrier.<sup>117</sup> Only in the latter case—where a carrier makes an affirmative choice to offer capacity on a common carrier basis—would the carrier be deemed to be offering telecommunications services.<sup>118</sup>

Interestingly, in reaching the decision that DSL transmission service would only be a telecommunications service to the extent carriers choose to offer it as such, the Commission failed to acknowledge the opposite conclusion it had reached in the *Advanced Services Order* and limited its discussion of that order to a single mention in a footnote.<sup>119</sup> One could easily conclude in reading the *Wireline Broadband Report and Order* that the Commission had never made an affirmative determination that DSL Internet access service is a telecommunications service and that *Brand X* and the *Declaratory Ruling* were the only recent, relevant precedent. The question of whether DSL service includes a separate offering of a telecommunications service is a more complex issue than whether cable modem service includes such an offering and requires a slightly different analysis. Notably, unlike cable operators, it is likely that providers of facilities-based DSL service have “made a stand-alone offering of transmission for a fee . . . to such classes of users as to be effectively

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116. *Wireline Broadband Report and Order*, *supra* note 11, para. 42.

117. *Id.* paras. 86–89.

118. *See id.* para. 90.

119. *See Wireline Broadband Report and Order*, *supra* note 11, para. 12 n.32 (stating that the Commission had “not been entirely consistent” with respect to the question of whether the “categories of ‘information service’ and ‘telecommunications service’ are mutually exclusive” without noting that in the *Advanced Services Memorandum Opinion and Order*, the Commission had in fact found these categories to be mutually exclusive but had also determined that DSL Internet access service consists of two separate services, an information service and a telecommunications service).

available directly to the public.”<sup>120</sup> Further, the wireline carriers that offer DSL service also offer traditional voice service (i.e., telecommunications services) directly to the public *using the same lines*.<sup>121</sup> The Supreme Court summarized the rationale underlying the *Declaratory Ruling* as follows: “[s]een from the consumer’s point of view, the Commission concluded, cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access[.]”<sup>122</sup> Significantly, a DSL customer uses the same wire not only for DSL service, but also for voice service.<sup>123</sup>

In the *Wireline Broadband Report and Order*, the Commission did not fully address these distinctions and omitted any indication that in the *Declaratory Ruling* it had deemed the fact significant that cable modem service does not include an offering of telecommunications to ISPs.<sup>124</sup> While the Commission did not expressly indicate that it was giving decisional significance to this fact, one of the primary reasons the Commission gave for its decision in the *Declaratory Ruling* was that cable operators had not made stand-alone offerings of transmission for a fee, either to end users or to “such classes of users as to be effectively available directly to the public.”<sup>125</sup> The latter statement strongly suggested that the offering of capacity to ISPs on a common carrier basis would have entailed a different result (i.e., that cable modem service does include a separate offering of telecommunications service).

Given the high stakes surrounding the struggle for access by ISPs and competitive local exchange carriers (“LECs”) to incumbent LECs’

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120. See *Declaratory Ruling*, *supra* note 4, para. 40 (stating that the Commission is not aware of any cable modem service provider that has charged a transmission fee).

121. See, e.g., Verizon Web site, Frequently Asked Questions – DSL, at Technology 1–5, <http://www22.verizon.com/forhomedsl/channels/dsl/learnmore/faqs/> (last visited Mar. 14, 2006).

122. *Brand X*, 125 S.Ct. at 2703 (citing *Declaratory Ruling*, *supra* note 4, para. 39). The accuracy of this statement is debatable at best: a consumer uses the same “high-speed wire” for cable service as for cable modem service. In fact, a cable customer who elects not to purchase cable modem service at all, but whose cable system has been upgraded to allow the offering of such service, would *never* use this high-speed wire in connection with the information-processing capabilities provided by Internet access service.

123. Admittedly, one could argue that the “high-speed wire” in the DSL context includes only the high-frequency portion of the loop. However, as noted, the consumer uses the same physical wire for both DSL and traditional voice services. Further, consumers whose local loops have been conditioned to allow the provision of DSL, but choose not to subscribe to this service, use the line only for the transmission of telecommunications services.

124. *Declaratory Ruling*, *supra* note 4, para. 48.

125. See *id.* para. 40.

broadband facilities, it is all but certain that the *Wireline Broadband Report and Order* will be challenged in court. The Commission, apparently contemplating such a possibility, stated that it “is free to modify its own rules at any time to take into account changed circumstances.”<sup>126</sup> However, a court may set aside such an action upon a finding that the agency acted in a manner that was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>127</sup> When an agency changes an existing policy, it must “supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”<sup>128</sup> The parties that appeal the *Wireline Broadband Report and Order* will likely argue that the Commission failed to engage in reasoned decision making because it failed even to mention its previous classification of DSL services, much less provide evidence of the changes since 1999 that necessitated a change in course. Such arguments are not without merit.

The Commission chose not to exercise its forbearance authority under Section 10 of the 1996 Act, expressing confidence in its decision to reclassify DSL services.<sup>129</sup> Had the Commission elected to do so, it could have forborne from exercising Title II regulation on DSL services upon a finding that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.<sup>130</sup>

Given the Commission’s previous decision in the *Advanced Services Memorandum Opinion and Order*, together with its apparent reluctance to acknowledge, much less explain, its change of course, a decision to forbear from exercising Title II regulation on DSL services arguably could have

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126. *Wireline Broadband Report and Order*, *supra* note 11, para. 81 (citing *Brand X*, 125 U.S.Ct. at 2699).

127. *Motor Vehicle Mfrs. Ass’n, Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (quoting 5 U.S.C. § 706(2)(A)).

128. *Id.* at 42.

129. *Wireline Broadband Report and Order*, *supra* note 11, paras. 81–82; *see also* 47 U.S.C. § 160 (2000). Note that the Commission did elect to forbear from imposing tariff requirements on those carriers that choose to offer DSL-based transmission capacity on a common carrier basis. *Wireline Broadband Report and Order*, *supra* note 11, paras. 91–94.

130. 47 U.S.C. § 160(a)(1)–(3) (2000).

been a safer approach in some respects. If the *Wireline Broadband Report and Order* is reversed on appeal, the Commission may wish to consider developing a record concerning the extent to which intermodal competition exists, particularly with respect to emerging technologies. Significantly, if the Commission determines that robust intermodal competition exists in the market for broadband services, it arguably could find that incumbent LECs are not required to offer identical prices for DSL transmission capacity to unaffiliated competitive LECs or ISPs. Notably, nothing in the Act prohibits price discrimination by common carriers, only “unjust or unreasonable” discrimination.<sup>131</sup> Since the FCC’s primary goal is to protect consumers, not competitors, one could argue that price discrimination is not unjustly or unreasonably discriminatory if such practices have no adverse impact on consumers due to the availability of competing forms of broadband Internet access. Other issues to consider in a forbearance analysis would include the extent to which incumbent LECs can be shown to have deferred investment due to regulatory considerations and economic analyses of requirements, such as interconnection and universal service contribution on the respective market shares of DSL service providers and cable modem service providers.

Whichever course of action the Commission takes regarding DSL, and regardless of whether or not the *Wireline Broadband Report and Order* is affirmed on appeal, the FCC will need to be mindful of the possibility that, as more and more services migrate to an Internet protocol-based platform, certain services it currently regulates as telecommunications services, particularly voice services, will likely one day be reduced to mere applications provided as part of a DSL package. As the Commission has already determined that the information service and telecommunications service elements of DSL are inseparable, it will be hard-pressed to develop a reasoned explanation of why an application riding on the network can be separated and regulated. Such convergence would undoubtedly strain the already burdened universal service mechanism past its breaking point and will also raise important issues in other areas of regulation, such as disability access.

### C. *The Ensign Bill*

On July 27, 2005, exactly one month after the Supreme Court decided *Brand X*, Senator John Ensign of Nevada introduced a bill “[t]o establish a market driven telecommunications marketplace, to eliminate government managed competition of existing communication service, and to provide

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131. 47 U.S.C. § 202(a) (2000).

parity between functionally equivalent services.”<sup>132</sup> While published reports suggest that the bill is not likely to pass,<sup>133</sup> its proposed elimination of the distinction between Title I and Title II services may foreshadow the direction of future legislation.

In the Ensign Bill, Basic Telephone Service (“BTS”) would retain a distinct regulatory classification. BTS would include single-line, flat-rate voice services within a local calling area, with access to 911, with touch-tone dialing, and with access to long distance.<sup>134</sup> The definition of BTS would exclude interexchange wireline service.<sup>135</sup>

The Ensign Bill would create a new category of service, a “communications service,” defined as:

any service enabling an end user to transmit, receive, store, forward, retrieve, modify, or obtain, voice, data, image, or video communications using any technology, including—(i) copper; (ii) coaxial cable; (iii) optical fiber; (iv) terrestrial fixed wireless; (v) terrestrial mobile wireless; (vi) satellite; (vii) power lines; or (viii) successor technologies; and . . . does not include (i) television or radio broadcasting; and (ii) any service that is not provided to the public or to a substantial portion of the public.<sup>136</sup>

The bill defines “broadband communications service” as a communications service with a capacity of greater than 64 kilobits per second.<sup>137</sup>

The new term “communications service” would essentially collapse the categories of “telecommunications service” and “information service” into a single category. Such services would be subject only to regulation in areas such as consumer protection, E911, consumer proprietary network information, access for persons with disabilities.<sup>138</sup> Notably, this would result in some additional regulation on services such as voice over Internet protocol even as the regulatory burden is reduced for traditional, circuit-switched voice services. This would help reduce the opportunities for regulatory arbitrage under the current regulatory scheme as noted above in Part IV.B.

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132. S. 1504, 109th Cong. Preamble (2005) [hereinafter *Ensign Bill*].

133. COMM. DAILY, Aug. 30, 2005, at 9.

134. *Ensign Bill*, *supra* note 132, § 4(a)(1).

135. *Id.*

136. *Id.* § 4(a)(4).

137. *Id.* §4(a)(2). Other parties will undoubtedly comment upon the curious definition of broadband as anything above 64 kbps in what is otherwise a forward-thinking piece of legislation.

138. *Id.* § 8(a).



## V. CONCLUSION

As described in this Article, radical changes in communications technologies and the competitive environment over the past forty years have forced the Commission to rethink the manner in which it distinguishes between traditional, common carrier transmission services and newer applications that make use of such services. The *Declaratory Ruling* marked a conscious decision to refrain from imposing legacy economic regulation on new services that bore considerable resemblances to those services provided by the former monopoly carriers. Following the Supreme Court's affirmance of the *Declaratory Ruling* in *Brand X*, the Commission made a well-intentioned, but perhaps legally flawed, effort to level the playing field for similar services provided over different platforms. While some defenders of the *Wireline Broadband Report and Order* contend that this order promotes greater certainty for incumbent LECs, the great irony is that these carriers will likely face more uncertainty over the coming months, or years, in which the inevitable litigation surrounding this order runs its course. Looking forward, it is essential that the FCC and Congress both act in a manner that is even-handed and promotes competition, but also creates certainty for service providers while protecting consumers and advancing important social goals such as continued affordability of basic telephone service.