Nos. 04-277 and 04-281

In the Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL., PETITIONERS

v.

BRAND X INTERNET SERVICES, ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

BRAND X INTERNET SERVICES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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The fundamental question in this case is whether cable modem service must, as a matter of law, be segregated into distinct information and telecommunications services for purposes of regulation under the Communications Act, or may instead, as the FCC found, be classified as "a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities." Pet. App. 95a. The text and congressional purposes of the Communications Act, 47 U.S.C. 151 *et seq.*, and the history of the Commission's regulatory treatment of information services fully support the Commission's classification decision. Respondents' arguments to the contrary rest on strained characterizations of the ambiguous statutory text and on mischaracterizations of the regulatory and legislative history, and must be rejected.

I. THE FCC REASONABLY CONCLUDED THAT CABLE MODEM SERVICE IS AN "OFFERING" OF A SINGLE, INTEGRATED INFORMATION SERVICE

1. The FCC's conclusion that cable modem service is an "offering" of a single, integrated information service finds ample support in the text of the Communications Act. The Act's definition of "telecommunications service" requires consideration of what is (1) "*offer[ed]*" (2) "for a fee" (3) "directly to the public." 47 U.S.C. 153(46) (emphasis added). Respondents essentially ignore the question of what is "offer[ed]" and move directly to whether cable modem service is provided "for a fee" and "to the public." See, *e.g.*, EarthLink Br. 18. As the Commission reasonably found, however, when examined from the perspective of "the nature of the functions that the end user is offered," cable modem service does not include an offering of pure transmission service (i.e., "telecommunications") because "[a]s provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other [information-processing] capabilities." Pet. App. 94a, 96a. See *id.* at 98a (analysis "focuses * * * on the single, integrated information service that the subscriber to cable modem service receives").

Respondents' argument to the contrary rests at bottom on the assumption that an "offering" of an integrated service or product must necessarily be viewed as the "offering" of each constituent part as well. EarthLink Br. 18-19; States Br. 18-22; MCI Br. 15-16. That assumption, however, is not well founded. The government's opening brief discusses the example of a New York-to-Los Angeles flight with a refueling stopover in Chicago, in which it would be far from obvious that the service offering must be disaggregated for regulatory purposes. See FCC Br. 27-28; see also NCTA Br. 21 & n.26. In *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984), the Court in a similar context affirmed an Environmental Protection Agency (EPA) regulation providing that multiple

pollution-emitting devices in a large facility need not each be deemed a separate "stationary source" under the Clean Air Act—an issue on which the EPA itself had adopted varying positions over time. See *id.* at 852-859.

As those examples illustrate, the answer to the question whether a multi-component service or item should be divided into its constituent parts for purposes of legal analysis depends on the legal context, purposes, and policies that are at stake. Congress entrusted the consideration and weighing of those factors in the first instance to the expert agency with responsibility for construing the statute. Thus, in *Chevron* itself, the EPA was entitled to deference when it determined that a group of multiple pollution-emitting devices constitutes a single "stationary source" under the Clean Air Act. 467 U.S. at 866. For the same reasons, deference is due to the FCC's expert determination that cable modem service is a single, integrated information service under the Communications Act without a separately regulated telecommunications service component.

Respondents' contrary argument would lead to a dramatic expansion of the scope of Title II's common carrier regulations. As NCTA explains, because most Internet service providers (ISPs) are responsible for some transmission of the subscriber's information—between their facility and the subscriber and/or between their facility and the Internet "backbone"—respondents' view results in making most independent ISPs providers of telecommunications services regulable under Title II of the Communications Act, 47 U.S.C. 201, even though such entities have always been deemed to be solely providers of information services. See NCTA Br. 20, 22; *In re Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11,501, 11,536 ¶¶ 73-75 (1998) (*Universal Serv. Report*).[1] That result is impossible to square with the

[1] Respondents err in denying that their theory would turn independent ISPs into providers of telecommunications services. EarthLink argues (Br. 45) that the FCC exercised its forbearance authority in 1985 to

deregulatory purposes of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56; see pp. 15-19, *infra*.

2. Respondents state that it is "critical" to their argument that "subscribers [are] not required to use the information services offered by the cable company, but could 'click through' those services and use the telecommunications component of cable modem service for the sole purpose of reaching information services offered by other providers." EarthLink Br. 16; States Br. 20 n.7, 22; MCI Br. 15. That "critical" prong of respondents' argument, however, is both legally and factually incorrect.

In the first place, respondents err in suggesting that a subscriber's ability to "click-through" without utilizing certain information processing functions could negate the "information service" character of cable modem service. The Act's definition of "information service" encompasses the "offering of a *capability*" for retrieving and utilizing information or engaging in various information-processing activities. 47 U.S.C. 153(20) (emphasis added). A cable modem subscriber's choice not to utilize certain capabilities does not eliminate that capability or change the underlying character of the service offering.

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deregulate non-facilities-owning ISPs, but the FCC's forbearance authority did not even come into existence until the 1996 Act, and the FCC has never made a finding that the requirements necessary to forbear under 47 U.S.C. 160 have been satisfied with respect to independent ISPs. The States, by contrast, argue (Br. 46) that ISPs are not telecommunications service providers because they may lease, but do not own, the telecommunications facilities at issue. Nothing in the Act, however, specifies that only *owners* of facilities can be providers of telecommunications services. See *Universal Serv. Report*, 13 F.C.C.R. at 11,563 ¶ 129. See *In re Regulatory Policies Concerning Resale & Shared Use of Common Carrier Servs. & Facilities*, 60 F.C.C. 2d 261, 308 ¶ 101 (1976) ("The fact that an offeror of an interstate wire and/or radio communication service leases some or all of its facilities—rather than owning them— ought not have any regulatory significance. * * * The ultimate test is the nature of the offering to the public."), aff'd, 572 F.2d 17 (2d Cir. 1978), cert. denied, 439 U.S. 875 (1978) (agency history omitted).

In any event, respondents' argument is counterfactual. Cable modem service subscribers do not typically obtain or use pure transmission capacity, divorced from all information-processing features. Although "click-through" access enables subscribers to bypass the cable operator's web page, e-mail service, and the like, such access still entails the use of other information-processing features offered by the cable operator. Most fundamentally, by "clicking through" to another ISP's website, a subscriber is necessarily utilizing the cable provider's services to "interact[] with stored data * * * maintained on the facilities of" the other ISP (namely, the contents of the requested web pages, e-mail boxes, etc.) and is thereby utilizing the cable operator's "capability for * * * acquiring, * * * retrieving [and] utilizing * * * information". *Universal Serv. Report*, 13 F.C.C.R. at 11,830 ¶ 76; 47 U.S.C. 153(20).

In addition, "Internet access service generally includes using the DNS" (*i.e.*, the domain name system), which is a "data retrieval and directory service" that is "most commonly used to provide an IP address associated with the domain name (such as www.fcc.gov) of a computer." Pet. App. 92a. DNS capability "is necessary because routing of traffic over the Internet is based on IP addresses, not domain names," and "before a browser can send a packet to a website, it must obtain the address for the site." *Id.* at 66a n.98. The FCC has found that DNS provides "a general purpose information processing and retrieval capability," and it thus does not involve pure telecommunications functions. *Id.* at 93a. Another example of an information access and retrieval capability that subscribers generally do not bypass when using "click-through" access is "caching" (*i.e.*, storing) of popular content on local computer servers. See *id.* at 67a n.76.[2] Contrary to respondents' contention that "most of

[2] The Act's definition of "information service" excludes "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."

what the end user purchases and values is raw, unadulterated transmission," MCI Br. 15, the fact is that the Internet access obtained by end users is integrally tied to information-processing functionality.

3. Respondents also err in contending (EarthLink Br. 37-39) that "information service" and "telecommunications service" cannot be deemed mutually exclusive. Nothing in the text of the Communications Act compels the conclusion that those two categories (which entail markedly different regulatory consequences) must overlap, and the Commission's conclusion that they do not is supported by the 1996 Act's legislative history and by decades of administrative practice, including the FCC's contemporaneous construction of the 1996 Act. See *Universal Serv. Report*, 13 F.C.C.R. at 11,516-11,517 & nn. 52-55 ¶ 33; *id.* at 11,521-11,524 ¶¶ 42-45; *EEOC* v. *Associated Dry Goods*, 449 U.S. 590, 600 n.17 (1981).

The text of the Act is entirely consistent with that view, because "telecommunications" is exclusively defined as "transmission * * * without change in the form or content of the information." 47 U.S.C. 153(20). Thus, "telecommunications" is limited to a "pure transmission path," as the Commission has consistently concluded in analyzing both that term and the related term "basic service," its predecessor under the *Computer Inquiries* regime. *Universal Serv. Report*, 13 F.C.C.R. at 11,536 ¶ 73; *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 419-420 ¶¶ 93, 95, 96 (1980) (*Computer II*) ("basic" service is "pure trans-

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47 U.S.C. 153(20). Respondents are correct that use of what EarthLink terms "incidental information management components" in providing traditional telephone service does not convert ordinary telephone service into an information service. See EarthLink Br. 16 n.4, MCI Br. 22-23. But information-processing capabilities such as the DNS and caching are *not* used "for the management, control, or operation" of a telecommunications network, but instead are used to facilitate the information retrieval capabilities that are inherent in Internet access. Their use accordingly does not fall within the statutory exclusion. Pet. App. 93a-94a & n.150.

mission capability"), aff'd, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). Because an information service like cable modem service offers the ability to change the form or content of information and to generate, acquire, store, and retrieve information, it is by definition *not* limited to "pure transmission capability" (as would be required for it to be an offer of "telecommunications"), and accordingly the two categories of service offerings may appropriately be viewed as mutually exclusive. See FCC Br. 21-23.

Respondents mistakenly suggest (EarthLink Br. 37, 38) that the Commission's reasoning would exclude cable modem service from the category of "information service," because information services are by definition provided "via telecommunications" whereas cable modem service generally entails a change in the form or content of information. But the fact that cable modem service is not viewed as an "offering" of telecommunications (and hence is not a telecommunications service) does not mean that it does not contain a telecommunications *component*; to the contrary, the Commission has consistently found that Internet access generally, and cable modem service in particular, employ telecommunications in conjunction with information processing capabilities. Pet. App. 95a-98a. There is no "offering" of telecommunications because the Commission has reasonably concluded that the "offer" should be examined as a whole from the perspective of the subscriber.

II. UNDER LONG-SETTLED STANDARDS, CABLE MODEM SERVICE IS NOT A COMMON-CARRIER SERVICE UNDER THE COMMUNICATIONS ACT

A. Common Carrier Status Under The Act

Respondents place considerable reliance on the FCC's pre-1996 regulation of common carriers' "enhanced" service offerings under the *Computer II* regime. According to respondents, the FCC is obligated to regulate cable modem service in the 21st century using the same regulatory approach it adopted decades ago to govern telephone com-

mon carriers operating in a monopoly environment. Respondents' arguments are wholly unpersuasive.

1. The FCC's view that a provider of cable modem service has made an "offering" of only a single, integrated information service is consistent with the settled understanding of the Communications Act. A provider of telecommunications service is a common carrier under the Act. See 47 U.S.C. 153(44). It has long been settled that an entity may become a common-carrier provider of telecommunications services in two ways. The entity may either voluntarily choose to offer telecommunications (*i.e.*, pure transmission capacity) to the public generally as a common carrier, or, if "the public interest requires common carrier operation of the proposed facility," the Commission may require the entity to make such an offering. *In re Cable & Wireless, PLC*, 12 F.C.C.R. 8516, 8522 ¶¶ 14-15 (1997). See generally *Virgin Islands Tel. Corp.* v. *FCC*, 198 F.3d 921, 925-926 (D.C. Cir. 1999); *National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 525 F.2d 630, 642 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976). Generally, the FCC has found that the public interest prong is satisfied if the entity involved has sufficient market power to warrant imposing a common-carrier requirement. See *Cable & Wireless*, 12 F.C.C.R. at 8522-8523 ¶¶ 15-16; *Virgin Islands Tel.*, 198 F.3d at 925.

2. Under that settled analysis, respondents' repeated complaints that the Commission has allowed cable operators' "self-interested economic choice," EarthLink Br. 26, to determine the regulatory status of their offerings ring hollow. Recognizing that cable operators have the same prerogative to choose how to offer their service as others under the Act will not cause common carriage regulation to "fall apart" or render Title II "a dead letter." EarthLink Br. 21; MCI Br. 14. One prong of the test for common-carrier status has always turned on business decisions by the entity in question —*i.e.*, whether the entity voluntarily chooses to offer pure transmission services indiscriminately to all purchasers. Cable modem providers have not done so. Pet. App. 97a.

Accordingly, cable modem providers are not common carriers—and not providers of telecommunications service—under that prong of the test.

3. The other prong of the "common carrier" test gives the Commission ample authority to require cable operators, if "the public interest requires," *Cable & Wireless*, 12 F.C.C.R. at 8522 ¶¶ 14-15, to break out the transmission component incorporated into their service and offer it as a separate, common-carrier service. But the Commission has not yet made such a determination. In its order below, the Commission issued a broad notice of proposed rulemaking seeking further comment on whether "to require that cable operators provide unaffiliated ISPs with the right to access cable modem service customers directly." Pet. App. 134a; see *id.* at 135a-136a. As a result of that further proceeding, the Commission could conclude that the public interest requires some sort of ISP access requirement short of common carriage, or even that cable operators must offer telecommunications on a stand-alone basis, such that they would become telecommunications carriers subject to Title II. At present, however, the Commission has not completed that further proceeding. Accordingly, cable operators are not now subject to common carrier obligations under Title II.

Respondents argue that the further notice of proposed rulemaking is largely illusory, because the Commission's classification decision precludes *all* federal regulation of cable modem service. The precise scope of the Commission's authority under Title I of the Communications Act, 47 U.S.C. 151, is not at issue in this case, and it is one of the subjects on which the Commission sought comments in its further notice. See Pet. App. 137a-141a. Nonetheless, Title I grants the Commission broad "regulatory authority over all 'interstate . . . communication by wire or radio.'" *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 173 (1968) (quoting 47 U.S.C. 152). Thus, even if a particular service is not regulated under Title II, "Commission jurisdiction (so-called 'ancillary' jurisdiction) *could* exist even where the Act does

not 'apply.'" *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 380 (1999). The Commission has long asserted its ancillary authority over interstate information-processing services, see *Computer II*, 77 F.C.C. 2d at 432 ¶¶ 124-125, and it has exercised that authority. See, *e.g.*, *In re Implementation of Sections 255 and 251(a)(2) of the Communications Act*, 16 F.C.C.R. 6417, 6455-6462 ¶¶ 93-108 (1999) (asserting jurisdiction over voice mail and interactive menu services to promote disability access); see also Pet. App. 137a-138a.[3] Indeed, in proceedings before the FCC, some of the respondents have urged the Commission to exercise its Title I authority to require cable operators to make their transmission capabilities available to unaffiliated ISPs—a position directly contrary to respondents' arguments in this Court.[4]

B. The *Computer II* Regime Does Not Provide A Basis To Challenge The Commission's Decision In This Case

To support their assertion that the transmission component of cable modem service must be broken out as a separate offering of telecommunications, respondents invoke the

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[3] The Commission may not use its Title I regulatory authority to contradict express statutory prohibitions. See *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 700 (1979); see also *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 670 (1972) (FCC may use its ancillary authority to require cable operators to originate local programming). Nothing in the Communications Act, however, precludes the FCC from regulating cable modem service providers on a non-common-carrier basis or from determining, if it were to become necessary in the public interest, that such providers must provide service as common carriers.

[4] See Comments of EarthLink, Inc., CS Docket No. 02-52 (filed June 17, 2002), at 13 ("EarthLink believes that the Commission retains sufficient authority to require multiple ISP access" notwithstanding its decision to classify cable modem service as an information service); Reply Comments of WorldCom, Inc., GN Docket No. 00-185 (filed Jan. 10, 2001), at 32 ("The FCC retains ample authority to mandate nondiscriminatory access to [cable modem service's] telecommunications capability under * * * Title I."). Those comments are available through the Commission's website at http://www.fcc.gov/cgb/ecfs.

Commission's historical regulation of telephone common carriers and, in particular, the regulatory regime that the Commission developed in its *Computer II* proceeding in the 1980s. In *Computer II* the Commission concluded that (1) "enhanced" services (now encompassed in the "information service" category) generally should not be subject to regulation under Title II, notwithstanding their inclusion of a transmission component, 77 F.C.C. 2d at 428-435 ¶¶ 114-132, and (2) telephone common carriers would be allowed to offer enhanced services on an unregulated, non-tariffed basis, but that common carriers using their own transmission services to do so must also offer competing providers of enhanced services "non-discriminatory access" to those same transmission services, *id.* at 475 ¶¶ 230-231. See FCC Br. 33-35. Contrary to respondents' arguments, however, neither the Commission nor Congress has extended those obligations wholesale to providers of cable modem service.

1. The *Computer II* order does not stand for the sweeping proposition that "the telecommunications component of a bundled package offered by the owner of a telecommunications facility is separately regulated." EarthLink Br. 24; see MCI Br. 3, 37. Rather, *Computer II* compelled facilities-based *common carriers* (*i.e.*, traditional telephone companies) that provide "enhanced" services to offer the underlying pure transmission capacity separately on a common-carrier basis. That obligation imposed on telephone companies was an exercise of the Commission's broad authority to "regulat[e] the entrance of communications common carriers into the nonregulated field" of enhanced services. *GTE Serv. Corp.* v. *FCC*, 474 F.2d 724, 730 (2d Cir. 1973); see *Computer II*, 77 F.C.C. 2d at 389 ¶ 15, 391 ¶ 18. Nothing in *Computer II* suggests that its specialized requirements for telecommunications common carriers necessarily apply outside of that specific historical and regulatory context.[5]

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[5] Indeed, the Commission subsequently made clear that, when "value added networks," which were *not* common carriers, offered enhanced ser-

The Commission thus reasonably rejected the view that the regulatory treatment of cable modem providers was dictated by the *Computer II* regime. See Pet. App. 100a. Whereas *Computer II* compelled "traditional wireline common carriers" to "offer the underlying telecommunications *as a stand-alone service*," *id.* at 99a, 100a (emphasis added), the Commission noted that no "requirement that such an offering be made" had been imposed on cable modem providers. *Id.* at 97a. Cable operators have not traditionally been regulated as common carriers, see *Computer II*, 77 F.C.C. 2d at 431-432 ¶¶ 122-123, and thus are not subject to the kind of forced "offering" of telecommunications to which telephone companies have historically been subject under *Computer II*. Accordingly, the FCC's reasoned conclusion that *Computer II* is inapplicable in this context is entitled to substantial judicial deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).[6]

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vices "in conjunction with basic transmission services" leased from third parties, the "entire offering" would be classified as a single, unregulated, enhanced service. *In re Independent Data Communications Mfrs. Ass'n*, 10 F.C.C.R. 13,717, 13,719-13,720 ¶¶ 17-18 (Common Carrier Bur. 1995); *In re Amendment to Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 3 F.C.C.R. 1150, 1170 n.23 (1988), vacated in part on other grounds, 905 F.2d 1217 (9th Cir. 1990) (agency history omitted). The Commission did *not* adopt the logic of respondents' approach, which would have mandated that such entities isolate the telecommunications component of their service offering so that it could be subject to regulation under Title II.

[6] The Commission also reasonably rejected arguments that it should at a minimum apply *Computer II* requirements to those cable modem services provided by cable operators that also offer local telephone service. Pet. App. 101a-104a. The Commission explained that *Computer II* requirements had never been applied outside the context of a traditional telephone network and that, even if *Computer II* did apply to cable operators providing local telephone service, the Commission would waive those requirements. *Id.* at 102a-104a. Imposing *Computer II* requirements on cable modem service whenever cable operators also offer local telephone service would treat some cable modem providers differently than others and would discourage competitive entry into former-monopoly local telephone markets. *Ibid.*; see *Verizon Communications, Inc.* v. *FCC*,

2. There is no basis for respondents' assertion that the 1996 Act extends to cable modem service providers the telephone companies' *Computer II* obligation to offer separately, on a common carrier basis, the telecommunications capability that they use in providing Internet access services. Rather than citing any provision of the 1996 Act that specifically imposes such a requirement, respondents invoke the Commission's statement in the *Universal Service Report*, 13 F.C.C.R. at 11,511 ¶ 21, that the 1996 Act's definitions of "telecommunications service" and "information service" "build upon frameworks established" in the *Computer II* proceeding. EarthLink Br. 22, 42; MCI Br. 34-35. Respondents misconstrue the relevant administrative history.

As the Commission explained in the *Universal Service Report*, Congress built upon the *Computer II* definitional "framework" in order to ensure that "information service providers are *not* subject to regulation as common carriers merely because they provide their services 'via telecommunications.'" 13 F.C.C.R. at 11,511 ¶ 21 (emphasis added). Thus, *Computer II*'s definitional framework directly supports the Commission's approach here. Under *Computer II*, "[a] basic transmission service is one that is *limited to* the common carrier offering of transmission capacity," whereas "[a]n enhanced service is *any offering* over the telecommunications network *which is more than a basic transmission service*." 77 F.C.C. 2d at 419 ¶ 93, 420 ¶ 97 (emphases added). Because cable operators' offerings are not "limited to" pure transmission, they would not be classified as basic service under *Computer II*. Respondents' real complaint, therefore, is not that the Commission departed from the *Computer II* definitional framework, but rather that it did not treat cable companies as if they were facilities-based telecommunications common carriers—an issue that *Computer II* did not address.

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535 U.S. 467, 489 (2002) (Congress sought to "give aspiring competitors every possible incentive to enter local retail telephone markets").

In any event, the Communications Act's definition of "information service" is broader than (and entirely subsumes) the *Computer II* term "enhanced service," because it is not limited to services offered over common carrier facilities. *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act*, 11 F.C.C.R. 21,905, 21,956 ¶ 103 (1996). Respondents' contention that the Act codified and froze the entire *Computer II* regulatory framework gives no effect to Congress's substantive expansion of the information service category.

C. The FCC's Regulation Of DSL Providers Does Not Dictate Its Analysis Of Cable Modem Providers

1. Respondents err in contending (EarthLink Br. 25-26; States Br. 15, 23; MCI Br. 7) that the FCC's analysis of DSL service is inconsistent with the Commission's decision in this case. Consistent with its reasoning below, the Commission has concluded that, when DSL technology is used "to provide members of the public with a transparent, unenhanced, transmission path," it should be classified as a telecommunications service. *In re Deployment of Wireline Servs. Offering Advanced Telecommunications Capability* (*Advanced Servs. Order*), 13 F.C.C.R. 24,011, 24,030 ¶ 36 (1998). Under the *Computer II* regime, DSL providers (*i.e.*, traditional telephone companies) have historically been required to offer pure DSL transmission capability on a common carrier basis separately from their "enhanced" or information service offerings (which have not been treated as common carrier offerings at all).[7] Accordingly, the historical treatment of DSL technology flows from the Commission's historical treatment of telephone company monopolists when they offered new information services over their traditional

[7] Although the term "DSL" is commonly associated with Internet access, it also refers to the underlying transmission technology that increases the capacity of telephone lines. Telephone companies have offered that pure transmission technology on a stand-alone basis to various types of customers. See *Advanced Servs. Order*, 13 F.C.C.R. at 24,030 ¶ 36.

telephone networks. Cable operators lack similar obligations at this time because they have no comparable history of regulation as monopoly common carriers.

2. In any event, and contrary to respondents' assertions, the Commission has never stated that the Communications Act *requires* it to break an integrated DSL Internet access service into separate information and telecommunications services. To the contrary, the Commission has tentatively concluded that such a service, like cable modem service, prospectively should be classified as solely an information service under the Communications Act. *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 F.C.C.R. 3019, 3030 ¶ 20 (2002); see FCC Br. 36 n.16. There is no basis for overturning the FCC's classification of cable modem service on the ground that the Commission has treated DSL differently, especially when the Commission is currently embarked on a proceeding to determine whether DSL providers (notwithstanding the historical reasons for their current treatment) should now be treated in the same manner as cable modem providers.

3. Contrary to respondents' contention (EarthLink Br. 41; States Br. 7; MCI Br. 20), the Commission's classification of cable modem service is consistent with the requirement that the statutory definition of "telecommunications service" should be applied "regardless of the facilities used." 47 U.S.C. 153(46). If the Commission had concluded that cable operators offer "telecommunications for a fee directly to the public," but nonetheless refused to classify that offering as a telecommunications service because it is provided through cable facilities rather than telephone facilities, respondents' argument might have merit. The Commission, however, rested its classification of cable modem service on a determination that cable modem service providers—unlike traditional telephone companies—have not made such an offering. Pet. App. 97a.

III. RESPONDENTS' OTHER CHALLENGES TO THE COMMISSION'S INTERPRETATION OF THE COMMUNICATIONS ACT HAVE NO MERIT

A. The Commission's Classification Of Cable Modem Service Is Consistent With The Policies Of The Act

1. Respondents argue that the Commission's interpretation of "telecommunications service" as an offering of pure transmission allows cable modem service providers "to escape regulation" under Title II. EarthLink Br. 14. As explained above, however, a provider that is under no obligation to make an "offering of telecommunications for a fee directly to the public" is permitted under the Act to refrain from doing so, and thus to remain outside the scope of Title II.

Nor can common carriers subject to Title II eliminate their common carrier status through mere pricing changes, as EarthLink also suggests (Br. 14). Telecommunications common carriers cannot cease providing telecommunications service without Commission authorization, 47 U.S.C. 214(a), and *Computer II* demonstrates that the Commission has ample authority to preclude evasion of Title II by common carriers. Under the Commission's approach, moreover, the classification of a service turns on "the nature of the service being offered" and "whether, functionally, the consumer is receiving two separate and distinct services." *Universal Service Report*, 13 F.C.C.R. at 11,530 ¶¶ 59, 60. The Commission thus classified cable modem service as a unitary information service not merely because subscribers pay a single price for all the capabilities of the service, but also because the transmission component serves no function other than to "enable[] the subscriber to utilize Internet access." Pet. App. 95a.[8]

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[8] Local telephone service provides an obvious contrast to cable modem service. Traditional telephone service provides a "pure" telecommunications link between the calling and called parties. Adding voice mail or another information-processing feature as part of a local telephone package does not affect subscribers' use of that telecommunications link for

2. Respondents attack the Commission's classification of cable modem service on the basis of their own policy view that the common carrier obligations in Title II should apply to that service. EarthLink Br. 28-32, States Br. 28-32; MCI Br. 18-19. They argue, at the extreme, that the Internet will "cease to function" unless cable modem service providers are subject to Title II. EarthLink Br. 31 n.9. That is an odd claim to make about *maintaining* the status quo. Cable modem service has not to date been regulated as a telecommunications service, yet it—and the Internet as a whole—have prospered. See FCC Br. 29-30.

In any event, there is one important, underlying policy that respondents ignore. Respondents' essential argument is that cable modem service should be viewed as containing a separate telecommunications component, because that construction of the Act would allegedly increase competition by allowing independent ISPs to market their services to end users through the cable companies' facilities. But respondents' construction would achieve that result only by imposing substantial regulatory costs and disincentives on cable modem service providers. Such regulatory burdens could lead to higher prices and reduced investment in broadband deployment by cable operators, and hence to reduced consumer choice, particularly in rural or other underserved areas. See FCC Br. 31.

The FCC's goal, like that which respondents assert, is increased competition. But the Commission has determined that a truly competitive market is best achieved by encouraging "multiple electronic platforms" for broadband service, "including wireline, cable, terrestrial wireless and satellite."

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purposes other than accessing voice mail or other forms of information services. Cf. *AT&T Corp. Pet. for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, FCC 05-41 (filed Feb. 23, 2005) (calling card that automatically provides advertisement prior to call remains "telecommunications service," because the card "offer[s]" only telephone service and does not provide an information service "capability").

Pet. App. 48a.[9] As the Commission explained, "[b]y promoting development and deployment of multiple platforms, we promote competition in the provision of broadband capabilities, ensuring that public demands and needs can be met." *Ibid.* The end result is a more competitive marketplace in which competing broadband providers have the incentive to invest in costly facilities and service enhancements so as to meet consumer needs and desires—including (if desired) the option to choose from multiple ISPs. That is the kind of choice that the FCC must be entitled to take into account in construing the Act, especially in a dynamic market that, far from respondents' dire predictions, has shown enormous growth under a hands-off regulatory regime.

B. The Commission's Forbearance Powers Do Not Require It To Classify All Services As Telecommunications Services

As the government's opening brief explains (Br. 29-32), the Commission's classification of cable modem service promotes the statutory policy of "encourag[ing] the deployment [of broadband services] on a reasonable and timely basis," 1996 Act § 706, 110 Stat. 153,[10] and the Commission's goal of creating a "minimal regulatory environment" that encourages broadband investment and innovation. Respondents assert that the Commission may pursue those objectives only by exercising its forbearance authority under Section 10

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[9] Another emerging source that has already made its commercial debut is broadband over power lines. See generally *In re Availability of Advanced Telecommunications Capability*, 19 F.C.C.R. 20,540, 20,561 (2004).

[10] Respondents err in contending (EarthLink Br. 43, States Br. 39-40) that Section 706 has significance only for broadband technologies classified as telecommunications *services*. Congress's directive to "remove barriers to infrastructure investment" in order to promote "reasonable and timely" deployment, § 706(a), 110 Stat. 153, applies equally to all broadband technologies, without regard to the manner in which they are offered to consumers.

of the Act, 47 U.S.C. 160. EarthLink Br. 44; States Br. 32-33; MCI Br. 27-28.

Respondents err in contending that the Commission must construe all ambiguities in Title II so as to impose a greater regulatory burden on information service providers, which the Commission could then lift under Section 10. EarthLink Br. 44; see MCI Br. 28. That contention flies in the face of Congress's objective in adopting the 1996 Act. Rather than drafting an expansively regulatory statutory regime that the Commission could then ease under Section 10, Congress expressly sought through the 1996 Act to "*reduce regulation* in order to * * * encourage the rapid deployment of new telecommunications technologies." Preamble, 110 Stat. 56 (emphasis added). The Ninth Circuit's extension of Title II to cable modem service defies that legislative objective, and is not made permissible by the fact that the Commission may have power under Section 10 to lessen the harm of the judicial error.[11]

C. The Commission's Pending Proceeding On Application Of CALEA To Cable Modem Service Has No Bearing On This Case

Contrary to EarthLink's suggestion (Br. 49), the FCC's pending rulemaking proceeding under the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. 1001 *et seq.*, has no bearing on the reasonableness of the FCC's classification of cable modem service under the Communications Act. CALEA, which imposes requirements on "telecommunications carriers" to facilitate authorized electronic surveillance by law enforcement agencies, see 47

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[11] *MCI Telecomm. Corp.* v. *AT&T*, 512 U.S. 218 (1994), on which respondents rely (EarthLink Br. 34-35), is inapposite. In *MCI*, the Court concluded that the Commission's authority to "modify" the Act's express tariff-filing requirements authorized only "moderate change," not "a fundamental revision of the statute." 512 U.S. at 228, 231. Here, by contrast, the Commission has not sought to change any arrangement codified in the Communications Act, but has simply applied the Act's definitions to determine the regulatory classification of cable modem service.

U.S.C. 1002, has its own distinct structure and purposes. CALEA has a significantly broader definition of "telecommunications carrier" than that in the Communications Act, which includes, *inter alia*, a service providing "a replacement for a substantial portion of the local telephone exchange service" if the "public interest" so requires—a provision with no express analogue in the Communications Act. See 47 U.S.C. 1001(8)(B)(ii). CALEA does not include the Communications Act's narrow definition of "telecommunications" or the mutually exclusive regulatory dichotomy of "telecommunications service" and "information service."

In August 2004—two years after the Commission's decision in this case—the FCC released a Notice of Proposed Rulemaking in which it tentatively concluded that, given CALEA's broader reach, all "facilities-based providers of any type of broadband Internet access, including * * * cable modem," are "subject to CALEA." *In re Communications Assistance for Law Enforcement Act & Broadband Access & Servs.*, 19 F.C.C.R. 15,676, 15,703 ¶ 47 (2004). The classification of cable modem service under CALEA will be addressed in that administrative context. With that proceeding pending, this Court should not address any interplay between CALEA and the Communications Act here.[12]

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[12] Respondents concede (EarthLink Br. 49; States Br. 17 n.6) that this Court is not bound by the Ninth Circuit's refusal to apply *Chevron*, and they make no effort to defend the judgment below on that ground. As previously explained, however (FCC Br. 38-44), that erroneous rationale has pernicious consequences for administrative law, and it would be appropriate for this Court to address the issue in order to provide guidance to the courts of appeals.

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MARCH 2005