



Supreme Court Rules for Cable in Brand X Case

Cable operators do not have to allow space on their networks for competitors

By Carl E. Kandutsch ■ *J.D., Ph.D.*

On June 27, the United States Supreme Court announced its decision in the “Brand X” case, dealing with the regulatory classification of cable modem services. In *National Cable & Telecommunications Assn. v. Brand X Internet Services, et al.*,¹ the Court, 6 to 3, reversed a federal appeals court decision and upheld the FCC’s determination² that cable modem service is an unregulated “information service” and exempt from the common carrier regulatory regime that governs traditional telephone service.

Because cable modem service is an “information service” rather than a “cable service” (or a “telecommunications service”), a municipality may not require, as part of the cable operator’s local franchise, that the operator share its high-speed data transmission facilities with unaffiliated broadband ISPs. The decision represents a victory for the big franchised cable operators, which may use their cable television infrastructure to promote their broadband Internet services at the expense of the competition. The decision is a defeat for independent ISPs hoping to compete in the market for broadband services. The ultimate effect on consumers remains to be seen.

ILECs Cheer

Several large telephone companies (such as SBC and Verizon) immediately praised the decision. That was, at first glance, a bizarre reaction, given that the ILECs had been among the strongest proponents (along with consumer groups) of “open access” for cable modem providers.

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At second glance, however, the telephone companies have reason to cheer. The *Brand X* decision is a judicial endorsement of the FCC’s deregulatory approach to broadband generally, and specifically its ongoing effort to eliminate unbundling requirements (under section 251 of the 1996 Telecommunications Act) for DSL providers.

The FCC may now pursue regulatory symmetry for cable- and DSL-based broadband, allowing the owners of high-capacity transport facilities to leverage that ownership to consolidate their power in the ISP and possibly other downstream markets, without regard to the transport technology used.

Brand X comes as good news for the

fiber optic communications industry, because less broadband regulation presumably means more investment by cable and telephone incumbents in next generation networks. For example, within days of the Supreme Court’s decision, BellSouth told the FCC that it plans to deploy fiber to almost 60 percent more locations in 2005 than it did in 2004.³

Likewise, but perhaps counter-intuitively, *Brand X* could boost fiber-based municipal communications networks. This is contrary to expectations because anything good for big cable tends to be bad for potential competitors of big cable. On the other hand, the decision leaves independent ISPs like Earthlink and Xmission (which do not own their own local trans-

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port facilities) out in the cold. As a result, these ISPs, and perhaps other unaffiliated broadband providers, assuming they can't get a favorable deal from the largest cable and telephone companies, will be forced to look for other avenues to reach customers. Alternative networks, including municipal networks such as Utah's UTOPIA system, provide such an avenue.⁴

Finally, *Brand X* raises a number of other potentially significant issues for broadband policy, issues that are still, for the most part, on the horizon. For example, there is the issue of bundling broadband products. *Brand X* endorses the FCC's judgment that a cable company's inclusion of a "telecommunications" (*i.e.*, pure transport) component in its cable modem product does imply that the product is not a single, integrated (and unregulated) "information service." Does this suggest that cable and telephone companies may escape legacy cable and telephone regulation for their video and voice products by bundling them together with broadband Internet products? ♦

About the Author

Carl Kandutsch is a consultant and former FCC attorney. He exhaustively covered *Brand X* in our January and February issues, available on line at www.bbpmag.com, and correctly predicted the outcome. He can be reached at ckandutsch@adelphia.net or at 207-659-6247. We intend to publish his more detailed analysis of *Brand X* and its implications in an upcoming issue.

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¹2005 U.S. LEXIS 5018.

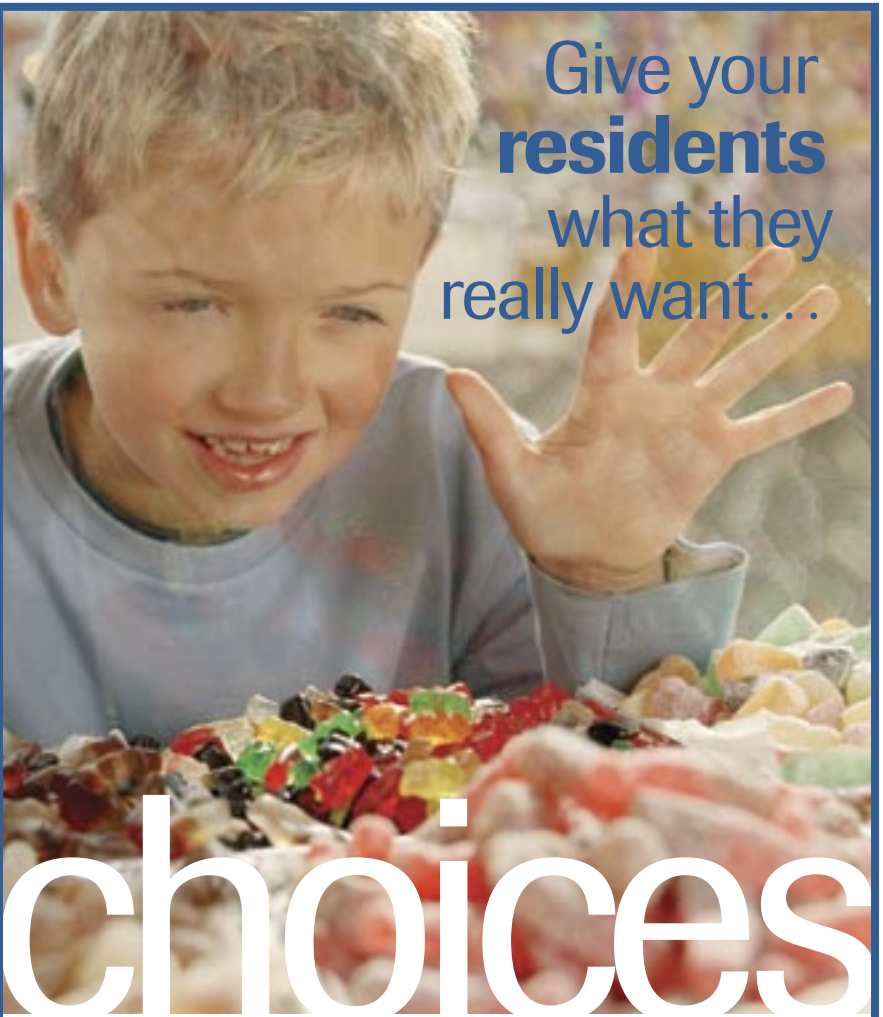
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³ Taylor, "BellSouth Hastens Fiber Roll-out," *The Financial Times* (June 30, 2005), available at <http://news.ft.com/cms/s/79829868-e99d-11d9-ba15-00000e2511c8.html>.

⁴ Oberbeck, "ISP Ruling May Boost Systems Like UTOPIA," *The Salt Lake City Tribune* (June 28, 2005), available at http://www.sltrib.com/search/ci_2828200.

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