Broadband Internet Access Service Transmitted via Wirelines (Digital Subscriber Line, DSL) Is an Information Service and Thus is Not Subject to the Title II Regulation of the Communications Act, and Telephone Companies are Not Required to Afford Non-Facility-Based Independent Internet Service Providers with Nondiscriminatory Access to the Companies' Wireline Facilities: *Time Warner Telecom, Inc. v. FCC*

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Broadband Internet Access Service Transmitted Via Wirelines (Digital Subscriber Line, DSL) Is an Information Service and Thus Is Not Subject to the Title II Regulation of the Communications Act, and Telephone Companies Are Not Required to Afford Non-Facility-Based Independent Internet Service Providers with Nondiscriminatory Access to the Companies' Wireline Facilities:

*Time Warner Telecom, Inc. v. FCC*

**Telecommunications — Statutory Interpretation — Administrative Law and Procedure — Communications Act** — The Court of Appeals for the Third Circuit denied independent Internet service providers (ISPs), competing telecommunications service providers, cable modem providers, and various public interest groups' petitions for review of final order of the Federal Communications Commission (FCC) that relieves telephone companies of any obligation to grant competing ISPs nondiscriminatory access to their wireline (DSL) transmission facilities.

*Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).*

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I. A SUMMARY OF THE TIME WARNER TELECOM OPINION

In 2005, the Federal Communications Commission ("FCC" or "the Agency") entered an order entitled "Appropriate Framework for Broadband Access to the Internet over Wireline Facilities"\(^1\) ("the Wireline Broadband Order").\(^2\) The order substantially limited federal regulation of broadband Internet access service that is provided over traditional telephone lines ("DSL" service) and relieved telephone companies of regulations requiring them to grant competing Internet Service Providers\(^3\) ("ISPs") nondiscriminatory access to their telephone lines ("wirelines"), which is necessary in order to reach subscribers of high-speed Internet service.\(^4\) The result of the Wireline Broadband Order is that telephone companies are now permitted to negotiate individual deals with independent ISPs, as well as other entities that plan to use their wireline facilities.\(^5\)

Four petitions were filed in the United States Court of Appeals for the Third Circuit requiring review of the order.\(^6\) These petitions were filed by several independent ISPs, competing telecommunications service providers, cable modem providers, and various public interest organizations, including telecommunications service provider Time Warner Telecom, Inc., independent ISP

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2. Time Warner Telecom, Inc. v. FCC, 507 F.3d 205, 208 (3d Cir. 2007).
3. An Internet Service Provider is a company that provides physical connection of the Internet to consumers. *Time Warner*, 507 F.3d at 209 (citing WorldCom, Inc. v. FCC, 246 F.3d 690, 692 (D.C. Cir. 2001); Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv. ("Brand X"), 545 U.S. 967, 974 (2005)). ISPs also enable the conversion between digital data transmitted over Internet and user-end information so that consumers can view information on their own computers and send it to other computers linked to the Internet. *Id.* (citing Brand X, 545 U.S. at 974).
4. *Time Warner*, 507 F.3d at 208. Two principle types of broadband services exist to provide high-speed Internet access: (1) cable modem service and (2) Digital Subscriber Line (DSL) service; DSL service is the type of broadband that Wireline Broadband Order concerns. *Id.* at 209. DSL services use telephone lines to transmit Internet data by connecting two DSL modems to a telephone network, one at the user end and the other at the telephone company's center office. *Id.* (citing WorldCom, 246 F.3d at 692). When a wireline carries both ordinary telephone calls and Internet services, the telephone company separates the two types of transmissions—it sends voice streams to the telephone network and data to a "packet-switched data network"; then the data is routed to an ISP. *Id.*
6. *Id.* at 205.
EarthLink, Inc., and the trade association COMPTEL. A number of telephone companies intervened in support of the FCC. The court combined the four petitions and issued one opinion. The petitioners contended that the *Wireline Broadband Order* allowed telephone companies to deny their competitors (independent ISPs) access to their wirelines and claimed that the order would result in both decreased competition and limited consumer choice in the high-speed Internet service market. The Agency argued that the decades-old regulatory scheme restrained telephone companies and significantly drove up their costs; consequently, little incentive existed for those telephone companies to make innovations and investments in new broadband technologies and service. The court found that the FCC's interpretation of regulations, specifically the Communications Act of 1934, had been reasonable and that the FCC had not abused its discretion. The petition for review was therefore denied.

Justice Fuentes delivered the opinion of the court. He began by providing a background introduction of the technical aspect and regulatory context of the *Wireline Broadband Order* and provided a general overview of the statutory treatment of broadband Internet access service. In the technical background section of the opinion, he explained the concepts of local exchange and local ex-
change carrier ("LEC") and compared narrowband Internet connections, i.e., dial-up connections, with broadband connections, which primarily include cable modem service and DSL service (the latter being at issue in this petition). He also provided an introduction of facility-based and non-facility-based ISPs and discussed the ways in which they function.

In an overview of the regulatory history in the area of telecommunications, Judge Fuentes discussed three key developments that led to the issuance of the Wireline Broadband Order, including the Communications Act of 1934 ("the 1934 Act"), the FCC's Computer II ruling in 1980, and the Telecommunications Act of 1996. By enacting the 1934 Act, Congress gave the Agency the authority to regulate telephone communications services. Title II of the 1934 Act, particularly, imposed common carrier obligations upon local telephone companies.

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18. Id. at 209. The Supreme Court has described the structure of local exchange as the following:

a network connecting terminals like telephones, faxes, and modems to other terminals within a geographical area like a city. From terminal network interface devices, feeder wires, collectively called the "local loop," are run to local switches that aggregate traffic into common "trunks." ... Just as the loop runs from terminals to local switches, the trunks run from the local switches to centralized, or tandem, switches, originally worked by hand but now by computer, which operate much like railway switches, directing traffic into other trunks. A signal is sent toward its destination terminal on these common ways so far as necessary, then routed back down another hierarchy of switches to the intended telephone or other equipment. Id. at 209 n.3 (citing Verizon Commc'ns v. FCC, 535 U.S. 467, 489-90 (2002)). The telephone companies that operate such telephone networks are called Local Exchange Carriers ("LECs"). Id.

19. Time Warner, 507 F.3d at 209. With dial-up connections, the end users use a modem to make calls to the ISP, which will connect them to the Internet. Id. Dial-up is a slow speed connection. Id.

20. Id.

21. Id. Telephone companies, i.e., LECs, provide both voice and data services over their interconnected telephone line system. Id. If LECs provide Internet access to consumers with their own facilities, they are called "facilities-based ISPs." Id. (citing Brand X, 545 U.S. at 975; Wireline Broadband Order, 20 F.C.C.R. at 14858). Independent ISPs, which lease LECs' wirelines on a wholesale basis to provide Internet service to their customers, are called "non-facilities-based ISPs." Id.


25. Id. at 210 (citing Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc., 127 S. Ct. 1513, 1516 (2007)).

26. Title II of the 1934 Act regulated the local telephone companies and incorporated common carrier requirements. Time Warner, 507 F.3d at 210 (citing Global Crossing, 127 S. Ct. at 1517). A common carrier is "a commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee," such as a shipowner, a railroad, or an airline. BLACK'S LAW DICTIONARY 226 (8th ed. 2004). Broadly speaking, telecommunications, public utilities and other entities that take on a quasi-public character by
In addressing the convergence of data processing services and traditional communications services over wirelines, *Computer II* established the classification of “basic services,” which would be subject to Title II common carrier regulation, as well as “enhanced services,” which would not be regulated. The primary concern presented in the consolidated petition was the *Computer II* ruling requiring that telephone companies grant their competitors in the enhanced services market nondiscriminatory access to their wirelines. The court proceeded to discuss the Telecommunications Act of 1996 (“the 1996 Act”) that significantly amended the 1934 Act. The importance of the 1996 Act for the purpose of these petitions was the classification of both “telecommunications service,” which is subject to Title II regulation, and “information service,” which is not regulated by Title II.

The next area of background information provided by the court dealt with the FCC’s classification of broadband Internet access service. The FCC had categorized broadband Internet access service that is provided via cable modems as an “information service” and determined that the *Computer II* nondiscriminatory access requirements did not apply to cable companies despite the fact that telephone companies were subject to these requirements. After briefly discussing the procedural background existing prior to the issuance of the *Wireline Broadband Order*, the
court summarized the two principal rulings of the *Wireline Broadband Order*: (1) wireline broadband Internet access service was classified as an “information service”—just like cable broadband service; and (2) the *Computer II* requirements of nondiscriminatory access no longer applied to LECs.\[36\]

The court then advanced its discussion to the two rulings that had been challenged by the petitioners.\[37\] First, it discussed the FCC's classification of wireline broadband Internet access service as an “information service,” rather than as a “telecommunication service,”\[38\] and concluded that the Agency’s determination was based upon a reasonable interpretation of the 1934 Act, as it was then codified (“the Communications Act”).\[39\] After referencing the statutory definitions of the two terms,\[40\] the court cited the United States Supreme Court’s opinion in *National Cable & Telecommunication Association v. Brand X Internet Services*\[41\] ("Brand X"). Brand X upheld the FCC’s conclusion that cable modem broadband Internet service is not a telecommunications service; rather, it provides consumers with information service in the form of Internet access—a service that is accomplished via telecommunications.\[42\] The majority of the Supreme Court agreed with the FCC's argument in the *Cable Modem Declaratory Ruling*\[43\] that, from the end users’ perception, the cable broadband services they receive are integrated, and the Court concluded that the transmission component of the services is integrated with the data processing component and is not a separate and an additionally offered service.\[44\] The court in *Time Warner* acknowledged that the FCC had applied the same analysis in the *Wireline Broadband Order*

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36. *Id.* at 214.
37. *Id.* at 215.
38. *Id.* (citing *Wireline Broadband Order*, 20 F.C.C.R. at 14862).
40. *Id.* at 214. “[T]elecommunications means the transmission, between or among points specified by the user, of information of the user’s own choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). “The term telecommunications service means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46). “The term information service means 'the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ’” 47 U.S.C. § 153(20).
41. 545 U.S. 967 (2005).
43. *Id.* at 216 (citing *Brand X*, 545 U.S. at 989).
44. 17 F.C.C.R. at 4823.
45. *Time Warner*, 507 F.3d at 216.
as the Supreme Court did in its *Brand X* decision and concluded that wireline broadband Internet access is an integrated information service.\(^{46}\)

Petitioners agreed that the Internet service component of the wireline broadband service is an unregulated "information service"; however, they insisted that the wireline transmission component of the service is a "telecommunication service" regulated by Title II of the Communications Act.\(^{47}\) The petitioners raised three arguments in support of their position: (1) the FCC's classification of wireline broadband service was not supported by record evidence; (2) the ruling was contrary to the FCC's past rulings; and (3) this classification of wireline broadband was not consistent with the *Communications Assistance for Law Enforcement Act*\(^{48}\) ("CALEA").\(^{49}\) The court addressed and rejected each of these three arguments.\(^{50}\)

The Agency's argument in support of its own position was that from the perspective of the end users, both wireline broadband service and cable modem service are functionally similar and, accordingly, each should be subject to the same classification under the Communications Act.\(^{51}\) By reviewing the records of public comments submitted in response to the *Wireline Broadband NPRM*,\(^{52}\) the court found that the FCC's conclusion was supported by record evidence.\(^{53}\) Petitioners then argued that wireline broadband service is distinguishable from cable modem service because the telephone companies (i.e., LECs) provide their wireline transmission capacities to independent ISPs on a "stand-alone" basis, i.e., the ISPs only lease telephone lines from LECs for transmission purposes while providing their consumers with their own

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46. *Id.* at 217 (citing 20 F.C.C.R. at 14863).
50. *Id.* at 217-20.
51. *Id.* at 217.
53. *Time Warner*, 507 F.3d at 217-18. The court quoted comments from Verizon and Qwest, which stated, among other things, that Cable modem and DSL are "functionally similar" and "unlike traditional dial-up connections, each enables consumers to use their ordinary telephone line for voice or fax while simultaneously accessing the Internet," that providers of cable modem and DSL "view them as substitutes," that DSL and Cable modem are "[a]nalogous" in that functions provided to the end user are the same, that service set up processes are "functionally identical," that all data is "packetized," that IP addresses are "assigned to the Premise in the same manner," that the end user's computer can be used "interchangeably," etc.; that consumers view them as "interchangeable," with "little difference" between perceptions among potential subscribers of either services." *Id.*
Internet access service.\textsuperscript{54} The court was not convinced by this argument and pointed out that LECs, as broadband providers, made their facilities accessible on a "stand-alone" basis solely because they are required to do so by \textit{Computer II}.\textsuperscript{55} The court noted that the very purpose of the \textit{Wireline Broadband Order} was to eliminate these requirements.\textsuperscript{56} The court found that record evidence disclosed that the cable modem companies possessed the capacity to provide transmission service to other ISPs on a "stand-alone" basis and that they had already done so.\textsuperscript{57} This evidence, however, did not prevent the Supreme Court from affirming the FCC's conclusion that cable modem broadband is an integrated information service.\textsuperscript{58} The Third Circuit, therefore, was unwilling to decide the question differently.\textsuperscript{59}

The court also found unpersuasive the petitioners' argument that the FCC's classification of broadband Internet access was improper because it conflicted with past Agency rulings.\textsuperscript{60} The FCC contended that even if conflicting decisions existed, a sufficient number of supportive prior rulings established the Agency's current classification of wireline broadband Internet access service as an information service.\textsuperscript{61} The court cited \textit{Brand X} in support of the FCC's contention that even though conflicts may exist, it does not necessarily follow that the classification provided by the order at issue is arbitrary and capricious.\textsuperscript{62} The Supreme Court, in \textit{Brand X}, stated that "[a]n initial agency interpretation is not instantly carved in stone"—i.e., the Agency must be free to consider varying interpretations and be free to revise its policy on a continuous basis.\textsuperscript{63} Consequently, the Third Circuit did not find

\begin{itemize}
\item \textsuperscript{54} \textit{Id.} at 218.
\item \textsuperscript{55} \textit{Id.} (citing \textit{Wireline Broadband Order}, 20 F.C.C.R. at 14886). LECs are actually the only broadband providers subject to these \textit{Computer II} requirements. \textit{Id.}
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{57} \textit{Id.} at 218 (citing \textit{Cable Modem Declaratory Ruling}, 17 F.C.C.R. at 4828-31).
\item \textsuperscript{58} \textit{Time Warner}, 507 F.3d at 218.
\item \textsuperscript{59} \textit{Id.} at 218-19.
\item \textsuperscript{60} \textit{Id.} at 219. For example, the current ruling is contradictory to the FCC's conclusion in \textit{Advance Services Order} that broadband Internet access consisted of both an information service and a telecommunications service. In re Deployment of Wireline Services Offering Advanced Telecommunications Capability ("Advance Services Order"), 13 F.C.C.R. 24012, 23017-18 (1998).
\item \textsuperscript{61} \textit{Time Warner}, 507 F.3d at 219 (citing 20 F.C.C.R. at 14862). For example, the FCC relied on its conclusion in the \textit{Universal Service Report}, that "the categories of 'information service' and 'telecommunications service' are mutually exclusive." Federal-State Joint Board on Universal Service ("Universal Service Report"), 13 F.C.C.R. 11501, 11519 (1998).
\item \textsuperscript{62} \textit{Time Warner}, 507 F.3d at 219 (citing \textit{Brand X}, 545 U.S. at 978).
\item \textsuperscript{63} \textit{Brand X}, 545 U.S. at 981.
\item \textsuperscript{64} \textit{Id.} (citing \textit{Brand X}, 545 U.S. at 981).
\end{itemize}
that the past conflicting rulings rendered the current classification unreasonable.65

The court treated petitioners’ third argument on the classification issue, which employed the CALEA66 statute, as a “red herring.”67 Petitioners argued that the FCC’s classification of wireline broadband was arbitrary and capricious because it conflicted with the Agency’s ruling in its CALEA Order68—that “broadband services are hybrid telecommunications-information services subject to the statute.”69 The court found the argument unsound because: (1) CALEA had a completely different legislative history and purpose; (2) the act used the term “telecommunications carriers,” not “telecommunication service”; and (3) the structure of CALEA was different, which indicated that Congress did not intend that the terms “telecommunications carrier” and “information service” be mutually exclusive.70 The court acknowledged that the FCC possesses the discretion to interpret two statutes differently and rejected petitioners’ argument.71

The second challenge brought by petitioners charged that the FCC’s decision to relieve all LECs from the obligation to provide nondiscriminatory access, as required by Computer II, was arbitrary and capricious.72 Petitioners objected to this decision with three arguments: (1) the FCC did not conduct a proper market analysis; (2) the FCC did not properly apply the NARUC I common carrier test;73 and (3) the FCC order violated the discontinu-

65. Time Warner, 507 F.3d at 219.
66. CALEA was enacted in 1994 to require telecommunications carriers to ensure that law enforcement officials could access their network. Time Warner, 507 F.3d at 219 (citing Am. Council on Educ. v. FCC, 451 F.3d 226, 228 (D.C. Cir. 2006)).
67. Id. at 219. “Red herring” is defined as an “irrelevant legal or factual issue, usu. intended to distract or mislead.” BLACK’S LAW DICTIONARY 1304 (8th ed. 2004).
69. Id. at 219 (citing CALEA Order at 14998-99). CALEA applies only to “telecommunication carriers,” not “information service providers.” Time Warner, 507 F.3d at 219.
70. Id. at 219. CALEA created three categories for purposes of identifying the communication services that are subject to the statute: “pure telecommunications service,” “pure information service,” and “hybrid telecommunications-information service.” Id. (citing CALEA Order, 20 F.C.C.R. at 14989, 14998-99). Only pure information service is not subject to the statute. Id.
72. Id. at 220.
73. The test was set in Nat’l Assoc. of Regulatory Util. Comm’rs v. FCC (“NARUC”), 525 F.2d 630, 640 (D.C. Cir. 1976). Time Warner, 507 F.3d at 220. Under the test, “a carrier has to be regulated as a common carrier if it will make capacity available to the public indifferently or if the public interest requires common carrier operation of the proposed facility.” Id. at 222 (citing Virgin Islands Tel. Corp. v. FCC (“Vitelco”), 198 F.3d 921, 924 (D.C. Cir. 1999) (internal quotations omitted)).
ance requirements of section 214 of the Communications Act, as well as the Due Process Clause in the Fourteenth Amendment of the United States Constitution. The court dismissed all three arguments as unpersuasive.

Petitioners argued that the FCC should be required to follow its well-established policy and past practice for assessing Title II LECs' market power. Specifically, they contended that before the FCC could relieve the LECs of the Computer II requirements, the Agency should be required to conduct a traditional market analysis with respect to the markets in which LECs were dominant. The FCC reasoned that a traditional market analysis had been applied to the conventional telephone services market, which had been mature and stable for more than twenty years. By contrast, the FCC characterized the broadband service market as emerging, dynamic, and rapidly changing and argued that any conclusion with respect to such a market, from a standard market dominance analysis would be premature. For these reasons, the Agency contended that it was justified in basing its decision on a prediction of the future trend in the broadband service market. The court refused to challenge the FCC's prediction and found that the Agency's decision to change the course of practice with respect to the market analysis was reasonable and justifiable.

The court also rejected petitioners' argument that the FCC had failed to consider the public interest as set forth in the NARUC I test, even though the Computer II requirements had been elimi-

74. According to § 214 of the Communications Act, a common carrier may not discontinue service, unless it first obtains from the FCC a "certificate that neither the present nor future public convenience and necessity will be adversely affected thereby." Time Warner, 507 F.3d at 223 (citing 47 U.S.C. § 214(a)).
75. U.S. CONST. amend. XIV.
76. Time Warner, 507 F.3d at 220.
77. Id. at 220-23.
78. Id. at 220 (citing Brief for Time Warner at 29, Time Warner Telecom Inc. v. F.C.C., No. 054769 (3d. Cir. Oct. 16, 2007)).
79. Id. Such markets included business market and certain geographic markets. Id. Petitioners conceded that cable modem broadband providers were certainly dominant in the residential market. Id. n.11.
80. Id. at 221.
81. Time Warner, 507 F.3d at 221. See Wireline Broadband Order, 20 F.C.C.R at 14898.
82. Time Warner, 507 F.3d at 221. The FCC projected that the market penetration, as well as the demand for broadband services will increase dramatically. Id. (citing Wireline Broadband Order, 20 F.C.C.R at 14884-85).
83. Id. The court reached its conclusion based on a well-settled standard that "an agency may change its course [from past practice] so long as it can justify its change with a 'reasoned analysis.'" Id. (citing Horn v. Thoratec Corp., 376 F.3d 163, 179 (3d Cir. 2004)).
nated from the LECs. According to the FCC, the elimination of the nondiscriminatory access requirement on LECs would give those telephone companies greater incentive to invest in and deploy new technologies, and the independent ISPs would continue to enjoy reasonable access to LECs' facilities because it would be in the interest of the carriers to make their facilities available at reasonable prices to competing ISPs. The FCC argued that, in so doing, the Title II LECs could spread the infrastructure costs of their networks over as many customers as possible. The court also held that the FCC's judgment providing that the public interest would be best served by deregulation of wireline broadband providers under Computer II was entitled to "substantial judicial deference." Petitioners' argument that Section 214 of the Communications Act had been violated was also rejected because the court found that the FCC properly considered the public interest before rescinding the Computer II requirements. With respect to the Due Process argument, the court found that the FCC had imposed sufficient safeguards on the LECs (a one year transition period, advance notice, etc.) to protect the independent ISPs' and consumers' Due Process rights.

By rejecting the petitioners' several arguments, the court concluded that the Wireline Broadband Order was based on a reasonable interpretation of the Communications Act, held that the FCC had not abused its discretion, and denied the petition for review.

II. THE HISTORY OF TELECOMMUNICATIONS REGULATION

A. Communications Act of 1934—The Beginning of Regulation

The issue in this case can be traced back to the Communications Act of 1934. The FCC was created by the 1934 Act to regulate

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84. Id. at 222.
85. Id. (citing Wireline Broadband Order, 20 F.C.C.R at 14887-94).
86. Time Warner, 507 F.3d at 222 (citing Wireline Broadband Order, 20 F.C.C.R at 14893).
87. Id. It has been well-settled that the task of weighing of policies under public interest standard has been delegated to the Commission. Id. (citing WNCN Listeners Guild, 450 U.S. at 586, 101).
88. Id. at 223.
89. Id. The FCC order required that the LECs continue to "honor existing transmission arrangements with their current ISP or other customers," and the LECs were also required to provide advance notice before discontinuing any services. Id. (citing Wireline Broadband Order, 20 F.C.C.R at 14905-08).
90. Id.
91. Time Warner, 507 F.3d at 209-10.
 interstate and international communication by wire and radio (Title I jurisdiction). Title II of the 1934 Act afforded the FCC broad authority to regulate telecommunications services. Telephone companies, as common carriers, were required to charge their customers "just and reasonable rates," and the FCC was given the power to set rates if the rates charged by these carriers were considered by the Agency to be unjust or unreasonable.

B. The Computer Inquiries Rulings—Deregulation of Enhanced Services

With the development of computer technologies, regulated conventional telephone communications were increasingly used for data processing services. The concern was that if Title II telephone companies were allowed to provide data services without clear regulatory safeguards, the carriers might fail to provide adequate communications services at reasonable and nondiscriminatory rates, and effective competition in data processing services market might be impaired. In order to address the issues presented by such a confluence, the FCC initiated the Computer Inquiry proceedings. Over the years, the Agency has issued three different rulings on this matter, i.e., "Computer I," "Computer II," and "Computer III." Computer I, which was finalized in 1971, required maximum separation of the regulated telephone communications services and the non-regulated data services. According to Computer I, Title II common carriers were allowed to pro-
vide data services strictly through fully separate subsidiaries having separate accounts, separate personnel, separate equipment, and separate facilities. In addition, Computer I prohibited the telephone companies from contracting with their subsidiaries for data processing services to prevent discriminatory conduct by the dominant carriers. The Court of Appeals for the Second Circuit affirmed the FCC’s broad authority under the Communications Act to regulate both computer and data processing services and upheld the Computer I order.

Computer II was issued in 1980 to address the increasing difficulty of distinguishing traditional telecommunications services and data processing services due to the rapid development of technologies. Remote terminals had formerly been used to communicate with mainframe computers in centralized locations, and these services had been classified as “pure communications.” Those “dumb” terminals, however, had now been replaced by “smart” microcomputers capable of manipulating and processing data. The result was the presence of “intelligence” on both ends of the wirelines. The FCC’s resolution of this issue was the dichotomy of basic and enhanced services, each of which were defined based on the end user’s perspective on how the service was offered. This classification established the division between the common carrier transmission services from these computer services that depend on the telephone company’s services in transmitting information. Examples of basic services, or “pure” or “transparent” transmission, include both telephone and facsimile (fax) communications. “Enhanced services,” as determined by the FCC, include, among other things, e-mail, the

100. *Time Warner*, 507 F.3d at 211.
103. *Time Warner*, 507 F.3d at 211.
110. *Time Warner*, 507 F.3d at 211.
World Wide Web, newsgroups, and voice mail. The significance of this classification is that "basic service" is subject to the Title II common carrier regulation. "Enhanced service," on the other hand, even when offered via wirelines, is not subject to common carrier regulation.

Moreover, Computer II eliminated the strict maximum separation requirement imposed upon all telephone common carriers, except for those assets controlled by the two dominant carriers, AT&T and GTE. As a result, telephone companies were allowed to provide enhanced services without creating subsidiaries. These facility-based providers were still required to grant independent competing providers nondiscriminatory access to their wirelines due to the concern that these telephone companies had monopoly powers because they owned the local exchange facilities. The D.C. Circuit upheld the Computer II ruling on appeal. The court affirmed the FCC's underlying market power analysis and found that the Agency's view regarding its Title I ancillary jurisdiction to regulate non-Title II activities (i.e., enhanced service) was reasonable.

The FCC issued the third Computer Inquiry proceeding, or Computer III, in 1986. The dominant telephone companies, or

112. Id.
114. Brand X, 545 U.S. at 996 (citing Computer II, 77 F.C.C.2d 384). This was not a Title II requirement and the FCC claimed ancillary jurisdiction under Title I of the Communications Act in making the ruling. Time Warner, 507 F.3d at 212; see 47 U.S.C. §§ 151-61.
115. Brand X, 545 U.S. at 996 (citing Computer II, 77 F.C.C.2d 384). Local exchange and toll transmission facilities are also referred to as "bottleneck." Computer II, 77 F.C.C.2d 384. See supra note 18 (describing the physical structure of a local telephone exchange).
117. Computer, 693 F.2d at 211-12. See supra note 114.
Bell operating companies ("BOCs"),\(^{119}\) were no longer required to use the costly separate subsidiaries to provide enhanced services.\(^ {120}\) The FCC, however, sought to address its original concerns regarding anticompetitive behavior by establishing non-structural safeguards.\(^ {121}\) The Agency’s short-term solution to the problem was a scheme it called Comparatively Efficient Interconnection ("CEI"); the long-term solution was called Open Network Architecture ("ONA").\(^ {122}\) Under CEI, a BOC was required to make all of the same provisions it afforded to its affiliated enhanced service provider ("ESP") to independent ESPs on the same terms and conditions.\(^ {123}\) ONA would require BOCs to break their telephone networks into blocks (lines, switches, call forwarding, call waiting, accounting, billing, etc.) so that the ESPs could selectively purchase these unbundled services and reassemble them into new and innovative services.\(^ {124}\) Computer III was reviewed by the Court of Appeals for the Ninth Circuit, and the ONA rules were vacated and remanded to the FCC.\(^ {125}\) That court held that the FCC had failed to adequately explain how the non-structured safeguards of Computer III were sufficient to prevent access discrimination.\(^ {126}\)

Computer networks were the direct beneficiaries of the Computer Inquiries, and the safeguards imposed upon common carriers by the rulings were considered to be for the benefit of computer networks.\(^ {127}\) After Computer III, the first commercial ISP was established in 1989, and the World Wide Web became a real-

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119. After the divestiture of AT&T in 1984, twenty-two Bell operating companies ("BOCs"), which had been AT&T's wholly owned subsidiaries providing local exchange service, split from AT&T, and were grouped into seven holding companies known collectively as the regional Bell operating companies (RBOCs). See 74 AM. JUR. 2D Telecommunications § 27; AT&T: History: The Bell System, http://www.corp.att.com/history/history3.html (last visited Oct. 3, 2008).

120. Time Warner, 507 F.3d at 212.

121. Cannon, supra note 110, at 200.

122. Id.


125. Cannon, supra note 110, at 202 (citing California v. FCC ("California"), 39 F.3d 919 (9th Cir. 1994), cert. denied, 514 U.S. 1050 (1994)).

126. California, 39 F.3d at 930.

By the mid-1990s, the number of Internet users had virtually exploded.

C. Telecommunications Act of 1996—Telecommunications Service vs. Information Service

In 1996, Congress overhauled telecommunications law for the first time since passing the 1934 Act by enacting the Telecommunications Act of 1996. Title II of the 1934 Act was amended to address the issue of market dominance by a small number of LECs. Particularly, Title II now imposed on “incumbent local exchange carriers” (“ILECs”) a duty to interconnect with other telecommunications carriers and set forth the requirements they must meet to fulfill the duty. For example, ILECs are required to permit nondiscriminatory interconnection; to provide any other carrier unbundled access to the ILEC’s network at cost-based rates; to charge customers just, reasonable, and nondiscriminatory rates; and to contribute to the federal “Universal Service Fund.”

The 1996 Act codified Computer II basic service and enhanced service as telecommunications service and information service, respectively. Title II of the amended 1934 Act regulates telecommunications carriers as common carriers, but information service providers are not so regulated. The 1996 Act also requires the FCC to forbear from imposing one of its regulations on telecommunications carriers if it should determine that the particular regulation is not necessary to safeguard public interest.

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128. Id. at 204.
129. Id.
130. Time Warner, 507 F.3d at 212.
131. Id. (citing James B. Speta, Handicapping the Race for the Last Mile? A Critique of Open Access Rules for Broadband Platforms, 17 YALE J. ON REG. 39, 63 (2000)).
132. ILECs refer to any LEC existing as of the date of passage of the 1996 Act. Id. They are the former monopoly local telephone companies, mainly BOCs, while the new players in the local market, such as start-up carriers, cable companies, utility companies, wireless carriers, etc., are called competitive local exchange carriers (“CLECs”). Richard E. Wiley et al., Communications Law 2007, 920 PLI/Pat 249, 286 (2007).
134. Id. The “Universal Service Fund” is used to subsidize telecommunications and information services in rural and high-cost areas, as well as for schools, libraries, and low-income households. 47 U.S.C. § 254(b)(3), (h)(1)(B). The Communications Act mandates contributions from “[e]very telecommunications carrier that provides interstate telecommunications services.” Id. § 254(d).
135. Time Warner, 507 F.3d at 213. For the Act definitions of “information service” and “telecommunication service,” see supra note 40.
136. Brand X, 545 U.S. at 975.
137. Id. at 976 (citing 47 U.S.C. § 160).
ever, the FCC retained its jurisdiction to impose additional regulations on information service providers under its Title I ancillary jurisdiction.\textsuperscript{138}

In implementing the 1996 Act, the FCC issued \textit{Universal Service Order}\textsuperscript{139} in 1997.\textsuperscript{140} In the following year, the Agency submitted a report to Congress ("the \textit{Universal Service Report")\textsuperscript{141} reviewing its implementation of the universal service provisions of the 1996 Act.\textsuperscript{142} In the \textit{Universal Service Report}, the FCC concluded that the categories of "telecommunications service" and "information service" in the 1996 Act are mutually exclusive and are consistent with the preexisting \textit{Computer II} definitions of "basic service" and "enhanced service."\textsuperscript{143} The FCC viewed the provision of transmission capacity to ISPs as "telecommunications service" and as a result, telephone companies offering leased lines to ISPs became subject to Title II universal service regulation.\textsuperscript{144} The report found, however, that non-facility-based ISPs, which lease lines from telecommunications carriers for the sole purpose of transporting data, provide information services; thus, they are not subject to Title II regulation.\textsuperscript{145} In late 1998, the FCC ruled that ILECs' digital subscriber line ("DSL") services, which are used by ISPs to provide high-speed Internet access to consumers, should be classified as interstate telecommunications services and therefore should be subject to the federal regulation.\textsuperscript{146}

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\textsuperscript{138.} \textit{Brand X}, 545 U.S. at 976 (citing 47 U.S.C. §§ 151-61).
\textsuperscript{140.} \textit{Id.} In the Universal Service section of the 1996 Act, Congress directed the FCC to establish mechanism to ensure "[c]onsumers in all regions of the Nation, including . . . those in rural, insular, and high cost areas . . . have access to telecommunications and information services . . . at rates that are reasonably comparable to rates charged for similar services in urban areas." \textit{Id.} at 8799 (citing 47 U.S.C. § 254).
\textsuperscript{142.} \textit{Id.}
\textsuperscript{143.} \textit{Id.} at 11507.
\textsuperscript{144.} \textit{Id.} at 11533.
\textsuperscript{145.} \textit{Id.} at 11532-33. The Agency found that Congress intended to keep information service providers from being subject to regulation as common carriers simply because they provide their services via telecommunications. \textit{Id.} at 11508.
\textsuperscript{146.} Jason Oxman, The FCC and the Unregulation of the Internet (Federal Communications Commission OPP Working Paper No. 31, 1999) (citing GTE Telephone Operating Companies Tariff No. 1, 13 F.C.C.R. 22466 (1998)). DSL services can give consumers ability to access Internet data services at speeds up to 50 times the traditional 56 kbps dial-up services. \textit{Id.}
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D. Cable Modem Declaratory Ruling—Deregulation of Cable Internet Access

While more than thirty years have passed since the FCC's first Computer Inquiry proceeding, the convergence of technologies has presented even greater challenges to the Agency in regulating the communications market. By way of example, not only can data communications now be offered over traditional voice lines, voice services can also be offered as a type of data service; not only can cable companies offer video programs, they are also capable of offering data and voice services over traditional television facilities. The ever-increasing blurring of the distinction between information and telecommunications services has made it difficult for the FCC to assign services into these mutually exclusive categories and thereby keep data services unregulated.

The issue of whether cable companies should be required to provide ISPs with access to their broadband system was first addressed by the FCC in 1998 in its “First Section 706 Inquiry,” which dealt with the deployment of broadband capability. In 2002, after two years of a rulemaking proceeding, the FCC issued Cable Modem Declaratory Ruling and therein concluded that cable modem broadband Internet access service is an “information service” and is, therefore, not subject to the Title II regulations. The Agency found no basis to treat cable companies differently from non-facilities-based ISPs, which were classified as solely information service providers, despite the fact that cable companies actually own the facilities they use to provide Internet access. The FCC reasoned that cable companies, like non-facilities-based ISPs, do not offer telecommunications directly to the end user; but,

148. Id. at 22, 26.
149. Id.
150. Id. See also Rob Frieden, Neither Fish Nor Fowl: New Strategies for Selective Regulation of Information Services, 6 J. TELECOMM. & HIGH TECH. L. 373, 376 (2008).
153. Id. Non-facility-based ISPs were classified as sole information service provider in the Universal Service Report. Id. (citing Cable Modem Declaratory Ruling, 17 F.C.C.R. at 4823; Universal Service Report, 13 F.C.C.R. at 11533).
rather, they use the underlying telecommunications to provide end users with Internet access, a service that was considered to be an information service.\textsuperscript{154}

\textbf{E. Brand X—Judicial Review of Cable Modem Declaratory Ruling}

The \textit{Cable Modem Declaratory Ruling} triggered numerous petitions for judicial review, all aimed at the FCC’s conclusion that cable modem Internet access was not a telecommunications service.\textsuperscript{155} The Court of Appeals for the Ninth Circuit was selected to review these petitions by judicial lottery.\textsuperscript{156} The court vacated that portion of the ruling that concluded that cable modem service was not a “telecommunications service” and held that such a conclusion represented an impermissible construction of the Communications Act.\textsuperscript{157} The court based its holding on a Ninth Circuit precedent,\textsuperscript{158} providing that cable modem service was a “telecommunications service,” and concluded that the precedential holding overrode the contrary interpretation of the Communications Act that had been made by the FCC in \textit{Cable Modem Declaratory Ruling}.\textsuperscript{159}

In \textit{Brand X}, the United States Supreme Court rejected the reasoning of the Ninth Circuit and stated that a prior judicial construction of a statute may trump an agency’s construction only if the terms of the statute are unambiguous and leave no room for

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\item[154.] \textit{Brand X}, 545 U.S. at 979 (citing \textit{Cable Modem Declaratory Ruling}, 17 F.C.C.R. at 4824; \textit{Universal Service Report} 13 F.C.C.R. at 11539-40). The FCC concluded that because the Internet access service enables users to manipulate and store information, it was an information service. \textit{Id.} at 978 (citing 17 F.C.C.R. at 4824).
\item[155.] \textit{Brand X}, 545 U.S. at 979. Seven different petitions were filed in the Third, Ninth, and District of Columbia Circuits. \textit{Brand X Internet Services v. FCC}, 345 F.3d 1120, 1127 (9th Cir. 2003). All the petitioners agreed that cable modem service is an information service, but advocated for the FCC to make an additional determination. \textit{Brand X}, 345 F.3d at 1127. For example, one group of petitioners, argued that cable modem service is both information and telecommunications services, and therefore, should be subject to Title II regulation and should be required to provide access to the competing ISPs. \textit{Id.} at 1127, nn. 10, 11.
\item[156.] \textit{Brand X}, 545 U.S. at 979. When an agency receives petitions to review with respect to an order in more than one courts of appeals, the judicial panel on multidistrict litigation is authorized to designate one of these courts of appeals, by means of random selection, to review the consolidated petition. 28 U.S.C. § 2112(a)(3).
\item[157.] \textit{Brand X}, 545 U.S. at 979 (citing \textit{Brand X}, 345 F.3d at 1132).
\item[158.] AT&T Corp. v. City of Portland ("Portland"), 216 F.3d 871 (9th Cir. 2000).
\item[159.] \textit{Brand X}, 545 U.S. at 979-80 (citing \textit{Portland}, 216 F.3d at 877-80; \textit{Brand X}, 345 F.3d at 1128-32). The issue of that case did not concern any FCC proceeding; but the court, nevertheless, followed precedent. \textit{Id.} at 980.
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an agency's use of its discretion.\textsuperscript{160} The Court concluded that the \textit{Chevron} framework governing judicial review of an agency's ruling should be applied to the FCC's interpretation of the term "telecommunications service."\textsuperscript{161} The Court found this term to be ambiguous because the statute does not clearly state whether the telecommunications component of the cable Internet access is functionally integrated in, or separated from the cable modem service and, consequently, that the \textit{Chevron} standard requires a federal court to accept the construction of the term as provided by the FCC—the agency designated by Congress to implement the statute—as long as its construction is reasonable.\textsuperscript{162} The majority of the Court deferred to the FCC's conclusion in this "technical" and "complex" area and held as "reasonable" the FCC's ruling that cable modem service is not both a telecommunications service and an information service, but rather, an integrated information service.\textsuperscript{163} The majority used an interesting "car dealership" analogy to illustrate this conclusion.\textsuperscript{164} In a dissenting opinion, however, Justice Scalia challenged the majority with a competing analogy (a pizza delivery service) to argue that the transmission component is a service that is separate from the cable modem service.\textsuperscript{165} He characterized the FCC's interpretation as unlawful and criticized the FCC's heavy reliance on its Title I ancillary jurisdiction to change regulations in whatever way it considered necessary.\textsuperscript{166}

\textsuperscript{160} \textit{Brand X}, 545 U.S. at 982.
\textsuperscript{161} \textit{Id.} at 981. The \textit{Chevron} framework is a two-step procedure. \textit{Id.} at 986. At step one, a court will determine whether the statute's plain language directly addresses the precise question at issue; if the statute is ambiguous on the point, the court proceeds to step two to determine whether the agency's construction is "a reasonable policy choice for the agency to make." \textit{Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837, 843, 845 (1984).
\textsuperscript{162} \textit{Brand X}, 545 U.S. at 981, 992, 997. On remand for further proceedings, the Court of Appeals for the Ninth Circuit affirmed the \textit{Cable Modem Declaratory Ruling}. \textit{Brand X Internet Services v. FCC}, 435 F.3d 1053 (9th Cir. 2006).
\textsuperscript{163} \textit{Id.} at 992.
\textsuperscript{164} \textit{Brand X}, 545 U.S. at 990. In this illustration, the majority stated that while it might be said that a car dealer offers cars for sale, it would not be said that the dealer offers for sale the essential integrated parts that make the car valuable, for e.g., the engine; in fact, it would seem very odd to say that a dealer offers such components for sale in addition to the car itself. \textit{Id.}
\textsuperscript{165} \textit{Brand X}, 545 U.S. at 1007 (Scalia, J., dissenting). Justice Scalia, joined by Justices Souter and Ginsburg, argued that a pizzeria could not say that it offered pizza and brought it to the customer's home, but did not offer delivery since delivery was an integrated part of its service. \textit{Id.}
\textsuperscript{166} \textit{Id.} at 1005, 1014 (Scalia, J., dissenting).
F. Wireline Broadband Order—Deregulation of DSL Services

Three months after the Supreme Court’s endorsement of its classification of cable modem Internet access as an information service, the FCC, in its Wireline Broadband Order, reclassified DSL service from telecommunications service to information service.\(^{167}\) The Wireline Broadband Order relieved all LECs of obligations imposed by Computer Inquiries with respect to wireline broadband Internet access services.\(^ {168}\) Unlike cable lines that were originally used for TV programming transmission, wirelines had been traditionally used exclusively for the Title II regulated telecommunications services.\(^ {169}\) The FCC failed to explain how the telecommunications component of DSL service had changed from a stand-alone service to an integrated component but simply employed a rationale similar to the one used when declaring cable modem service an unseverable information service, in order to reach regulatory parity between cable modem and DSL services.\(^ {170}\)

G. Extension of Deregulation to Other Broadband Services

In pursuing the goal of creating a consistent regulatory framework for various broadband platforms, the FCC extended the ruling of Wireline Broadband Order to other forms of broadband services.\(^ {171}\) In 2006, the FCC, in its BPL-Enabled Internet Order, classified broadband over power line (“BPL”)-enabled Internet access service as an information service.\(^ {172}\) In 2007, the FCC released Wireless Internet Order\(^ {173}\) and classified wireless broadband Internet access service as an information service regardless of the type of technology (mobile, portable, or fixed) that is employed to offer the service.\(^ {174}\) The FCC, however, has been reluctant to make a determination on the classification of the Voice over Inter-
net Protocol ("VoIP") service. Nevertheless, by invoking its Title I ancillary jurisdiction, the Agency issued an order in 2006 requiring "interconnected" VoIP service providers to contribute to the Universal Service Fund and thereby made VoIP subject to the same regulations as common carriers. This decision was affirmed by the Court of Appeals for the District of Columbia using the Chevron two-part test.

III. EVALUATING THE TIME WARNER HOLDING

Judging from the evolution of regulatory history and the development of case law, particularly the Supreme Court's holding in Brand X, the decision of the Court of Appeals for the Third Circuit in Time Warner was both reasonable and predictable in that the court closely followed existing precedent. The FCC's argument in support of its Wireline Broadband Order that the policy of further deregulation would help promote competition in the broadband markets, however, does not square with either reality or the existing statistical data, even though the FCC's deregulation policy in 1980s and 1990s was beneficial to the development of the Internet. Congress, through the 1996 Act, afforded the FCC all necessary power to expand its deregulation policy. Courts, on the other hand, probably have been too deferential to the FCC's exercise of its discretion to legitimately claim effective judicial oversight of the Agency.

The court's decision in Time Warner in upholding the FCC's Wireline Broadband Order was predictable. The United States
Supreme Court in *Brand X* recently endorsed the FCC’s order in *Cable Modem Declaratory Ruling* in which the Agency classified cable broadband Internet service—a service that reasonably and sufficiently resembles the wireline broadband Internet service—as a deregulated information service.\(^\text{179}\) While the Court’s holding in *Brand X* is controversial and features Justice Scalia’s strong dissenting opinion in which two other Justices joined,\(^\text{180}\) it is not surprising that the Third Circuit followed precedent and endorsed the FCC’s deregulation order regarding the wireline broadband service. The court in *Time Warner* followed the Supreme Court’s model by using *Chevron’s* reasonable standard of review and also adopted the Court’s disposition to give the FCC all due deference in areas of its apparent expertise.\(^\text{181}\) The court, however, did not challenge the FCC’s discretion in making conflicting rulings, in interpreting two statutes differently, or in changing its market analysis approach.\(^\text{182}\) Rather, the court chose to take a reasonable and safe approach; thus, its holding in *Time Warner* was a “safe” decision.

Whether the FCC’s arguments in support of its rulings were sound and reasonable is a different story, and whether these rulings have accomplished the goal of promoting competition in the broadband markets is open to question. The FCC’s late twentieth century policy was helpful to Internet development. The series of *Computer Inquiry* proceedings that were promulgated by the FCC to benefit the computer networks, have, to a certain extent, fulfilled their mission. By creating the dichotomy of enhanced service and basic service, the Agency has allowed the computer networks to develop and flourish in two different ways.\(^\text{183}\) On the one hand, the *Computer Inquiries* made it possible for the Internet to grow in an unregulated environment as an enhanced service.\(^\text{184}\) On the other hand, the transmission services underlying Internet service remained regulated as a basic service; thus, hundreds of ISPs were able to offer affordable Internet access over inexpensive telephone lines to customers.\(^\text{185}\) Moreover, the Universal Service Fund mechanism—paid only by basic service providers—has con-

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\(^{179}\) *Brand X*, 545 U.S. at 974.

\(^{180}\) Id. at 1006-20 (Scalia, J., dissenting).

\(^{181}\) *Time Warner*, 507 F.3d at 221.

\(^{182}\) Id. at 219-21.

\(^{183}\) Oxman, *supra* note 146, at 3.

\(^{184}\) Id. at 3.

\(^{185}\) Id. at 5. In the early development of Internet, the Internet access was provided by dial-up connections. *Id.*
tributed significantly to the high level of wireline telephone service penetration in the United States while the exemption of enhanced service providers ("ESPs") from access charges has made it possible for ISPs to provide Internet access to end users on an inexpensive, flat rate basis.\textsuperscript{186} The deregulatory environment created by the FCC in the 1980s and 1990s for Internet services fostered the rapid growth of the Internet.\textsuperscript{187} By the late 1990s, there were over 6,000 ISPs offering dial-up Internet access, with a significant number of users relying on small or mid-size ISPs for their service.\textsuperscript{188} From 1993, the year the first commercial web browser came onto the market, to 1997, the number of computers linked to the Internet grew from 1.3 million to 16 million.\textsuperscript{189}

The early development of cable modem broadband services also benefitted from the FCC policy. After the enactment of the Telecommunications Act of 1996, the FCC continued its policy of deregulation by correlating the Computer II categorization of enhanced and basic services to the 1996 Act's terminologies of "information" and "telecommunication" services and by preserving the unregulated status of the ISPs as an information service.\textsuperscript{190} In an effort to foster the growth of the new high-speed data service, the FCC chose to treat the DSL services as telecommunications services and required telephone companies to make the services available to ISPs on a nondiscriminatory basis, while leaving cable modem services completely unregulated.\textsuperscript{191} In the late 1990s, the Agency's policy was positive in fostering competitive broadband deployment because cable modems using video program transmission pipe were still new in the communications markets, while

\textsuperscript{186} Id. at 15-16. With universal service system, LECs were allowed to charge long distance telephone companies (interexchange carriers, "IXCs") above cost to access their local facilities, and with such implicit subsidies LECs were able to provide services to high-cost rural areas with affordable rates below cost. Id. at 15. ESPs were exempted from such per-minute based access charge that IXCs were required to pay because FCC determined that ESPs were not subject to Title II regulation, and in terms of their telephone network usage, they should be treated as end users rather than as carriers. Id. at 16-17.

\textsuperscript{187} Id. at 3.


\textsuperscript{189} Id. at 4.

\textsuperscript{190} Id. at 18 (citing Universal Service Report, 13 F.C.C.R. 11501).

\textsuperscript{191} Oxman, supra note 146, at 19, 21 (citing GTE Telephone Operating Companies Tariff No. 1, 13 F.C.C.R. 22466 (1998); Applications For Consent to The Transfer of Control of Licenses and Section 214 Authorizations From Tele-Communications, Inc., Transferor to AT&T Corp., Transferee, 14 F.C.C.R. 3160 (1999)).
telephone lines had been deployed for decades.\textsuperscript{192} Today, the top ten cable broadband providers hold a 54% share of the broadband market with 35.3 million subscribers.\textsuperscript{193}

While the FCC continued moving toward additional deregulation in the new millennium, which led to the issuance of \textit{Cable Modem Declaratory Ruling} and the \textit{Wireline Broadband Order}—the latter being at issue in the present case, the landscape of the telecommunications market has gone through major changes after a series of mergers and acquisitions. The monopoly of AT&T and the Bell Systems ended with the divestiture of AT&T in 1984.\textsuperscript{194} Beginning in the second half of the 1990s, a series of mergers occurred among the BOCs, which had split from the old AT&T, together with a number of other telephone companies, resulting in only three regional BOCs.\textsuperscript{195} Similarly, the cable markets had fallen under the control of a few giant players through mergers and acquisitions.\textsuperscript{196} By 2006, each of the top ten broadband providers was a regional monopoly in either cable or DSL service.\textsuperscript{197} Together, these companies controlled 83% of the broadband market.\textsuperscript{198} The two platforms dominated 98% of the entire broadband market with satellites, wireless, and power-line broadband services accounting for no greater than 2% of the market.\textsuperscript{199} By the end of the second quarter of 2008, the top twenty cable and telephone companies constituted about 94% of the broadband mar-

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\item[192.] Oxman, \textit{supra} note 146, at 18.
\item[194.] See \textit{supra} note 114.
\item[195.] See Cybertelecom :: Timeline, http://www.cybertelecom.org/notes/timeline.htm (last visited October 12, 2008). After the merger of Bell South and AT&T (SBC, the old Southwestern Bell, acquired AT&T in 2005 and renamed as AT&T) in 2006, the three ROBCs left were Verizon, AT&T and Qwest. \textit{Id. See also} Cybertelecom :: Mergers, http://www.cybertelecom.org/broadband/merger.htm (last visited October 12, 2008); FCC, High-Speed Services for Internet Access: Status as of June 30, 2007 at 13 (2008), \textit{available at} http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf.
\item[196.] See List of cable companies, Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/List_of_cable_companies#United_States (last visited October 12, 2008). The five biggest cable companies by number of subscribers are Comcast, Time Warner Cable, Cox Communications, Charter Communications and Cablevision, with Comcast and Time Warner controlling more than 70% (37.3 million) of the total subscribers of the top five companies (52.3 million). \textit{Id.}
\item[198.] \textit{Id.}
\item[199.] \textit{Id.}
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ket.\textsuperscript{200} Other statistics also indicate that the broadband market has become a series of regional duopolies. For example, based on the 2006 data, Sprint, the largest non-ILEC ISP, accounted for less than 2% of the entire broadband market;\textsuperscript{201} and according to a study conducted by the Government Accountability Office ("GAO"), the median number of broadband providers available to consumers was two.\textsuperscript{202}

Competition has been further reduced by the FCC's 2005 \textit{Wireline Broadband Order}, deregulating DSL service and freeing ILECs from being required to provide competing ISPs with non-discriminatory open access to their "last-mile" infrastructure.\textsuperscript{203} According to the FCC's latest report, as of June 2007, 97% of ADSL\textsuperscript{204} connections were being provided by the ILECs or their affiliates, while competing ISPs accounting for only 3% of market share.\textsuperscript{205} The market share of non-ILEC ISPs has declined in each of the last five years.\textsuperscript{206} Obviously, the FCC's policy as expressed through \textit{Wireline Broadband Order} and \textit{Cable Modem Declaratory Ruling} has not achieved the Agency's statutory objective in promoting competition;\textsuperscript{207} nor has the Agency's argument that ILECs have incentives to make their facilities available to the non-ILEC ISPs at a reasonable rate squared with the actual market data.\textsuperscript{208}

Indeed, the Agency's regulatory policy has failed to fulfill the goal stated by the Bush Administration to provide universal and

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\item \textsuperscript{201} Turner, \textit{supra} note 197, at 19.
\item \textsuperscript{202} \textit{Id.} at 21.
\item \textsuperscript{203} \textit{Id.} at 20. "Last-mile" broadband infrastructure refers to the telephone or cable wires that deliver broadband to the homes of consumers. \textit{Id.} at 22.
\item \textsuperscript{204} ADSL stands for Asymmetric Digital Subscriber Line, which provides speeds in one direction greater than speeds in the other direction (the most commonly used DSL service). FCC, \textit{supra} note 195, at 13. ADSL "allows faster downstream data transmission over the same line used to provide voice service, without disrupting regular telephone calls on that line." Getting Broadband, http://www.fcc.gov/cgb/consumerfacts/highspeedinternet.html (last visited October 12, 2008). Symmetric Digital Subscriber Line ("SDSL") provides equal speeds for downstream and upstream traffic "used by business for services such as video conferencing. \textit{Id.}
\item \textsuperscript{205} FCC, \textit{supra} note 195, at 13.
\item \textsuperscript{206} Turner, \textit{supra} note 197, at 21, fig.15.
\item \textsuperscript{207} In stating its goal in issuing \textit{Cable Modem Declaratory Ruling}, the FCC stated that its broadband policy "will first and foremost be guided by, and grounded in, the Communications Act. Furthermore, as a policy matter, \textit{[the FCC] recognize[s] that the statutory objectives to promote competition and universal service have not changed."} \textit{Cable Modem Declaratory Ruling}, 17 F.C.C.R. at 3021.
\item \textsuperscript{208} The court in \textit{Time Warner} addressed and accepted the FCC's argument in the opinion. \textit{See Time Warner}, 507 F.3d at 222 (citing \textit{Wireline Broadband Order}, 20 F.C.C.R. at 14892-94).
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affordable broadband access by 2007.\textsuperscript{209} The reality is this: the United States is falling significantly behind the rest of the developed world in broadband penetration, as well as in broadband speed and price.\textsuperscript{210} During the 2000-2005 period, the United States dropped from fourth to twelfth place in broadband penetration and dropped further to fifteenth place in 2007.\textsuperscript{211} Because of the lack of competition, U.S. consumers pay higher prices yet get slower speeds for broadband connections as compared with other developed countries.\textsuperscript{212} In 2006, the U.S. ranked 13 among 30 OECD members in terms of the price that consumers were paying per megabit per second ("Mbps") of broadband connections.\textsuperscript{213} The situation is getting worse. According to the most recent OECD report, the ranking of the U.S. in prices has dropped further to 18 in 2007.\textsuperscript{214} Consumers in Japan, the country ranked number one, paid 13 cents per Mbps per month, while Americans pay $2.83—about 22 times higher.\textsuperscript{215}

The FCC's argument in the \textit{Wireline Broadband Order} that its deregulation policy fosters competition and growth in the broadband market has proved to be unsound, although its reasoning supporting parity treatment between cable broadband and wireline broadband may have some merit. Affording the same policy considerations to both cable and DSL services, however, does not necessarily mean that both must be deregulated by eliminating the open access requirement. What the FCC should have done was to require both local telephone companies (ILECs) and cable

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\item \textsuperscript{210} Turner, supra note 197, at 3-4.
\item \textsuperscript{211} \textit{Id}, at 8 (citing Organization for Economic Cooperation and Development (OECD), http://www.oecd.org/sti/ict/broadband). The latest OECD report on broadband growth and policies shows that eight countries, Denmark, the Netherlands, Switzerland, Korea, Norway, Iceland, Finland and Sweden, led the 30 OECD members in broadband penetration. OECD, Broadband Growth and Policies in OECD Countries at 25 (2008), available at http://www.oecd.org/dataoecd/32/57/40629067.pdf.
\item \textsuperscript{212} Turner, supra note 197, at 14.
\item \textsuperscript{215} OECD, supra note 211, at 43.
\end{itemize}
companies that own the "last-mile" facilities to provide to competing ISPs with open access to their infrastructure on a nondiscriminatory basis. While the deregulation policy afforded to cable modem service during its early deployment period helped it grow, notwithstanding the competition coming from well-deployed telephone lines, it has already surpassed DSL service in broadband markets, and any favorable regulatory policy afforded to cable broadband has become unnecessary. An open and nondiscriminatory access rule is the correct way to promote competition and to benefit consumers by making it possible for non-facility-based ISPs to break the cable and telephone companies' duopolies and to become recognizable players in the broadband market.

The FCC has been given all the statutory power it needs in order to expand its deregulation policy by Congress through the 1996 Act. The FCC also maintains great flexibility to use its broad Title I ancillary jurisdiction in making decisions, as long as it makes its case based on what is perceived to be the "public interest." Courts have been affording great deference to the FCC's decisions and reasoning. Except for Computer III, which did not pass judicial review and therefore was not implemented as planned, all the other relevant rulings, from the first two Computer Inquiries to the Cable Modem Declaratory Ruling, the Wireline Broadband Order, and the Contribution Methodology on VoIP, have been upheld and endorsed by reviewing courts. By using the Chevron "reasonable" standard and by deferring to the FCC's conclusions in the "technical" and "complex" broadband area, courts essentially have not imposed any meaningful judicial oversight over Agency decisions as long as the Agency provides some reasoning and argument in support of its position, whether plausible or not. Courts do not question the methods that the FCC uses in collecting evidence and in compiling statistical data, nor do they question whether the Agency's conclusions about the current and future market conditions are sound. The policy of deregulating DSL services and cable broadband services coupled with the con-

216. The 1996 Act granted authority to the FCC to order telephone companies to eliminate their tariffs imposed by Title II regulation. See supra text accompanying note 134. See also Frieden, supra note 150, at 415.

217. See supra text accompanying note 138. See also Frieden, supra note 150, at 415.

218. Frieden, supra note 150, at 421. For example, in supporting its regulatory decisions, the FCC generated optimistic market penetration and competition data, which did not square with the data compiled by unbiased organizations, such as OECD and International Telecommunication Union. Id, at 421-23, n.183.
tinuous mergers of telephone and cable companies has resulted in the creation of duopolies in the broadband market, despite the FCC's stipulation that the policy is designed to promote competition. Courts, however, remain willing to defer Agency's rationales and projections.\footnote{See id.}

Precisely as Justice Scalia stated in his dissenting opinion in \textit{Brand X}, the FCC, by using the classification of telecommunications and information service, coupled with its broadly construed ancillary jurisdiction, can freely determine—in its sole discretion—whether to or not to impose an obligation to a particular service.\footnote{See Brand X, 545 U.S. at 1013-14 (Scalia, J., dissenting).} The FCC can even determine whether to regulate a service without first determining its classification, provided that the Agency believes that such a classification will bring an undesired result. The \textit{Contribution Methodology} ruling on VoIP is a perfect illustration of this principle. VoIP service is provided through Internet access and is obviously more like an information service, which would not be subject to Title II regulation, than like a telecommunications service.\footnote{See supra text accompanying notes 176, 177.} The FCC, by using its ancillary power has, nevertheless, made VoIP subject to the universal service obligation, rendering it a de facto telecommunications service without any determination of its classification.\footnote{See supra notes 175, 177.}

Justice Scalia's concern over the FCC's overly expanded power, exercised with virtually no oversight, is completely legitimate, particularly when considering that the United States is lagging behind the rest of the world in broadband services largely because of the FCC's regulatory policies. The failure of the FCC's policy may also be evidenced by its current proposal in October 2008 of a new plan, which will overhaul the telecommunications regulations for the purpose of promoting the development of affordable broad-

\footnote{\begin{itemize}
\item \textit{Winter 2009 Time Warner v. FCC} 177
\item 219. See id.
\item 220. See Brand X, 545 U.S. at 1013-14 (Scalia, J., dissenting). The FCC, in its \textit{Cable Modem Declaratory Ruling}, determined that the Title II common carrier regulation did not apply to cable companies; however, it did invite comment on whether it should use its Title I jurisdiction to require cable companies to provide independent ISPs nondiscriminatory access to their cable lines. \textit{Id.} at 979. (citing \textit{Cable Modem Declaratory Ruling}, 17 F.C.C.R. at 4839). Commenting on this part of the ruling, Justice Scalia pointed out the irony of the FCC's authority to "turn statutory constraints into bureaucratic discretions," to-wit: the FCC rendered its Title II regulatory authority inapplicable to cable modem service by classifying the service as a sole "telecommunication service," yet, by using its Title I ancillary jurisdiction, the Agency can order cable companies to "unbundle" the telecommunications component of their service, and as a consequence, cable companies would then become subject to Title II regulation. \textit{Id.} at 1013-14 (Scalia, J., dissenting).
\item 221. See supra notes 175, 177.
\item 222. See supra text accompanying notes 176, 177.
\end{itemize}}
band networks.\textsuperscript{223} Although it is not unreasonable for an appellate court to follow the Supreme Court's footprint in endorsing the FCC's order that has created duopolies and has discouraged competitions, it is time for reviewing courts to take a closer look at the FCC's decisions and reasoning and to provide more rigorous judicial oversight over the Agency's regulatory power.

\textit{Liu Duan}

\textsuperscript{223} See FCC overhaul eyes broadband but could raise bills (AP), http://tech.yahoo.com/news/ap/20081015/ap_on_hi_te/tec_fcc_telecom_overhaul_5 (last visited October 22, 2008). In October 2008, the FCC came up with a new proposal to overhaul the "intercarrier compensation" and Universal Service Fund systems for the purpose of promoting the development of affordable broadband networks. \textit{Id.} The Agency has planned to vote on the proposal in a meet scheduled for November 4, 2008. \textit{Id.}