



# FCC and Brand X Internet Services **Part Two**

Should data over cable and data over DSL be treated the same?

By Carl Kandutsch ■ *Esq.*

**T**he Supreme Court agreed in December to consider whether cable companies must open their high-speed lines to rival Internet providers. Among the issues: Is cable wiring, used for non-cable services, a “telecommunications service” that makes it subject to Federal Communications Commission rules requiring phone companies to provide access to independent providers or resellers? Last month, we provided a brief historical summary of the circumstances that have led to the *FCC v. Brand X Internet Services* case. In this article, we examine in more detail the legal issues involved in the case and attempt to assess the case’s significance for the future of broadband services.

The history of modern communications policy in the United States is characterized by a complex interplay of forces, including business models in the economic sphere, legal and regulatory structures in the political sphere, and networking devices in the technological sphere.

Business models are based on the profit-maximizing usage of network technology. At the same time, the government’s regulatory policies must respond to industry’s prevailing business models. There’s feedback. As regulatory policy evolves and adjusts to various economic and social pressures, business models will evolve and adjust accordingly, to take full advantage of the reigning legal structure.

History demonstrates that the more

## Why You Should Care

*Bill Burhop, Executive Director, Independent Multi-Family Communications Council*

On March 15, 2002, the FCC issued a Declaratory Ruling, determining that cable modem service, as currently offered, constitutes an “interstate information service” rather than a “telecommunications service” or a “cable service.” This meant that cable operators with proprietary cable modem Internet service Providers (ISPs, such as AT&T’s @Home) could not be regulated as common carriers. Thus, they had no obligation to permit unaffiliated ISPs to connect to their cable networks. The FCC ruling followed the Ninth Circuit’s *AT&T v. City of Portland* decision (216 F.3d 871 (9<sup>th</sup> Cir. 2000)) and its own Notice of Proposed Rulemaking.

An interesting array of parties appealed the FCC’s Declaratory Ruling, and the case was assigned by lottery to the same Ninth Circuit panel. The Ninth Circuit affirmed its own prior ruling in the *City of Portland* case. In *Brand X Internet Services v. FCC*, the appellants included ISPs (Brand X Internet Service, Earthlink) and the Consumer Federation of America, arguing that cable modem service is both an information service and a telecommunications service, and is therefore subject to common carrier regulation. Local government entities (National League of Cities, United States Conference of Mayors, National Association of Counties, Texas Coalition of Cities for Utilities Issues), argued that cable modem service is both an information service and a cable service, subject to regulation by local authorities. One ILEC (Verizon) argued that the Declaratory Ruling is correct, but that DSL service, like cable modem service, is an unregulated information service as well.

The FCC’s regulatory classifications are important because each industry sector regulated by the FCC operates under vastly different rules. This article (as well as Part I, published in the previous issue), written by an attorney who used to work for the FCC, is not light reading. But the issues are important for anyone involved in the broadband industries who wants to understand how the FCC and the courts are shaping the competitive environment in which MDUs, ISPs, PCOs, CLECs and other providers operate.

If our industry is going to successfully compete with other major providers, you need to have a grasp of these issues.

or less stable equilibrium produced by this more or less closed system of relationships is marked by a kind of inertia, an institutional resistance to sudden or radical change that is expressed in the cliché, “if it ain’t broke, don’t fix it.” Telecom gurus refer to this institutional inertia when they speak of “legacy business models,” “legacy regulatory structures,” and “legacy networks.” Because institutions (business and political) cling to whatever has worked in the past, history in this context tends to move forward in sudden fits and starts.

Those starts and stops are sometimes traumatic, as what the business schools call “disruptive” technological innovations force their way into a social vision that is based more on elephantine memory of the past than bold imagination of the future. To put that another way, every so often, a revolution in the one component of this system that is relatively independent – the technological component – disrupts the equilibrium of the other components.

Revolutionary technological innovations, like the invention of the printing press, telegraph, radio and television, can and do fundamentally upset the balance between business and regulatory models, forcing the restructuring of each around a new center of gravity.

The latest of these revolutionary technological innovations is the emergence of the Internet. Legacy business and regulatory models are being strained to the breaking point in adjusting to IP-based<sup>1</sup> networks capable of delivering voice, video and data functions, including broadband Internet access, to the home or business on a single wire.

Although we live in an age of media convergence, the prevailing regulatory framework is still structured around legal classifications left over from a time when discrete communications functions (in this case, voice and video) were tied to discrete physical platforms (in this case, the public switched telephone network or PSTN and the broadcast spectrum) and therefore to discrete business models. For example, copper

telephone line carried voice telephony service, the coaxial cable line carried cable television video service, and radio waves carried television and radio services. Accordingly, the government’s legal and regulatory structure was built around several “vertically” oriented axes tying specific functions to specific communications platforms.<sup>2</sup>

Thus, the regulatory model for voice communications was and still is based on the principle of controlling monopoly ownership of the PSTN. In contrast, the regulatory model for video communications was and still is (despite the migration to cable) based on the principle of First Amendment-protected use of radio spectrum for the

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broadcast of content over the airwaves.

With the emergence of the broadband Internet, these regulatory models, together with the business models they enable and constrain, are confronted with the fact that several communications functionalities (voice, video and data) are no longer discrete. They can be provided as a bundled product over any of several communications platforms, such as DSL, cable modems or high-speed wireless connections.

It is in this historical context of media convergence that the significance of the Supreme Court's *FCC v. Brand X* case must be evaluated.

**“The Services”**

Beginning in the 1960s, the FCC recognized that burgeoning computer-based services, although dependent on telephone networks, could not be neatly forced into any of the existing regulatory categories. In 1980 the FCC issued its seminal *Computer II* order,<sup>3</sup> which distinguished those services that should continue to be regulated as common carriage offerings under Title II of the Communications Act, from those services that use communications inputs in a highly competitive and unregulated services marketplace.

The former were called “basic services,” subject to

common carrier regulation, and the latter were called “enhanced services.” Although enhanced services used

regulated basic services, they were not themselves subject to regulation. The Telecommunications Act of 1996 codified the FCC's “basic/enhanced” distinction by distinguishing between “telecommunications service” and “information service.”

In addition, the Act's new Section 706 focused on encouraging the deployment of what Congress called “advanced telecommunications capa-



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bility." The Brand X case raises the question of how broadband services delivered via cable modems ought to be classified for regulatory purposes.

The 1996 Act defines "telecommunications" to mean "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>4</sup> "Telecommunications service" in the 1996 Act means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of facilities used."<sup>5</sup> Providers of telecommunications service are common carriers subject to an array of regulatory burdens under Title II, including the duty to provide competitive local exchange carriers (CLECs) with non-discriminatory access to their local networks.

In contrast, "information service" is defined under the Act as meaning "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 network or the management of a telecommunications service."<sup>6</sup>

Although the FCC retains jurisdiction over information services under Title I of the Communications Act, such services are currently unregulated.

Finally, "cable service" is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other program-

ming service."<sup>7</sup> Cable services are subject to local franchising requirements and some minimal Title IV federal

regulation including program access and "must-carry" rules developed by the FCC.<sup>8</sup>

As was indicated in Part I of this article last month, the FCC had refrained from classifying cable modem service until 2002, perhaps in response to the Ninth Circuit's decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871

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## *I suspect that the Supreme Court will find a way to overturn the Ninth Circuit's decision that cable modem service constitutes a telecommunications service subject to common carrier regulation.*

(9<sup>th</sup> Cir. 2000). The court had ruled that cable modem service includes a “telecommunications service,” and the Commission ruled that cable modem service is an unregulated “information service” that relies on “telecommunications” but does not include a separate “telecommunications service.”<sup>9</sup>

### **Issues before the Court**

The issue of broadband regulation comes to the Supreme Court as an appeal from the FCC's *Declaratory Ruling* cited in footnote 10. Specifically, the Supreme Court will consider whether the Ninth Circuit Court of Appeals was correct when it vacated the FCC's declaration that cable modem service did not include a (separable) “telecommunications service,” *after* the same Ninth Circuit had already ruled that it did in the City of Portland case.

Thus, there are really two issues before the Court: First, who has paramount authority, a federal agency (the FCC) or a federal court, in interpreting the 1996 Telecommunications Act as it applies to cable modem service? Second, does that service include a (separable) telecommunications service? Although the Court may well avoid the second issue, we provide a brief sketch of the questions raised.

The essence of the Ninth Circuit's decision is the assertion that the two components of cable modem service are separable into two distinct “services” for regulatory purposes.<sup>10</sup>

First is the provision of Internet-enabled services, for example, email and the capacity to download web pages. Second is the “pipeline” through which those services are provided.

This approach accurately reflects the

FCC's own treatment of dial-up ISP service. In the *Computer Inquiry* decisions and elsewhere, FCC said dial-up Internet access is an “information service,” and ISPs have non-discriminatory access to the underlying transmission facilities of telephone companies.<sup>11</sup> When a local telephone company simultaneously offered Internet access (via a subsidiary ISP), it was still required to offer telecommunications services to other ISPs on a common carrier basis.<sup>12</sup>

If the Supreme Court upholds the Ninth Circuit's ruling, then cable modem service is a “telecommunications service” and the cable company would have to do the same thing.

Cable companies would be required to unbundle ISP service from transmission, making the latter available for interconnection by unaffiliated ISPs on a non-discriminatory basis.<sup>13</sup>

Unlike dial-up Internet access, however, cable modem service was not superimposed upon an established common carrier facility (the PSTN), but rather upon cable systems, a different architecture subject to a different regulatory framework supporting a different business model. The FCC is surely correct to point out that cable companies providing Internet access do not separately offer distinct “transmission service” to their subscribers along with their ISP offering.

It is therefore difficult to see how cable modem service, *as it is currently offered to customers*, can include a “telecommunications service” insofar as that term is defined to mean “the offering of telecommunications for a fee directly to the public.” From a marketing perspective, the FCC's position is

well-founded: cable modem service is a “single integrated service” that includes both Internet-based services and Internet connectivity.

The fact that cable modem service includes a telecommunications component (namely, the end-to-end transport of “information of the user's choosing”) is consistent with the definition of “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”

Note, however, that a regulatory regime based on the way a product is currently marketed is not necessarily a preferable regulatory regime from a policy perspective.

For instance, legal regimes designed to regulate some forms of monopoly behavior accomplish this goal precisely by altering the way a product is marketed, to serve the public interest.

Regulatory classifications do not in themselves provide the answers to difficult policy questions, especially when the classifications are fundamentally outmoded.

### **A Prediction**

I suspect that the Supreme Court will find a way to overturn the Ninth Circuit's decision that cable modem service constitutes a telecommunications service subject to common carrier regulation under Title II of the 1996 Telecommunications Act.

In accordance with the FCC's *Declaratory Ruling*, the cable broadband industry would then rejoin the unregulated environment now occupied, thanks to other recent FCC actions, by companies offering other “information services,” including the DSL Internet access platform,<sup>14</sup> cutting edge broadband applications that can run over multiple platforms, such as VoIP,<sup>15</sup> and deregulated high-speed network infrastructures like FTTH and BPL.<sup>16</sup>

In clearing the space for this unregulated broadband environment, the FCC is betting on promises from the major cable operators and the former

Bell telephone monopolies to invest huge sums in the technology required to implement Section 706 of the 1996 Act by bringing “broadband to all Americans.”

On the other side of this bet is the hope that in an age of relentless consolidation, the few remaining major media conglomerates will not use their market power to exert control over broadband networks in a way that will stifle the user-based innovation that has made the Internet such a success.

We may be witnessing the slow demise of common carrier regulation in the communications industries.

If so, I hope the FCC is moving toward a regulatory philosophy that is based not on what I earlier described as “vertical” assumptions (where function is tied to physical infrastructure), but on a “layered” approach. That approach would recognize the independence of communication functions across multiple physical platforms in an era of converged media.<sup>17,18</sup> ♦

<sup>1,2</sup> “IP” of course refers to “Internet Protocol,” and “IP-based networks” refers to communications networks that rely on IP for the provision of services and applications that utilize digital communications of increasingly higher speeds and capacities.

<sup>3</sup> The structure of the Communications Act of 1934 reflects the “vertical” orientation of American communications policy; Title II deals with telephony, Title III with television, radio and wireless communication, and Title IV with cable television.

<sup>4</sup> *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations* (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384, 430 (1980) (“*Computer II*”).

<sup>5</sup> 47 U.S.C. § 153(43).

<sup>6</sup> 47 U.S.C. § 153(46).

<sup>7</sup> 47 U.S.C. § 153(20).

<sup>8</sup> 47 U.S.C. § 522(6). “Video programming” means “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” 47

U.S.C. § 522(20).

<sup>9</sup> One court has held that cable modem service is a “cable service” because it provides “news, commentary, games, and other proprietary content with which subscribers interact as well as Internet access.” *MediaOne Group, Inc. v. County of Henrico*, 97 F.Supp. 2d 712, 715 (E.D. Va. 2000), aff’d on other grounds, 257 F.3d 356 (4<sup>th</sup> Cir. 2001). Because this decision is unlikely to carry much influence and is not directly pertinent to the issues in *Brand X*, we do not discuss the “cable service” classification in this article.

<sup>10</sup> *Declaratory Ruling*, 17 FCC Rcd 3019 (2002), available at 2002 WL 252714.

<sup>11</sup> “Like other ISPs, [AT&T’s cable broadband service] consists of two elements: a ‘pipeline’ (cable broadband instead of telephone lines) and the Internet service transmitted through that pipeline. However, unlike other ISPs, [the cable broadband provider] controls all of the transmission facilities between its subscribers and the Internet. To the extent [a cable broadband provider] is a conventional ISP, its activities are that of an information service. However, to the extent that [a cable operator] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.” *Brand X Internet Services v. FCC*, 345 F.3d at 1129, quoting the same court’s earlier decision in *AT&T v. City of Portland*, 216 F.3d at 878.

<sup>12</sup> *Computer II*, 77 FCC 2d at 474.

<sup>13</sup> This requirement “provides a structural constraint on the potential for abuse of the parent’s market power through controlling access to and use of the underlying transmission facilities in a discriminatory and anticompetitive manner.” *Id.*

<sup>14</sup> The argument for “open access” to cable broadband networks is summarized in Part I of this article, published in last month’s issue of this magazine.

<sup>15</sup> *In the Matter of Appropriate Framework for Broadband Access to the In-*

*ternet over Wireline Facilities*, 17 FCC Rcd 3019 (2002) (transmission component of retail wireline broadband Internet access service provided over telephone company’s own facilities is “telecommunications” and not a “telecommunications service”).

<sup>16</sup> VoIP means voice over Internet protocol, or Internet telephony. The FCC has tentatively concluded that VoIP is an “information service” and not a “telecommunications service.” *In the Matter of Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither a Telecommunications Service nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45 (rel. Feb. 19, 2004).

<sup>17</sup> The FCC has released ILECs from the requirement of unbundling fiber optic loops that extend to most consumers’ premises – known as fiber-to-the-home or FTTH loops – on the ground that such unbundling is not necessary to ensure competition in those markets. See *Triennial Review Order*, 18 FCC Rcd 16978 (2003). Around the same time, the FCC also issued an order permitting utility companies to carry digital data on their electric wires, using a technology called “broadband over power lines” or BPL. The FCC’s BPL decision is in Report and Order (FCC 04-245, rel. Oct. 14, 2004).

<sup>18</sup> For discussions of a layered approach to communications policy, see Yochai Benkler, “From Consumers to Users: Shifting the Deeper Structures of Regulation,” *Federal Communications Law Journal* 52 (2000) 561, and Kevin Werbach, “A Layered Approach for Internet Policy,” *1 J. Telecomm. & High Tech. L.* 37 (2002).

## About The Author

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