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# From *AT&T* to *Brand X*: Declining Checks and Balances in an Increasingly Complex Marketplace

ROSS G. HICKS\*

## I. INTRODUCTION

When President Clinton signed the Telecommunications Act of 1996,<sup>1</sup> he used the same pen that President Eisenhower used to sign legislation for the Interstate Highway system into law. It was a fitting analogy. In the same way that the interstate road system was expected to open up interstate commerce, the Internet system was expected to open up electronic commerce. In signing the 1996 legislation into law, President Clinton and Congress were updating the regulatory and legislative framework to adapt it to the new realities and opportunities provided by the Internet. The legislation noted that broadband access to the Internet was critical to the continued economic vitality of the United States.<sup>2</sup>

In contrast to the success of the Interstate Highway system, however, broadband adoption in the United States has lagged behind that of other developed nations.<sup>3</sup> Against this backdrop, in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>4</sup> the Supreme Court held that, under the Telecommunications Act, cable modem providers are not required to provide access to other Internet Service Providers (ISPs), despite the fact that local telephone providers had been required to provide access to third party Digital Subscriber Line (DSL) providers. As a result, the goal of increased broadband adoption now falls squarely on the unfettered administrative choices made by the FCC.

Over and above the direct implications to the high speed Internet access industry, *Brand X* raises questions regarding the level of deference Article III courts afford administrative agencies where the issues involve

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1. Pub. L. No. 104-104, 110 Stat. 56 (1996).

2. *See id.* at 56, 77.

3. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD BROADBAND STATISTICS (2006), <http://www.oecd.org/sti/ict/broadband> [hereinafter OECD BROADBAND STATISTICS]. For example, Canada, Sweden, Korea, and Denmark all out-rank the United States in broadband subscribers per 100 habitants. *Id.*

4. 545 S. Ct. 2688 (2005).

extraordinary technical complexity. Traditionally, agencies have been entitled to significant deference in the resolution of cases and controversies that require a high level of technical sophistication and expertise.<sup>5</sup> To that end, Congress routinely delegates authority to agencies to promulgate rules and adjudicate disputes that require expertise in narrow technical fields because of the expertise assumed to be available to agency personnel.<sup>6</sup> Likewise, in recognition of this expertise, courts routinely defer to agency adjudications.

The *Brand X* case, however, poses the question of whether such routine deference has gone too far. The FCC's interpretation of the statute's terminology not only contorts its meaning but also may conflict with Congress's regulatory framework. Congress promulgated significant legislation for the entry ramps to the information superhighway, but relatively little legislation for the superhighway itself.<sup>7</sup> The FCC followed Congress's structure by initially imposing significant regulation for the DSL entry ramps.<sup>8</sup> By contrast, however, the FCC imposed very little regulation on the functionally equivalent "cable modem" entry ramps.<sup>9</sup> Although legitimate policy reasons may have led the FCC to make that "fresh analysis" of the need for regulation of all high speed entry ramps, such a new analysis should be confined to the legislative framework. If the new economic realities of the analysis require making a choice outside the legislative framework, the FCC should be required to seek legislative changes. By allowing the FCC to "define" away key concepts of the legislative framework, the Court has weakened the checks and balances that would be in place had the FCC been forced to seek additional legislative approval to reform the relevant provisions of the Telecommunications Act.

This note examines the administrative law implications of the *Brand X* decision. First, this note reviews the history and legal context framing the decision.<sup>10</sup> Then, this note examines the decision itself from a textual, historical, and policy perspective.<sup>11</sup> It is concluded that, while agencies offer welcome expertise for resolving complex questions, deference to agency expertise should not trump Congressional guidance to the contrary.<sup>12</sup>

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5. See generally ALFRED C. AMAN & WILLIAM T. MAYTON, ADMINISTRATIVE LAW ch. 1 (2d ed. 2001).

6. *Id.* at 11.

7. See 47 U.S.C. §§ 201-202 (2006).

8. *Brand X*, 125 S. Ct. at 2711.

9. *Id.*

10. *Infra* Parts II, III, IV.A.

11. *Infra* Parts IV.B-D.

12. *Infra* Part V.

## II. BACKGROUND

This Part examines the key statutory, judicial, and administrative decisions made prior to the *Brand X* decision in order to provide the context for this case.

### A. *Telecommunications Antitrust History*

For much of the twentieth century, telephone service was heavily regulated, with long distance service under the authority of the FCC and local calls under the jurisdiction of state regulators.<sup>13</sup> Such a regulatory regime made sense since virtually every aspect of the telephone infrastructure was managed by a single corporation, namely American Telephone and Telegraph (AT&T).<sup>14</sup> While some rural areas were serviced by small companies, those companies had to connect to the AT&T infrastructure to provide long distance service.<sup>15</sup> Given the monopoly of the AT&T system, the wisdom of the regulatory environment was seldom questioned since competition would incur the cost of duplication of copper wiring to each household.<sup>16</sup>

In the 1970s, however, corporations demanded increasing telecommunications capabilities that AT&T could not readily supply.<sup>17</sup> Out of the conflict between the long standing monopoly and the unmet demand for telecommunications capabilities was borne an antitrust lawsuit.<sup>18</sup> The lawsuit culminated in a consent decree in 1982.<sup>19</sup> This decree divided the telephone industry into local telephony (which continued to be a monopoly) and long distance telephony (which was now subject to competition).<sup>20</sup>

Not surprisingly, AT&T's skirmishes with the Department of Justice did not first surface until the 1970s. Initial concerns of monopolistic effects commenced almost 100 years earlier and periodically surfaced through to the early seventies.<sup>21</sup> In 1934, with AT&T controlling more

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13. See generally PAUL VALLE-RIESTRA, TELECOMMUNICATIONS (2002).

14. See *id.* at 10.

15. See *id.* at 11.

16. PATRICIA AUFDERHEIDE, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST 15-18 (1999).

17. See generally GERALD W. BROCK, TELECOMMUNICATIONS POLICY FOR THE INFORMATION AGE 111-16 (1994).

18. See VALLE-RIESTRA, *supra* note 13, at 10-11.

19. *United States v. W. Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983) [hereinafter *AT&T Reorganization Plan Case*] (setting out the approved AT&T reorganization plan); *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) [hereinafter *AT&T Consent Decree Case*] (setting out the terms of the consent decree).

20. VALLE-RIESTRA, *supra* note 13, at 11.

21. In the late 1800s, upon the expiry of its patents, AT&T permitted only those independent telephone companies who were licensed by AT&T to connect into its nationwide telephone system. Following a period when AT&T acquired many of these independent telephone companies, the Depart-

than eighty percent of the telephones, telephone lines, and long distance lines, Congress acted decisively.<sup>22</sup> It both enacted the Communications Act and created the FCC.<sup>23</sup> Such dominance by AT&T continued until 1969 when MCI, then a small telecommunications company, offered to provide a price-competitive, value-added long distance service for business clients using microwave technology.<sup>24</sup> Although required to provide local connectivity for long distance companies such as MCI,<sup>25</sup> AT&T obstructed the development of such competing long distance services.<sup>26</sup> With the demand for specialized data transmission services outstripping AT&T's ability to provide such services, the need for further regulatory enforcement resulted in yet another antitrust lawsuit in 1974.<sup>27</sup> This lawsuit ended in the famous consent decree mandating the breakup of AT&T by 1984.<sup>28</sup>

This event, at a time of the Reagan revolution,<sup>29</sup> also marked a dividing line between an FCC whose regulatory mode was primarily one of implicit fairness and an FCC whose regulatory mode was now concerned with economic efficiency.<sup>30</sup>

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ment of Justice launched an antitrust lawsuit in 1912, which resulted in an agreement with AT&T that required AT&T to seek prior approval when acquiring an independent telephone company. Concerns surfaced again in the thirties, but World War II forestalled any government responses. However, in 1949, accusations of anti-competitive transfer pricing policies resulted in a further agreement that prohibited forays by AT&T into the nascent computer fields. *See id.* at 9-11.

22. *Id.* at 10.

23. *Id.* In addition to creating the FCC and establishing regulations for telephone services, the Communications Act of 1934 also established a regulatory framework for radio services, and enacted provisions regarding judicial review and enforcement. *See S. REP. NO. 104-23*, at 2 (1995).

24. The FCC, by a four-three vote, approved MCI's application as an experiment rather than as an initial implementation of a new pro-competitive telecommunications policy. *See BROCK, supra* note 17, at 113-15.

25. The successful MCI application triggered additional demand for such services, accompanied by additional applications to provide similar services. In 1971, the FCC responded by reaching its Specialized Common Carrier (SCC) decision, a new pro-competitive policy, that required AT&T to provide local interconnectivity with companies such as MCI. *See id.* at 116-17.

26. VALLE-RIESTRA, *supra* note 13, at 11.

27. *See id.*

28. *AT&T Consent Decree Case*, 552 F. Supp. 131, 131 (D.D.C. 1982).

29. "The election of Ronald Reagan in 1980 was a watershed for deregulatory action, in part because executive appointments to agencies and courts accomplished change that would have been far more difficult to enact in a legislative arena." AUFDERHEIDE, *supra* note 16, at 26.

30. The prior regulatory notion of "implicit fairness" can best be captured by the requirements of universal telephone service, telephone connectivity without discrimination, and subsidized telephone service for the poor. Such requirements were often used to justify maintaining the highly regulated system served by the AT&T monopoly. By contrast, the new regulatory mode of economic efficiency focused on the public interest being better served by replacing paternalistic governmental regulation with deregulated marketplace efficiency. Moreover, proponents of the new pro-competitive regulatory approach were quick to remind opponents that the purpose of the 1934 Communications Act was to offer "a rapid, efficient . . . communication service with adequate facilities at reasonable charges." *See id.* at 22-28.

### B. *The Telecommunications Act of 1996*

In 1996, Congress, in its first significant revision of the 1934 Communications Act, further deregulated telecommunications by opening both long distance and local calling markets to competition.<sup>31</sup>

The Telecommunications Act of 1996 updated the Communications Act of 1934 by encouraging the deployment of advanced telecommunications services (including broadband Internet access) through a national legislative policy of deregulation and competition.<sup>32</sup> The 1996 Act relied upon the definitions developed by the FCC in its “Computer Inquiries” findings.<sup>33</sup> These FCC findings established an architectural framework that distinguished between “basic services” (i.e., regular telephone voice calls) and “enhanced services” (i.e., data processing services).<sup>34</sup>

Congress adopted the FCC’s distinction between the two services. In the Telecommunications Act of 1996, these two services were re-named as “telecommunications services” and “information services” respectively, and definitions were provided in the legislation.<sup>35</sup> Further, “telecommunications carriers” were defined as “provider(s) of telecommunications services” and made subject to common carrier regulations that required provision of carrier services on a non-discriminatory reasonably priced basis.<sup>36</sup>

In addition to the mandatory regulatory framework noted above, Congress also provided for a “forbearance” mechanism by which the FCC could relax the stringent common carrier regulatory regime, provided certain requirements were met.<sup>37</sup> Such requirements captured various public policy and customer protection concerns.<sup>38</sup>

In summary, Congress modernized the Communications Act by establishing a regulatory regime centered on the bifurcated functional framework of telecommunications access and information services.<sup>39</sup> Telecommunications access to consumers was deemed to be susceptible to monopolistic concerns and warranted significant regulatory controls.<sup>40</sup> Information services, on the other hand, were to be left largely unregulated.<sup>41</sup>

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31. 47 U.S.C. §§ 271-272 (2000).

32. See VALLE-RIESTRA, *supra* note 13, at 12.

33. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 125 S. Ct. 2688, 2688 (2005).

34. See *id.* at 2697.

35. 47 U.S.C. § 153(20), (46) (2006).

36. *Id.* §§ 153(44), 201-202.

37. See *id.* § 160. This was the method chosen by Congress by which the FCC could relax common carrier requirements provided certain enumerated factors had been met. See S. REP. NO. 104-23, at 50 (1995).

38. 47 U.S.C. § 160 (2000).

39. *Brand X*, 125 S. Ct. at 2697.

40. See *id.* at 2696.

41. *Id.*

Using the information superhighway analogy, Congress determined that the exit/entry ramps (the telecommunications access) warranted strict regulatory controls due to the lack of competitive pressures and the likelihood of unreasonable tolls being charged.<sup>42</sup> However, mindful that sufficient competitive pressures might surface to alleviate the fear of monopolistic toll charges, Congress specified that under such circumstances regulatory controls could be lifted using the “forbearance” route.<sup>43</sup>

The importance of this distinction was apparent in the FCC’s decision that cable modem providers were not telecommunications providers and, therefore, were not subject to Title II common carrier regulations. Since the enactment of the Telecommunications Act of 1996 (and even before), the FCC began to consider where cable modem providers fit in its bifurcated regulatory structure. The first significant FCC response on this issue was published as a working paper.<sup>44</sup> The paper noted that cable modem providers claimed that cable modem Internet service fell under the cable service provisions of the Act, thus avoiding the onerous Title II common carrier requirements.<sup>45</sup> Eventually, after several years, the FCC finally issued its ruling that cable modem providers were indeed not subject to common carrier regulations, by holding that they did not provide telecommunications access.<sup>46</sup> Such a ruling triggered the chain of events leading to the *Brand X* case.

### C. Technology Development in the Telecommunications Market

In the early 1980s, the break-up of AT&T via the Department of Justice consent decree of 1982 created two distinct markets within the telecommunications industry: the local market (providing local calls) and the long distance market.<sup>47</sup> The local market remained a monopoly and was subject to significant regulation, while the long distance market was opened to competition.<sup>48</sup>

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42. *See generally id.*

43. *Id.*

44. BARBARA ESBIN, FCC, INTERNET OVER CABLE: DEFINING THE FUTURE IN TERMS OF THE PAST (1998), [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp30.pdf](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp30.pdf).

45. “Subchapter II is commonly referred to as Title II, which is the heading used in the Communications Act and its various amendments, but which is not used in the codified version of the Act.” VALLE-RIESTRA, *supra* note 13, at 15. Title II imposes a stringent regulatory regime on those entities deemed to be common carriers. For example, common carriers are required to provide service to the public at reasonable rates and without unreasonable discrimination. 47 U.S.C. §§ 201-202 (2006); ESBIN, *supra* note 44, at 89-90.

46. *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4819 (2002) [hereinafter *FCC Cable Modem Ruling*].

47. VALLE-RIESTRA, *supra* note 13, at 11.

48. *See id.*

In a similar fashion, the FCC split the telecommunications industry into two markets, but its split was based on usage.<sup>49</sup> The first market, telecommunications services, was heavily regulated.<sup>50</sup> The second market, information services (which used regular telephone technology to accomplish data processing services over distance), was not considered to be under the threat of a monopoly and thus was subject to far less regulation.<sup>51</sup>

The same dichotomy continued into the 1990s, as initial Internet usage developed using dial-up technology.<sup>52</sup> Local telephone service providers were considered telecommunications providers and the Telecommunications Act required these local providers to make their telephone wire facilities available to all ISPs that requested it.<sup>53</sup> Conversely, informational providers were not required to accommodate competitors and were free to pursue their own build out strategy without obligations to third parties.<sup>54</sup>

Availability of telecommunications facilities remained an issue as technology evolved in the 1990s. Dial-up technology is slow while Internet content and applications providers quickly demanded high speed solutions for their residential customers.<sup>55</sup> To meet that demand, the local telephone companies began to offer DSL service.<sup>56</sup> Third party DSL providers demanded and received the right to lease local telephone company lines at approved rates.<sup>57</sup> The objective of such regulation was to increase the speed of development by artificially creating a competitive situation where the number of DSL suppliers was increased beyond the single local service provider in a given area.<sup>58</sup> Despite this regulatory boost, for various reasons, DSL adoption failed to reach the desired goals.<sup>59</sup>

While the DSL technology path evolved, cable TV operators who already had wired access to residential households, developed their own strategy of providing high speed Internet access to residential consumers

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49. *Id.* at 18.

50. *See id.* at 19.

51. *See generally id.* at 18-19.

52. *See generally* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2695-97 (2005).

53. 47 U.S.C. § 251(a)(1) (2006).

54. *See Brand X*, 125 S. Ct. at 2696. The net result is that since the physical connection to a residence represented a natural monopoly, this field should be regulated to provide reasonable access to all interested parties, while informational services have little monopolistic market power merit little regulation.

55. *See* VALLE-RIESTRA, *supra* note 13, at 1-3; *see generally* FCC, Broadband Access for Consumers, <http://www.fcc.gov/cgb/consumerfacts/dsl2.html> (last visited Nov. 6, 2006) [hereinafter FCC Fact Sheet].

56. *See* VALLE-RIESTRA, *supra* note 13, at 2-3; *see generally* FCC Fact Sheet, *supra* note 55.

57. *See generally* Chris Sandlund, *Pipe Dreams*, BUSINESS WEEK ONLINE, Mar. 13, 2000, <http://www.businessweek.com/smallbiz/content/mar2000/te3670056.htm>.

58. *See generally id.*

59. *Broadband Blues*, ECONOMIST, June 21, 2001, at 62.



via cable modems.<sup>60</sup> While cable modem service is similar to DSL service functionally, there is one important difference in terms of distance limitations.<sup>61</sup> Both services provide high speed digital Internet access through the use of add-on technology to existing wires into customer homes and offices.<sup>62</sup> DSL accomplishes this result by transmitting signals as an overlay to the traditional copper telephone wires.<sup>63</sup> While high speeds can be achieved, the technology has some built-in limitations in terms of the maximum distance that a consumer can be located from the local telephone exchange.<sup>64</sup> By contrast, cable modem service technology exploits unused channels on existing cable TV wires into a consumer home and office.<sup>65</sup> This technology offers high speed service without the distance limitations of DSL.<sup>66</sup>

### III. THE *BRAND X* CASE

In the period after the enactment of the 1996 Telecommunications Act, both DSL and cable modem providers rose to the market challenge to offer high speed Internet access to the public.<sup>67</sup> DSL providers, who were typically the “Baby Bell” companies,<sup>68</sup> were subject to mandatory common carrier regulation under Title II of the Communications Act.<sup>69</sup> Accordingly, as these Baby Bell companies deployed their DSL service to the public, they were also required to provide non-discriminatory access to

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60. VALLE-RIESTRA, *supra* note 13, at 89-90; FCC Fact Sheet, *supra* note 55. The Telecommunications Act recognizes three major types of communications-related services, namely: telecommunications services, information services, and cable services. Cable services are defined as: “the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and . . . 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) (2006). Cable TV operators were traditionally regulated under the cable service regulatory provisions of the Act. However, with the provision of cable modem Internet access offerings, cable TV operators now also came under the scrutiny of the information service regulatory regime, and potentially the telecommunications service regulatory regime. *See* VALLE-RIESTRA, *supra* note 13, at 78-79. This is the crux of the *Brand X* case.

61. *See generally* VALLE-RIESTRA, *supra* note 13, at 3.

62. *See generally* *id.* at 2-3, 89-90.

63. *See id.* at 2-3.

64. *See id.* at 3.

65. *See generally* FCC Fact Sheet, *supra* note 55.

66. Similar results are being achieved and/or sought with high speed technology adapted for power line wired connectivity, wireless connectivity, and satellite connectivity into homes and offices.

67. *See generally* VALLE-RIESTRA, *supra* note 13, at 2-3, 89-90.

68. “Baby Bells” is the vernacular term for the Regional Bell Operating Companies, which are comprised of Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, Southwestern Bell Communications, and U.S. West. These companies were the local telephone companies that resulted from divestiture of AT&T, pursuant to the AT&T Reorganization Plan. *See generally id.* at 11.

69. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2696, 2710 (2005).

their own telephone wires to competing DSL providers.<sup>70</sup> Thus, Earthlink, despite not owning any wires to commercial offices or residential homes, was legitimately able to provide DSL access to the next door neighbor of a Verizon DSL customer.<sup>71</sup> Earthlink obtained the necessary “connection” or “telecommunications” component by leasing the use of Pacific Bell’s telephone wires under the mandatory Title II access obligations.<sup>72</sup>

During this same post-Telecommunications Act period, however, the FCC was silent on whether cable modem providers would also be subject to Title II common carrier regulations.<sup>73</sup> The key question was whether cable modem providers would be deemed *telecommunications* service providers (like a local telephone company provider, e.g., Verizon), *informational* service providers (like Earthlink and America Online), or both.<sup>74</sup> Finding that cable modem providers were telecommunications service providers would impose Title II common carrier obligations on them.<sup>75</sup>

Finally, in 2002, the FCC issued its declaratory ruling on third party access to cables by independent ISPs.<sup>76</sup> Under this ruling, cable modem operators were not deemed telecommunications service providers and thus were not required to provide leased access to their cables to third party internet service providers (ISPs).<sup>77</sup> The FCC’s reasoning was based on its own 1998 Universal Service Report,<sup>78</sup> which held that third party ISPs do not offer telecommunications services (i.e., do not offer connectivity) but merely use such services.<sup>79</sup> Therefore, using the same reasoning, the FCC concluded that cable modem providers, who market a “sufficiently integrated” informational service offering, also do not *offer* any telecommunications capability but merely *use* such an embedded capability.<sup>80</sup>

The net result was a paradox. DSL providers, who own their own facilities (i.e., who own the telephone wires making the connection to customers), are required to lease access to their wires to competitors, but cable

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70. *Id.* at 2710.

71. *See id.*; *see generally* Earthlink, Earthlink’s History, <http://www.earthlink.net/about/history/earthlink/> (last visited Oct. 22, 2006) [hereinafter Earthlink History].

72. *See generally* Earthlink History, *supra* note 71.

73. *Brand X*, 125 S. Ct. at 2697. It was not until September 2000 that the FCC commenced rule-making on the issue of cable modem providers. *Id.*

74. *See id.*

75. *Id.*

76. *FCC Cable Modem Ruling*, 17 F.C.C.R. 4798, 4819 (2002).

77. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2697-98 (2005).

78. *In re Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11501, 11532-33 (1998) [hereinafter *Universal Service Report*].

79. *Brand X*, 125 S. Ct. at 2697-98.

80. *Id.* at 2705. The term “sufficiently integrated” refers to the fact that a telecommunications service, as well as an informational service, is embedded within the cable modem service offering. *Id.* at 2704-05.

modem service providers are not required to lease access to their cable connections to competitors.<sup>81</sup>

In response, Brand X, a Santa Monica ISP company whose business model relied on the availability of leased access to cables connecting commercial and residential consumers, sued the FCC to overturn its ruling.<sup>82</sup> The consolidated appeals relied on two separate grounds: (1) that the rulemaking was contrary to the intent of Congress, as reflected in the Telecommunications Act; and (2) that the rulemaking was arbitrary and capricious in contravention of the Administrative Procedure Act.<sup>83</sup>

The Court of Appeals for the Ninth Circuit overturned the FCC's finding, ruling that the Ninth Circuit's prior precedent was binding on the FCC.<sup>84</sup> That precedent adopted a "best reading" standard of statutory construction for the ambiguous terms in dispute.<sup>85</sup> Applying this standard, the court determined that a cable modem service was indeed, in part, a "telecommunications service," as defined in 47 U.S.C. § 153(46).<sup>86</sup>

Quickly, cable modem operators sought and were granted certiorari by the Supreme Court.<sup>87</sup> In overturning the Ninth Circuit decision, the Supreme Court made two key rulings. First, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>88</sup> a court's precedent trumps an authorized agency interpretation only when that court finds that the statute compels a single unambiguous interpretation.<sup>89</sup> As the Ninth Circuit did not find the legislative meaning to be unambiguous, the Ninth Circuit could not therefore trump the agency decision.<sup>90</sup> Thus, the FCC ruling was entitled to deference.<sup>91</sup> Secondly, a court must honor such deference even if the agency ruling is not the best interpretation, provided the ruling is at least reasonable.<sup>92</sup>

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81. *Id.*

82. *See id.* at 2698. Note that numerous lawsuits resulted from the FCC ruling, but the Ninth Circuit was chosen by judicial lottery to hear the resulting appeals. *Id.*

83. *Id.* at 2695, 2710.

84. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003) (per curiam). The precedent relied upon by the Ninth Circuit was *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

85. The key terms that were in dispute were "telecommunications," "telecommunications service," "information service," and "cable service." The "best reading" language comes from the Supreme Court case. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2701 (2005).

86. *Brand X*, 345 F.3d at 1132.

87. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 543 U.S. 1018 (2004) (granting certiorari).

88. 467 U.S. 837, 842-44 (1984).

89. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2688 (2005).

90. *Id.* at 2701.

91. *Id.*

92. *Id.* at 2699.

The *Brand X* decision rested on the ambiguity of the terms “telecommunications,” “telecommunications service,” and “information service” in the Telecommunications Act.<sup>93</sup> Under this statutory framework, the central issue became: (1) whether cable modem suppliers unambiguously offer a telecommunications service in the same way that the Baby Bell companies such as Verizon do; or (2) whether they solely provide an information service in the same way that Earthlink and America Online do.<sup>94</sup> If it is the former, then Title II common carrier obligations would apply to the cable modem providers.<sup>95</sup>

Affirming the FCC ruling, the Supreme Court in *Brand X* determined that cable modem providers do not offer telecommunications services as defined by the Telecommunications Act, and, therefore, do not fall under the mandatory Title II common carrier regulatory environment.<sup>96</sup> Further, according to the Court, even if a colorable claim of “offer” could be made, the circumstances are sufficiently ambiguous as to require *Chevron* deference by courts to the FCC ruling.<sup>97</sup>

The Supreme Court also concluded that the FCC ruling was neither arbitrary nor capricious within the meaning of the Administrative Procedure Act, despite the clear conflict resulting between the burdensome regulatory requirements imposed on DSL providers and the modest regulatory requirements now imposed on the cable modem providers.<sup>98</sup> Instead of finding arbitrary or capricious rulemaking, the Court held that the FCC had simply undertaken a “fresh analysis” of the problem.<sup>99</sup>

With this background in mind, the next Part analyzes the reasoning of the *Brand X* decision. This Note then discusses how this may affect the future of broadband technology.<sup>100</sup>

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93. *Id.* at 2697. Telecommunications is “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.” 47 U.S.C. § 153(43) (2006). Telecommunications service is “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.” *Id.* § 153(46). Information service is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” *Id.* § 153(20).

94. *Brand X*, 125 S. Ct. at 2697.

95. *Id.*

96. *Id.* at 2695.

97. *Id.* at 2705.

98. *Id.* at 2711.

99. *Id.*

100. *Infra* Part IV.

IV. *BRAND X* ANALYSIS

Because *Brand X* involves an agency's interpretation of a statute, four distinct aspects must be analyzed: (1) the administrative procedure; (2) the text; (3) the historical context; and (4) the policy driving the decision.

A. *Chevron Background and Administrative Procedure Analysis*

In legislation, gaps often exist in the statutory coverage. These gaps may be unintentional, where foresight does not anticipate a particular fact scenario, or intentional, where Congress wishes to rely on the expertise of an agency to create detailed rules for various factual scenarios.<sup>101</sup> *Chevron* addressed this issue by determining what level of deference should be afforded an executive agency when it acts in the rulemaking capacity afforded to it by Congressional legislation.<sup>102</sup> *Chevron* held that if a statute is ambiguous and the authorized agency's clarification of that ambiguity is reasonable, then a court is required to accept the agency's determination.<sup>103</sup> *Chevron* provided a two-step process for a court to use in determining the appropriate deference to give to the agency.<sup>104</sup> It specified that the court should first consider the plain meaning of the statute in question.<sup>105</sup> If its meaning directly addresses the question at issue, then the court simply needs to rule as to whether the agency decision is consistent with that interpretation.<sup>106</sup> If, however, the court determines that the statute is ambiguous, then *Chevron* requires that the court must determine the reasonableness of the agency's decision, and defer to such an interpretation only if it is reasonable.<sup>107</sup> Of course, in the absence of a prior agency decision, the courts are free to make their own interpretation of an ambiguous statute.<sup>108</sup>

In order for an agency to rely upon *Chevron*, the agency must act within its jurisdiction,<sup>109</sup> must follow valid rulemaking procedures (including a period for public comment), and must make a reasonable inter-

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101. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

102. *Id.* at 865-66.

103. *Id.* at 843-44.

104. *Id.* at 842-43, 845.

105. *Id.*

106. *Id.* at 842-43.

107. *Id.* at 843-44.

108. *Id.* at 843. However, should the primary jurisdiction doctrine apply, then courts should require that the cause of action be heard in the relevant agency, either before or instead of, an action in court. *See United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956).

109. For example, the Internal Revenue Service can fill in gaps in the taxation statutes (i.e., Title 26) but cannot fill in gaps within the patent statutes (i.e., Title 35).

pretation.<sup>110</sup> Once it meets these requirements, the agency has broad authority.<sup>111</sup> The agency is not required to choose the best interpretation, nor may it be prevented from changing its interpretation at a later date.<sup>112</sup> However, should an agency change its interpretation, it must explain the inconsistency; an unexplained inconsistency may invoke a judicial finding of unreasonableness.<sup>113</sup> Even if a court finds an agency's decision unreasonable, the agency can cure this flaw by correcting its rulemaking process.<sup>114</sup> The agency can then promptly re-assert its old decision, this time backed by an improved process.<sup>115</sup> Thus, the sequence of an agency decision (versus a court decision) is irrelevant to the supremacy of an agency decision.<sup>116</sup> Hence, in cases where a court rules before an agency, the agency is free in a later decision to reach a different statutory interpretation from that of the court.<sup>117</sup> In cases where an agency makes an initial determination that is followed by a contrary court decision (holding that the agency decision is unreasonable), the agency is free to cure the unreasonableness by addressing the rulemaking inadequacy.<sup>118</sup> Only in a case where a court makes a finding that a statute is unambiguous is the agency prevented from making a contrary ruling.<sup>119</sup>

Consequently, under *Chevron*, administrative agencies have become extremely powerful, despite the nominal constitutional protection of separation of powers.<sup>120</sup> In situations where the regulation of fast moving technologies is covered by necessarily broad statutes and where a high level of technical sophistication and expertise is essential to making sound decisions, agencies possess both legislative (rulemaking) and executive (enforcement) powers, while simultaneously enjoying substantial immunity from judicial override.<sup>121</sup> Only when an agency decision is determined to be unreasonable, will its decision be overturned by a court of law.<sup>122</sup> Consequently, the traditional "checks and balances" protection embodied in the

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110. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

111. *Id.* at 843, 845.

112. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699-700 (2005).

113. *Id.*

114. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196, 209 (1947).

115. *Id.*

116. *Brand X*, 125 S. Ct. at 2700.

117. *Id.* at 2699-701.

118. *See Chenery*, 332 U.S. at 196, 209.

119. *Brand X*, 125 S. Ct. at 2701-02.

120. *AMAN & MAYTON*, *supra* note 5, § 13.7.2, at 481 n.47 ("the person who fleshes out the meaning of the rule is the true law-giver in the circumstances") (quoting *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987) (Easterbrook, J.)).

121. *See generally id.*

122. *Id.* § 13.7.2, at 479-80 n.42.

Constitution is limited to determinations of the “reasonableness” of the agency’s efforts to construe ambiguous statutory provisions.<sup>123</sup>

If the judicial threshold for statutory “ambiguity” is high, courts will retain a substantial role in the development of statutory interpretation.<sup>124</sup> Conversely, if the threshold for statutory “ambiguity” is set very low, an agency’s authority will be greatly expanded at the expense of substantial judicial oversight.<sup>125</sup> Congress also has a choice to make in drafting new legislation, particularly in regulating areas involving complex technology that is constantly changing in response to innovation.<sup>126</sup> Congress could attempt to minimize ambiguity by crafting narrow legislation that defines a particular unambiguous meaning. However, such a choice would likely lock in a particular field of technologies and not provide an appropriate framework that would cater to new and evolving technologies as they become available. Thus, in the telecommunications arena, it is reasonable for Congress to use broad language, albeit with some vagueness, to describe the statutory framework governing its desired scope of the regulation of current and future telecommunications technologies.

Where such broad language results in a debate as to the plain meaning of certain terms, courts “must look to the particular statutory language . . . and design of the statute as a whole.”<sup>127</sup> Consequently, a choice by Congress to use broad language that triggers a claim of ambiguity should not result in deference to an agency interpretation that is adverse to the broad intent established by Congress. “Such legislative regulations are given controlling weight unless they are . . . manifestly contrary to the statute.”<sup>128</sup> Therefore, it is difficult to rationalize the *Brand X* Court’s statement that “[a]ny inconsistency bears on whether the Commission has given a reasoned explanation for its current position, *not on whether its interpretation is consistent with the statute.*”<sup>129</sup> As a general matter, while reasoned explanations may adequately explain changing agency interpretations, such interpretations should nevertheless be confined to the limits set by the statutory framework. Even fuzzy limits distilled from broad Congressional language are nevertheless limits that should be respected by the other branches of government and, in particular, by other agencies.

Another question of administrative procedure is raised by Justice Scalia’s dissent in *Brand X*, where he states that “Article III courts do not

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123. *Id.*

124. *See generally id.* § 13.7.3 (discussing cases in which two Supreme Court Justices examine the same statutory language but have opposing determinations of ambiguity).

125. *See generally id.*

126. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

127. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

128. *Chevron*, 467 U.S. at 844.

129. 125 S. Ct. at 2711 (emphasis added).

sit to render decisions that can be reversed or ignored by Executive officers.”<sup>130</sup> As noted earlier, the *Chevron* precedent provides numerous advantages, particularly in a technocratic and dynamic industry such as telecommunications. *Chevron* enables the FCC to reach an opposing determination to that of a lower court, provided it meets the low threshold of reasonableness.<sup>131</sup> One could argue that a series of flip-flops in agency determinations is prima facie unreasonable. While that may be true, such an analysis avoids a more pressing constitutional issue.

At its simplest, *Chevron* holds that where the statute is ambiguous and the agency’s determination is reasonable, the agency, not a court, has the ultimate authority to interpret the statute.<sup>132</sup> This is in stark contrast to the traditional role of Article III courts.<sup>133</sup> The traditional role, in the absence of an agency, is for the courts to be the final arbiters in interpreting a statute. However, according to *Chevron*, where an agency is granted rule-making authority under a particular statute, a reasonable agency interpretation will trump an interpretation by a court of law.<sup>134</sup> In essence, the legislature has not only delegated the agency certain rulemaking authority (i.e., to fill in the meaning of statutory gaps) but it has also delegated the power to make final interpretations of statutory meaning.<sup>135</sup>

Justice Kennedy recognized this dilemma in *Brand X* by noting that the Supreme Court itself could rule that its interpretation was final by declaring that the meaning was now unambiguous.<sup>136</sup> Lower courts, however, lack this ability. Lower courts cannot simply declare that a statute is unambiguous where Congress has explicitly authorized the relevant agency to resolve an ambiguity. Moreover, in addition to this “finality” problem, courts are bound by *stare decisis* to provide a stable and predictable basis from which the industry and the general public may make sound choices. By contrast, *Chevron* permits, within reason, agencies to change decisions as they see fit.<sup>137</sup> While the agency’s expertise may rationally support such changed interpretations, such changes create inefficiencies by undermining public confidence in present statutory interpretations.

The above discussion addressed the generalized issues implicit within the administrative framework outlined by *Chevron*. With respect to the particular facts of *Brand X*, the key administrative process issue became

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130. *Id.* at 2720 (Scalia, J., dissenting).

131. *Id.* at 2699.

132. 467 U.S. at 843-44.

133. *See, e.g.*, U.S. CONST. art. III, §§ 1-2; *Marbury v. Madison*, 5 U.S. 137, 147 (1803).

134. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005).

135. *See id.*

136. *Id.* at 2712 (Kennedy, J., concurring) (recognizing the need to give the Supreme Court itself a way out of this constitutional predicament).

137. *See id.* at 2711.



the following: (1) whether Congress, when choosing the particular language of the Telecommunications Act, intended a complete deferral to the FCC to use its unique expertise to start with a clean slate and make rules about the regulatory environment of telecommunications; or (2) whether Congress clearly revealed its biases in the type of regulatory environment it desired for both current, as well as future, communications technologies.<sup>138</sup> The first step in resolving this question requires a textual analysis of the relevant portions of the Telecommunications Act.<sup>139</sup>

### B. *Textual Analysis*

The first step of textual analysis requires weighing the *Brand X* decision against the relevant statutory language and its requirements. Specifically, Congress requires Title II common carrier regulation of telecommunications service providers, for example, those providers who “[offer] telecommunications for a fee directly to the public . . . regardless of the facilities used.”<sup>140</sup> In turn, telecommunications is defined to be “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content.”<sup>141</sup> By contrast, the less onerous obligations of the Title I regulatory scheme apply to information service providers, for example, those who offer “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*.”<sup>142</sup> This definitional framework contains two functional blocks under scrutiny, namely a “telecommunications” functional block (i.e., the connection piece between the consumer and the Internet) and an “information” functional block (i.e., where information is modified, stored or otherwise processed).<sup>143</sup> Telecommunications providers supply the former, while information service providers supply the latter.<sup>144</sup> In spite of this statutory distinction, information service providers must use telecommunications to accomplish their mission. The statute explicitly recognizes this when it

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138. *See id.* at 2700.

139. *See infra* Part IV.B.

140. 47 U.S.C. § 153(46) (2006).

141. *Id.* § 153(43).

142. 47 U.S.C. § 153(20) (emphasis added).

143. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2696-98 (2005). The term “functional block” is not a term of art. Rather it serves to highlight the fact that Congress categorized the types of communication services based on the functionality provided, and not on either the technical means used to provide such functionality or the identity of the provider. *See generally id.* at 144.

acknowledges that information service providers act “via telecommunications.”<sup>145</sup>

The key question for the Court was whether a cable modem provider, who clearly provides an information service, also provides a telecommunications service. The majority held that an information service provider is not also *de facto* a telecommunications service provider, as telecommunications services are not offered. In parsing the statutory sentence defining a telecommunications provider, the majority focussed on the verb “offer.”<sup>146</sup> While the information service provider clearly gave the customer telecommunications services, the majority determined that this did not amount to an “offer” as the telecommunications capability was deemed to be merely a component, and not a “stand-alone” separate product.<sup>147</sup> Indeed, as Justice Thomas further noted, while some ambiguity can exist as to whether “offer” necessarily requires this particular interpretation, the Court’s precedent requires deference to the FCC’s choice of possible alternative definitions.<sup>148</sup>

By contrast, Justice Scalia, in his dissent, noted that the more appropriate focus is on the object of the verb “offer,” namely whether the telecommunications capability is sufficiently distinct as to be a separately “offered” product, rather than a mere component of an integrated information service product offering.<sup>149</sup> Justice Scalia noted that when a pizza is ordered for delivery, both the delivery and the pizza are “offered” to the public.<sup>150</sup> Likewise, a pet shop that sells puppies on a leash offers both puppies as well as leashes.<sup>151</sup> Consequently, Justice Scalia reasoned that both the telecommunications capability and the informational services were “on offer” by the cable modem provider.<sup>152</sup>

The majority noted that the “question turns not only on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided.”<sup>153</sup> Accordingly, using their own analogy of car sales, the majority illustrated the point that the fact that cars are sold does

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145. Telecommunications access is required in order to provide information service. *See id.* at 2715 n.3 (Scalia, J., dissenting).

146. The predicate of the sentence, namely “telecommunications for a fee directly to the public . . . regardless of the facilities used” did not figure prominently in Justice Thomas’s reasoning—rather he acknowledged, as did the FCC, that what matters is what is “seen from the consumer’s point of view.” *Id.* at 2703.

147. *Id.* at 2704.

148. *Id.* (referring to the deference afforded to the FCC in the interpretation of the meaning of the word “cost” in *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 498 (2002)).

149. *Id.* at 2714 (Scalia, J., dissenting).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 2705 (majority opinion).

not require that engines and car frames are also “on offer.”<sup>154</sup> When items such as engines and car frames are so tightly integrated in the finished offering, those items are mere ingredients and not separately “on offer.”<sup>155</sup> Consequently, the majority held that the cable company’s telecommunications connection and the cable company’s informational services element are “sufficiently integrated” such that it is reasonable to view the two elements as a single, integrated offering. The tight integration supports the “parts of a car” analogy rather than the “puppies and leashes” analogy.<sup>156</sup> To bolster its decision, the majority noted that, not only are the two components necessary for a cable modem service to perform, but that in any event, there is ambiguity and the “parts of a car” analogy was a reasonable choice for the FCC (and the Court) to make.<sup>157</sup>

In sum, textual analysis casts doubt on the *Brand X* decision because the Congressional language does not create the type of ambiguity exploitable by the FCC. Congress used broad language and therefore somewhat generalized terminology. For example, it did not wish to lock in a particular Internet connection technology.<sup>158</sup> However, by virtue of Congress’s expressly stated *technology-neutral* position, it is unreasonable to permit the FCC to use the *difference in the means of technological implementation* as a vehicle to avoid common carrier regulation of cable modem providers.

The Telecommunications Act explicitly defined types of communication services in terms of functionality provided and not in terms of technology used or identity of the provider. In particular, Congress defined the “connection functionality” to be the “telecommunication services” and defined the “information functionality” to be the “information services.”<sup>159</sup> A required component of the information services functionality is a telecommunications capability in order to provide the connection to the end customer.<sup>160</sup> At the time of the legislation, Congress would have been aware of at least two means of implementation of the telecommunications building blocks (“connection technologies”), namely the slow dial up tele-

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154. *Id.* at 2704.

155. *Id.*

156. *Id.* at 2704-05.

157. *Id.* at 2705.

158. For example, Congress used the words “irrespective of the facilities used” in a bid to ensure that the common carrier regulatory scheme would apply whether or not a different implementation scheme would be employed. 47 U.S.C. § 153(46) (2006).

159. Information service, being defined as “the offering . . . via telecommunications,” explicitly represents that the information service uses “telecommunications.” 47 U.S.C. § 153(20) (2006).

160. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2703 (2005).

phone line service, and also the faster broadband service.<sup>161</sup> Rather than enumerate the various types of technologies used to implement the telecommunications functionality, Congress instead chose to define the term more broadly in terms of the functionality provided and specifically chose *not* to tie the definition to a particular choice of technology. The inference can therefore be drawn that Congress intended to capture future telecommunications technologies under the same Title II regulatory umbrella. Consequently, Congress's deliberate choice of broad functional language precludes the FCC's choice of different regulatory schemes for the same functionality. Specifically, it is unreasonable for the FCC to require two forms of telecommunications service (dial-up and DSL) to be regulated as Title II common carriers while cable modem service providers escape such regulation—given that the language of the Act is technology neutral, and DSL and cable modem services both provide the same function of broadband connectivity.

Despite the similarity in performance between a DSL service and a cable modem service, the FCC claims that history supports its regulatory distinction between the two services, or at least provides sufficient ambiguity to require *Chevron* deference.<sup>162</sup> Certainly, it is true that DSL service providers have historically been regulated as common carriers as these providers were the progeny of the AT&T divestiture. However, the language of the Act does not support a regulatory structure based on history. Were such claims to be valid, the language of the Act would note the historical status quo, e.g., describe specifically the incumbent technologies or particular parties and their regulatory status as of the date of enactment and specifically state that such regulatory status would continue.<sup>163</sup> As noted above, the statutory language does not, either implicitly or explicitly, grandfather regulatory status for some parties based on their historical standing. On the contrary, the statutory language provides a framework based on *functionality*, without reference to the specific technology used and without reference to whether it has any historical preference. The statute is clear—so long as a telecommunications service is offered, the telecommunications service provider should be regulated in accordance with the Title II regulatory scheme.

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161. The Senate Report notes that one witness at a hearing had noted that “the U.S. needs an integrated broadband network.” S. REP. NO. 104-23, at 12 (1995). Dial-up service had been around for many years at the time of the hearings.

162. *Brand X*, 125 S. Ct. at 2711.

163. By way of contrast, the Telecommunications Act of 1996 defines a rural telephone company as an entity that “has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.” 47 U.S.C. § 153(37)(D) (2006).

Further, the *Brand X* Court invokes the “sufficiently integrated” test to justify holding that the telecommunications element (the connectivity element) of a cable modem service is not “on offer” within the meaning of the Telecommunications Act.<sup>164</sup> Certainly, hydrogen is not “on offer” when water is “on offer,” as the hydrogen is sufficiently integrated in the water.<sup>165</sup> However, as the dissent notes, such an analogy is not always appropriate.<sup>166</sup> Unbundling hydrogen and oxygen from water requires sophistication, energy, and effort. Such is not the case with the telecommunications component and the informational services component of a cable modem service. While these two components are integrated (indeed they are tightly integrated in order to ensure interoperability), unbundling the components is solely a question of marketing and not a question of difficult engineering. Quite simply put, integration does not shed any light on whether individual components may be unbundled and are therefore “on offer.” If all integration could not be unbundled, then multiple manufacturers could not compete by building individual portions of a system and vertical monopolies would be the order of the day. Under the *Brand X* Court’s “sufficiently integrated” holding, only Boeing would be able to build the airframe, the engines, and the electronic systems of a modern airplane, rather than subcontracting out the engines, as is the current practice in the aeronautical manufacturing industry.

Finally, the FCC maintains that the lack of a separate “stand-alone” offering of telecommunications services provides dispositive evidence that cable modem providers are not covered by Title II regulations.<sup>167</sup> Cable modem providers point to the bundling of telecommunications and information services as their defense to the claim that they offer telecommunications services.<sup>168</sup> However, by analogy, such a defense would necessarily mean that wine suppliers would be immune from alcohol regulations provided they always sell a pound of cheese with every bottle of wine, or that dynamite suppliers would be immune from explosives regulations provided they always sell a box of matches with every stick of dynamite. Such a statutory reading leads to absurd results. Moreover, it would be unwise for a statutory framework to be so readily vitiated by simple marketing decisions of the vendors concerned. In particular, where providers have exclusive service franchises, heightened regulatory scrutiny is vital to protect the public from monopolistic effects.

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164. *Brand X*, 125 S. Ct. at 2704-05.

165. *Id.* at 2714 (Scalia, J., dissenting).

166. *Id.*

167. *Id.* at 2703-04 (majority opinion).

168. *Id.* at 2698, 2704.

In summary, a textual analysis could have shown that the FCC was entitled to deference provided the Telecommunications Act supported such deference. However, while the *Brand X* Court found sufficient ambiguity in the wording of the Telecommunications Act, a closer reading shows that the language, while broad, was nevertheless sufficiently clear as to rule out the conflicting interpretation offered by the FCC in its rulemaking capacity.

### C. Historical Analysis

An analysis of the history of the enactment of the Telecommunications Act of 1996 provides some insight into the probable expectations of Congress when it modernized the communications statutes. The Act incorporated the state of the regulatory history at the time of enactment. The most important aspect of this history was the computer inquiries made by the FCC over the previous decades, and, in particular, the resulting conclusions, as reflected in its Computer II Rules.<sup>169</sup> These rules established a regulatory dichotomy between providing basic services and enhanced services. Specifically, “basic services” were defined to be “the common carrier offering of transmission capacity for the movement of information.”<sup>170</sup> Such “basic services” were envisaged to be a pure transmission capacity that did not affect the customer supplied information.<sup>171</sup> Moreover, the definition did not in any way restrict the “carrier’s ability to take advantage of advancements in technology.”<sup>172</sup>

By contrast, “enhanced services” were nothing more than “basic services.” As such, “computer processing applications which act on the content, code, protocol, and other aspects of the subscriber’s information” provide enhanced services.<sup>173</sup> The FCC’s report specifically identified a “mail box” as an example of an enhanced service.<sup>174</sup>

As the *Brand X* Court noted, the “telecommunications service” and “information service” definitions from the Act parallel the *Computer II* definitions of “basic service” and “enhanced service” respectively.<sup>175</sup> Accordingly, Congress used this regulatory dichotomy to require mandatory regulation of basic services (i.e., the telecommunications services) while only Title I regulation was required for enhanced services (i.e., the infor-

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169. *In re* Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 417-23, ¶¶ 86-101 (1980) [hereinafter *Computer II Rules*].

170. *Id.* at ¶ 93.

171. *Id.* at ¶ 96.

172. *Id.*

173. *Id.* at ¶ 97.

174. *Id.*

175. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2697 (2005).

mation services).<sup>176</sup> Given these historical underpinnings for the regulatory distinctions, it appears that provision of a connection from the home, via cables, like traditional telephone wires, should fall on the “basic service” side of the regulatory demarcation line. Ironically, this straightforward approach was used to extend the regulatory scheme from telephone wires to include high speed DSL Internet connectivity.<sup>177</sup>

Since DSL Internet connectivity and cable modem Internet connectivity are similar, it seems only logical to apply the same regulatory approach to cable modem connectivity as that in place for DSL connectivity. However, the FCC chose a different regulatory path. While the FCC is entitled to change its mind, it cannot embark on a path that is in inherent conflict with the statutory underpinnings and still be entitled to *Chevron* deference. Such conflict should be *per se* unreasonable.

#### D. Policy Analysis

Analysis of any statute requires an examination of Congress’s objectives in enacting the statute.<sup>178</sup> In particular, it is essential to ensure that the resulting plain language interpretations are consistent with the policy objectives set forth by Congress. In enacting the Telecommunications Act, Congress sought to decrease regulation.<sup>179</sup> Less regulation would spur investment and growth in the infrastructure necessary for a broadband capability in the United States.<sup>180</sup> In fact, the original need for regulation of AT&T arose from a need to eliminate the undesirable economic effects of a monopoly and to ensure that such services were provided on an efficient non-discriminatory basis.<sup>181</sup>

If cable modem service was the only broadband access point into residences and commercial businesses, then monopolistic concerns would undoubtedly outweigh the objective of deregulation. After all, concerns about monopoly drove the original breakup of AT&T.<sup>182</sup> The average consumer, however, has multiple means of broadband access to the Internet.<sup>183</sup>

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176. *Id.* at 2696.

177. *Id.* at 2711.

178. KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 201 (1999) (noting that the canons of statutory construction include “policy rules and presumptions” (quoting WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994))).

179. Congress’s stated intention in passing the Telecommunications Act of 1996 was “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” See Pub. L. No. 104-104, 110 Stat. 56, 56 (1996).

180. S. REP. NO. 104-23, at 1-2 (1995).

181. See *supra* Part II.A.

182. *Id.*

183. See OECD BROADBAND STATISTICS, *supra* note 3.

In addition to DSL and cable, the average consumer also has the possibility of wireless access, power line access, and satellite connectivity to the Internet.<sup>184</sup> Given the multiplicity of access points to the Internet, the objective of deregulation is not hampered by any realistic concerns of monopolization. On the contrary, rapid expansion of broadband access technology would best be served by providing broadband suppliers with the freedom to develop the deployment of their technology with the expectation that they are not obligated to share their facilities investment with potential competitors.

#### E. *Summary of Analysis*

In summary, both textual and historical considerations point to an unambiguous interpretation of the Telecommunications Act. Deference to the FCC's interpretation would therefore be inappropriate since its interpretation falls outside the scope of the legislative mandate. However, the increase in the number of available methods of broadband access technologies favors the outcome offered by the FCC, and ultimately adopted by the *Brand X* Court. In the next five years, it will be interesting to observe the increase in availability of broadband access within the United States to levels more like those found elsewhere in the world. It is worth noting that to ensure parity between cable modem providers and DSL providers, the FCC has already, subsequent to the *Brand X* decision, afforded DSL providers the same diminished regulatory environment in which to thrive and offer products to consumers.<sup>185</sup> The other legacy to monitor will be the diminished burden that administrative agencies appear to have to meet in order to merit *Chevron* deference. Finally, on a constitutional note, it would seem that too low a burden on an administrative agency's rulemaking authority would pose a threat to the checks and balances of a constitutional system.

### V. CONCLUSION

By deferring to the FCC ruling that cable modem providers are not offering telecommunications services, the *Brand X* Court gave administrative agencies extraordinary deference upon finding statutory ambiguity. The

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184. *Id.*

185. *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14853 (2005), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-05-150A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf). As a result of this order, DSL information providers are no longer required to make available the underlying telecommunications access capability.



Court deferred to the agency despite the inconsistent regulatory treatment of DSL and cable modem services, and despite the fact that the regulatory framework is in conflict with the legislative framework. The changing economic circumstances, together with the FCC's subsequent ruling lifting the regulatory burden from the DSL providers, will possibly ensure expanded broadband Internet access in the United States. It is far from clear, however, that the administrative means used comport with the constitutional checks and balances envisioned for the three branches of government. *Brand X* supports: (1) very narrow readings of statutory text (a service is not being "offered" when it is merely being "used"); (2) expansive uses of policy (changing economic circumstances enable an agency to take a "fresh analysis"); and (3) agencies' prerogative to ignore legislative alternatives (not choose the "forbearance" route when a narrow reading allows one to re-define the problem out of existence). While agency expertise is valuable, constitutional checks and balances are invaluable. In the future, the Supreme Court should not be so ready to hand the reins of interpretation to the "fourth" branch of government.