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.
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT MCI, INC.

JEFFREY A. RACKOW
MCI, INC.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6000

MARK D. SCHNEIDER *
MARC A. GOLDMAN
THOMAS G. PULHAM
JENNER & BLOCK LLP
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Respondent MCI, Inc.

* *Counsel of Record*

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STATEMENT OF THE CASE AND STATEMENT OF FACTS

This case involves the Federal Communication Commission's ("FCC" or "Commission") attempt to negate Title II of the Communications Act, 47 U.S.C. § 101 *et seq.* ("Act"). The FCC here concludes that cable operators providing telecommunications do not have Title II obligations so long as they unilaterally choose to bundle the telecommunications they are providing with information services. But the characteristics that led Congress to regulate telecommunications facilities are not changed when the owner of the facility chooses to combine its telecommunications services with its own Internet Service Provider ("ISP") service, and asserts the right to exclude all other ISPs from its network. In fact, it was just this kind of discrimination that led Congress to regulate telecommunications services in the first place.

The FCC's decision threatens to eliminate competition among ISPs that need access to cable broadband facilities to reach their customers. While that is bad enough, the decision's implications extend much further. Because all telecommunications carriers routinely bundle information services with their telecommunications offerings, the Commission's decision that such bundling exempts a service from regulation, when applied generally, will lead to the dismantling of the statutory structure governing the nations' transmission infrastructure, and will render Title II of the Communications Act a dead letter. A construction of the statute's definitions that negates the statute's central operating provision cannot stand based on pleas of deference to agency decisionmaking.

I. The Regulatory Background

A. Common Carriage and the 1934 Communications Act

In the Communications Act of 1934 Congress transferred regulatory control of communications services to the newly created FCC. In order to mitigate the problems that attended the telephone company's monopoly over the telephone network,[1] Congress imposed significant duties on the activities of "common carriers"—which the 1934 Act defined as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio."[2] Under Title II of the Act, common carriers were required to "furnish . . . communication service upon reasonable request therefor" to any member of the general public. 47 U.S.C. § 201. The Act also required common carriers to charge rates that were "just and reasonable" and nondiscriminatory. 47 U.S.C. §§ 201(b), 202.

B. The Regulatory Treatment of Enhanced Services

In the 1970s, data processing services began to grow in importance and became increasingly intermingled with communications services. The Commission had to determine the appropriate regulatory treatment of these services. The Commission concluded that there was no need to regulate data processing, which lacked the bottleneck and network

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[1] *See, e.g.*, 78 Cong. Rec. 8822 (1934) (statement of Sen. Dill) (discussing extent of telephone monopoly).

[2] 47 U.S.C. § 153(h) (1970). The D.C. Circuit has read that definition to reflect the common law of carriers. *Nat'l Ass'n of Regulatory Uti. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

characteristics of telecommunications. *See, e.g., In re Amendment of Section 64.702 of the Communication's Rules and Regulations*, 77 F.C.C.2d 384, ¶ 132 (1980) ("*Computer II*"). But the Commission also concluded that it needed to continue to apply common carrier requirements to transmission, as the Communications Act required it to do.

In a series of seminal decisions known as the "*Computer Inquiry*" cases, the Commission therefore drew a distinction between "basic" transmission services,[3] and "enhanced" services that were carried over those bottleneck transmission lines.[4] It concluded that "basic transmission services are traditional common carrier communications services," and "enhanced services are not." *Computer II* ¶ 119. Accordingly, it determined that basic transmission services must be regulated under Title II of the Communications Act. Enhanced services generally would remain unregulated, *Id.* ¶¶ 124-125, subject only to the FCC's Title I jurisdiction, which is "restricted to [matters] reasonably ancillary to the effective performance of the Commission's various responsibilities." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

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[3] *Id.* ¶ 93. As defined in the *Computer Inquiry* cases, basic service was "the common carrier offering of transmission capacity for the movement of information," which involves providing a communications path "for the analog or digital transmission of voice, data, video, etc. information." *Id.*

[4] Enhanced service is defined as "any offering over the telecommunications network which is more than a basic transmission service." *Computer II* ¶¶ 97-98. In particular, enhanced services are "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

When carriers combined basic and enhanced services together and provided them over their own transmission facilities ("facilities-based carriers"), the Commission ensured continued application of the Act's mandates and the Commission's deregulatory policies by requiring the carriers to separately price the underlying transmission services and provide them to the public on a nondiscriminatory basis.[5] Otherwise, in the FCC's view, the requirements of Title II could be avoided in situations in which they should fully apply. *In re Independent Data Communications Mfrs. Ass'n, Inc.*, 10 F.C.C.R. 13,717, ¶ 44 (1995) ("*Frame Relay Order*").

C. The 1996 Act

In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 66 ("the 1996 Act"), Congress amended the Communications Act, but did not alter the longstanding obligations of common carriers. 47 U.S.C. §§ 201-202. Instead it added new requirements applicable to "telecommunications carriers." Telecommunications carriers are defined as providers of "telecommunications services," *id.* § 153(44), which in turn are defined as "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." *Id.* § 153(46). "Telecommunications" are defined as "the transmission, between or among points specified by the user, of

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[5] In *re Amendment of Sections 64.702 of the Commission's Rules and Regulations*, 104 F.C.C.2d 958, ¶¶ 98-99, 154, 158 (1986) ("*Computer III*"); *see also In re Amendment to Sections 64.702 of the Commission's Rule of Regulations*, 2 F.C.C.R. 3072, ¶ 61 (1981) ("*Phase II Declaratory Ruling*") ("The guiding principle we follow is that carriers must provide efficient nondiscriminatory access to the basic service facilities necessary to support their competitor's enhanced services . . . through unbundled basic offerings.").

information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). The Commission has interpreted "telecommunications carriers" to be essentially synonymous with the "common carriers" previously regulated by the Act.[6]

Telecommunications carriers are required to interconnect with other carriers (regardless of whether the FCC concludes this is desirable, the standard under the 1934 Act) and to configure their networks so as not to frustrate interconnection with other carriers. 47 U.S.C. § 251(a)-(b). They are required to take a variety of steps to protect the public, such as protecting confidential information and paying for universal service. 47 U.S.C. §§ 221, 254(d). And some carriers (the Bell Operating Companies and other incumbent local exchange carriers) are subject to a series of additional obligations, essentially escalating a carrier's responsibilities based on the degree of its monopoly control. *Id.* §§ 251, 252, 271.

In an important sense, however, these are only presumptive requirements. Section 10 of the Act authorizes the FCC to "forbear" from application of any statutory or regulatory requirements if specified statutory criteria are satisfied. 47 U.S.C. § 160. *See, e.g.*, *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, ¶ 95 (2002) ("*Declaratory Ruling*"), Pet. App. 102a. Those criteria

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[6] *In re AT&T Submarine Sys., Inc., Application for a License to Land and Operate a Digital Submarine Cable System*, 13 F.C.C.R. 21585, ¶ 6 (1998) ("[T]he term 'telecommunications carrier' means essentially the same as common carrier."), *aff'd*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); *accord In re Cable & Wireless, PLC, Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable*, 12 F.C.C.R. 8516, ¶¶ 12-13 (1997).

require the FCC to assess, *inter alia*, whether deregulation will lead to discriminatory practices, whether it will leave consumers unprotected, and whether it will deter "competition among providers of telecommunications services." 47 U.S.C. § 160(b).

In the 1996 Act, Congress also retained the existing distinction between these "telecommunications services" and "information services,"[7] which in most respects mirror the categories of "basic services" and "enhanced services." *In re Implementation of the Non-Accounting Safeguards of Section 271 and 271 of the Communications Act of 1934, as amended*, 11 F.C.C.R. 21,905, ¶¶ 102-103 (1996) ("*Non-Accounting Safeguards Declaratory Ruling*"). Congress did not impose any requirements on information services.

Congress further mandated that when the FCC determines whether a service is an information service or a telecommunications service it may not consider the nature of the facilities used to provide the service, whether they be cable or telephone facilities. 47 U.S.C. § 153(46); *Declaratory Ruling* ¶ 35, Pet. App. 90a. Congress expressly contemplated that cable facilities might be used to provide telecommunications services and therefore might require treatment as common carriage.[8] The Commission

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[7] Information services are defined as "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).

[8] *See* 47 U.S.C. § 541(b)(3)(A) ("If a cable operator or affiliate thereof is engaged in the provision of telecommunications services—(i) such cable operator or affiliate shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services."); *id.* § 541(d)(2) (discussing state regulation of cable companies' provision of "any communications service other than cable service, whether offered on a common carrier or private contract basis"); *id.* § 522(7) (defining a "cable system" as "a facility . . . that is designed to provide cable service .

accordingly has treated telephone service as a telecommunications service even when offered over cable facilities. *See, e.g.*, *Declaratory Ruling* ¶ 45, Pet. App. 102a.

Finally, the Commission has, on multiple occasions, considered the appropriate treatment of services that include both a telecommunications and an information service component, such as the cable modem service here. The Commission consistently has concluded until now that, although information services are presumptively exempt from regulation, the bundling together of telecommunications and information services does not exempt the telecommunications component of the service from regulation under Title II. Specifically, the Commission has always applied the rule that facilities-based carriers offering bundled services must separately offer transmission in order to ensure continued application of Act's common carrier requirements.[9] It has never before limited that requirement to any particular type of facilities. And it has specifically applied that requirement to broadband Internet access services, concluding that the bundling together of broadband transmission service with information services into an Internet access service does *not* eliminate the telecommunications service. *See, e.g.*, *In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, ¶ 36 (1998) ("*Advanced Services Declaratory Ruling*"); *infra* pp. 35-37.

. . , but such term does not include . . . a facility of a common carrier. . ., except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to the subscribers").

[9] *In re Policy and Rules Concerning the Interstate Interexchange Marketplace*, 16 F.C.C.R. 7418, ¶ 39 (2001) ("*CPE/Enhanced Services Bundling Declaratory Ruling*"); *Phase II Declaratory Ruling*, ¶ *61.*

II. The FCC's Declaratory Ruling

In the *Declaratory Ruling*, the Commission for the first time directly addressed the question of whether broadband Internet access service is subject to the requirements of Title II of the Act when it is provided by a cable company ("cable modem service"). The Commission concluded that it is not.

Broadband Internet access service is a service that consumers purchase, typically through their cable company or phone company, that allows consumers to obtain a high speed "always on" connection to the Internet. As its name implies, the service principally provides "Internet access," the ability to send information to, and receive information from, the Internet. It is thus quintessentially a transmission service. However, the service typically also includes information service components, such as the ability to create a "web page" or to store emails, with the information necessary for the operation of these services stored on the cable companies' computers. In the FCC's parlance, the service is in this way a "mixed service," albeit one in which the transmission feature constitutes by far the largest component of the mixture.

The FCC here announced and applied a rule of general application that "mixed" services should always be considered exclusively "information services," and never be considered in any degree "telecommunications services." In the FCC's understanding, by definition a service can be one thing or the other, but it cannot be both. This is so, the FCC determined, because "'information service' and 'telecommunications service' definitions establish mutually exclusive categories of service." *Declaratory Ruling* ¶ 41, Pet. App. 97a. Accordingly, the FCC concluded that when information services are offered "as part and parcel" of an

"integrated" service that includes a transmission component, the entire service is an unregulated information service, and not a regulated telecommunications service. *Id.* ¶ 39, Pet. App. 97a.

By virtue of this construction of these definitions, unless a company chooses to offer transmission services to the public "as a stand-alone service," *id.* ¶ 42, Pet. App. 99a, without any bundled information service included, the company is an unregulated information service provider, and not a regulated telecommunications service provider.

Applying these principles, the Commission determined that cable modem service is an information service. The Commission found that cable modem service includes information service components such as e-mail storage, newsgroups, the ability to create a web page and other similar functions. *Declaratory Ruling* ¶ 38, Pet. App. 93a. The Commission then concluded that cable modem service is not also a telecommunications service because the "telecommunications component is not . . . separable from the data processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities." *Declaratory Ruling* ¶ 39, Pet. App. 96a. The Commission offered no explanation of what it means in saying the telecommunications component is not "separable." It acknowledged that the telecommunications component of the service could as a technical matter be separately offered, but suggested the key is that, "*[a]s currently provisioned*, cable modem service is a single, integrated service." *Id.* ¶ 38, Pet. App. 95a (emphasis added). Cable modem service "does not include a *stand-alone offering* of telecommunications service to subscribers." *Id.* ¶ 48, Pet. App. 104a (emphasis added).

After concluding that services that are not offered as stand-alone telecommunications services are not telecommunications services at all, the Commission then treated as a separate question whether it will apply the *Computer Inquiry* requirements to the service, so that the service providers would be *required* to unbundle and offer a separate transmission service. In the Commission's view, therefore, when a company offers anything other than a stand-alone telecommunications service, the question of whether the telecommunications component of that service is subject to Title II is not settled through application of the statutory distinction between telecommunications and information services, but rather by the Commission's independent assessment of whether the *Computer Inquiry* rules should be deemed applicable.

The Commission therefore went on to ask whether it should require cable modem operators to offer a "bare" transmission service which would meet the definition it had given for "telecommunications service." The Commission concluded that such unbundling should not be required. The Commission stated that it has never before applied the *Computer Inquiry* unbundling requirements to cable networks and it saw no reason to "extend" them in this fashion. The Commission added that it would waive the requirements if they were applicable. *Id.* ¶ 45, Pet. App. 102a.

The Commission based this conclusion on a concern that there may be policy reasons not to create an "open access" regime for cable modem service that would exist if Title II were applicable and the Commission decided not to forbear. *Id.* ¶¶ 46-47, Pet. App. 102a-104a. But the Commission's conclusion was not based on evaluation of these policy considerations. To the contrary, the Commission explained that it was simultaneously issuing a

notice of proposed rulemaking ("NPRM") asking whether it should exert its ancillary jurisdiction to require open access. *Id.* ¶¶ 77-78, Pet. App. 139a. It also concluded that if cable modem service were a telecommunications service, it *might* be appropriate to forbear from application of Title II requirements, but this could be determined only through the NPRM. *Id.* ¶ 95, Pet. App. 152a. The Commission therefore did not apply the statutory forbearance criteria.

III. The Court of Appeals' Decision

The Ninth Circuit ruled that the FCC's decision that cable modem service was not, at least in part, a telecommunications service violated the Act. Pet. App. 15a-16a. The Court relied on its prior conclusion in *City of Portland* in which it had held that "to the extent that [the cable company] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000). Judge Thomas further explained in his concurrence that the statute was not ambiguous on this point: Congress spoke precisely to the question at issue. Pet. App. 25a.

SUMMARY OF ARGUMENT

Petitioners argue that this is a case about deference to the FCC's "core federal policy" of "reducing regulatory impediments to the rapid deployment of broadband." U.S. Br. at 2. It is not. The *Declaratory Ruling* did not determine how little or how much regulation would be appropriate for cable modem service. Instead, the *Declaratory Ruling* left the question of "whether (and, if so, how) cable modem service should be regulated under the law" to a future rulemaking. *Declaratory Ruling* ¶ 7, Pet. App. 48a.

This case concerns instead a threshold issue: whether, when the FCC considers the appropriate regulatory treatment of cable modem service, it will do so pursuant to the requirements set out by Congress in the 1996 amendments to Title II of the Act, or instead whether is free to ignore these legislative directives. The FCC in particular has adopted a construction of the Act's definitions of "telecommunications service" and "information service" that operates to permit it to decide whether to apply Title II or not as it sees fit.

The plain meaning of the text of the these statutory definitions powerfully supports the Ninth Circuit's construction of the definitions, and militates against the FCC's contrary interpretation. As its name implies "Internet access service" is a service that provides transmission to and from the Internet—a classic telecommunications service. Nothing in the text of the definitions supports the FCC's view that the essential nature of the service is changed because the cable operators bundle it together with data storage and other information service components.

Moreover, the FCC's construction undermines the statute it is supposed to be implementing. All of Congress's reasons for regulating "naked" transmission services fully apply to a bundle of services that includes an information service component, so the Commission's decision to regulate one and not the other violates the central goals of the statute. The Commission's asserted policy of promoting cable modem and broadband services cannot justify an interpretation of "telecommunications service" that applies to all transmission media (wireline as well as cable), and to both narrowband and broadband services. A policy that subjects some of these service and not others to Title II is flatly inconsistent with the Act's directive that the definition of "telecommunications service" does not depend on the facilities used.

If the FCC's definition of "telecommunications service" were applied consistently, no company would ever be found to be offering a "telecommunications service," and so no carrier ever would be subject to the strictures of Title II. Instead, all companies that offer transmission services would be considered exclusively "information service providers." Since the FCC claims that it has broad and unguided discretion to regulate "information service providers" as it sees fit under Title I of the Act, the result of its construction of the definitions is to give to the FCC broad discretion to regulate without regard to the requirements of Title II.

The consequences of this new construction thus extend well beyond cable modem service or broadband services in general. Any owner of a transmission network can easily include an information service within its service offering. The effect of the FCC's new rule is therefore that *no* company is subject to Title II common carrier rules unless it chooses to make itself subject to those rules, or unless the FCC at its own discretion chooses to require the company to unbundle its service and offer naked transmission services to the public.

Since the FCC has chosen in the *Declaratory Ruling* to limit the "unbundling" requirements of its *Computer Inquiry Rules* to the owners of telephone lines, but not the owners of cable lines, currently only the owners of telephone lines are subject to Title II. And if the FCC, acting within its own discretion, chooses to eliminate the *Computer Inquiry* unbundling obligations of telephone operators (as it is considering doing, *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 F.C.C.R. 3019, ¶ 27 (2002) ("*Broadband Framework NPRM*")), then the owners of telephone lines as well could

choose to free themselves of all Title II common carrier obligations. Title II would become a dead letter.

Those are the necessary consequences of the definitions the FCC defends here. But Congress could not possibly have intended that the body of law it created under the greatly expanded Title II be entirely discretionary, to be applied or not as the FCC sees fit. That is underscored by Congress's inclusion in the Act of a "forbearance" provision that gave the FCC the ability to forbear from Title II regulation, but only if strict statutory criteria were met. 47 U.S.C. § 160 The FCC's construction here renders that provision, and the whole of Title II, an irrelevancy.

The FCC's definitional sleight of hand also represents a radical and unexplained departure from a long line of FCC precedent that had held that a facilities-based provider may not shield its transmission network from regulation by "contaminating" it with an information service. Indeed, the FCC had previously applied this rule specifically to Internet access services offered by a facilities-based provider, concluding that the information services offered as part of the service did not change the nature of the basic regulated transmission service that the provider is offering.

For each of these reasons, the FCC's construction of the statutory definition fails under step one of the *Chevron* inquiry, because it does not "give effect to the unambiguously expressed intent of Congress." *Chevron, USA., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The Ninth Circuit properly declined to follow it.

ARGUMENT

I. The Plain Language of the Act Shows That Cable Modem Service Is a Telecommunications Service

A cable company that provides Internet access services over its own transmission facilities is providing information services, but also is providing a telecommunications service. While several of the applications typically provided in an Internet access service are information services (such as the ability to create a "web page"), most of what the end user purchases and values is raw, unadulterated transmission that sends information to, and receives information from, sites on the Internet.[10] In fact, a central, if not sole, emphasis in the sales pitches of cable operators is the speed of their transmission media, and its "always on" characteristic. *See* Cable Br. at 4 (explaining that speed and "always on" characteristic made cable modem service very popular). The *Declaratory Ruling* itself defines "'high-speed Internet access' in general as a service that 'enables consumers to communicate over the Internet at [high] speeds' . . . and that that enables subscribers to 'send and view content with little or no transmission delay.'" *Declaratory Ruling* ¶ 1 n.2, Pet. App. 41a-42a (quoting FCC Orders).

Such a transmission component of a "mixed" service, U.S. Br. at 26, squarely falls within the definition of

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[10] The service also provides the necessary transmission protocols that "facilitate the economical, reliable movement of information" over the transmission medium. *Frame Relay Order* ¶ 33. These too are components of a "telecommunication service," being expressly excluded from the definition of "information service." 47 U.S.C. § 153(20) (excluding use of information services "for the management, control, or operation of a telecommunications system or the management of a telecommunications service").

"telecommunications service." Cable modem service includes "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) (definition of "telecommunications service"). Cable modem service is sold to the public for a fee. And cable modem service is overwhelmingly "telecommunications," which the Act defines as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). Because that telecommunications is sold to the public for a fee as part of the sale of cable modem service, the cable modem service constitutes a telecommunications service under the plain language of the Act. A fast, "always on" transmission medium is a paradigmatic telecommunications service.

On the other hand, the service does not fit neatly into the definition of "information service." Information services are not used to transmit information of the user's choice. They are used to obtain information stored on the provider's network, or to manipulate data in some way. The legal research company Lexis-Nexis, for example, provides an information service, a service that offers "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(20). Its services cannot be used to transmit information of the user's choosing unrelated to the data stored on Lexis-Nexis computers.

The FCC does not deny that this most straightforward reading of the statutory definitions (adopted by the Ninth Circuit here) is reasonable. It contends, however, that its contrary construction of the definition is also reasonable, and so is entitled to *Chevron* deference. In its construction, "the

Act's 'information service' and 'telecommunications service' definitions establish mutually exclusive categories of service." *Declaratory Ruling* ¶ 41, Pet. App. 97a. If there are information service functions provided along with telecommunications, the Commission therefore must find a "single, integrated information service." *Id.* As the government puts it here, a telecommunications service exists only when there is a "simple, transparent transmission path without the capability of providing enhanced functionality." U.S. Br. at 22 (quoting *Universal Service Report* ¶ 39). Because cable modem service includes some information service components, in the FCC's view it is exclusively and entirely an information service. *See Declaratory Ruling* ¶ 38, Pet. App. 93a-95a.

Petitioners principally offer a negative defense of the agency's construction, asserting that "[n]othing in the Communications Act required the Commission to break down that single service into conceptually distinct components for regulatory purposes and analyze each to determine its proper legal classification." U.S. Br. at 25-26. They observe that when a statute is ambiguous the agency has "the discretion to consider the various policies involved and construe the statute in the manner best calculated to achieve them." *Id.* at 28.

But "[a]mbiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner,* 513 U.S. 115, 118 (1994), and as we show in what follows, the statutory context negates the FCC's construction here.

II. The FCC's Interpretation Is Inconsistent With the Statutory Framework

A. The FCC's Construction Does Not Implement the Statutory Distinction Between Telecommunications Service And Information Service

The FCC's construction of the definitions undermines the provisions of the Act within which the definitions operate. Specifically, Congress created an elaborate statutory framework for the regulation of transmission of information, but not for storage and manipulation of that information. In three related respects the FCC's interpretation of the statute is not faithful to this legislative framework.

First, the *Declaratory Ruling* undermines Congress' fundamental decision to regulate transmission networks. Congress regulated transmission services because of the network effects of transmission, because transmission networks often have bottleneck characteristics, and because of the overall importance of communications to the economy.[11] That much is apparent from the specific requirements Congress imposed on telecommunications services: provisions requiring interconnection, unbundling (in some circumstances), universal service payments, and access for customers with disabilities. 47 U.S.C. §§ 251, 254, 255.

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[11] *See Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942) (purpose of Act is to protect public interest in communications); *Orloff v. FCC*, 352 F.3d 415, 418 (D.C. Cir. 2003) (purpose of Act is to eliminate discrimination in rates); *In re Application of GTE Corp.*, 15 F.C.C.R. 14032, ¶ 67 (2000) (purpose of Act is to eliminate bottlenecks and promote competition).

Each of the reasons Congress chose to regulate transmission facilities fully applies to mixed services. For example, the importance of Congress's requirement that telecommunications carriers interconnect their facilities with other carriers is the same whether or not the carriers bundle their telecommunications services with information services. If a carrier owns a bottleneck network facility that the public interest requires be shared, that interest is not changed one jot when the carrier also provides an information service over that bottleneck transmission facility. The FCC's decision to remove "mixed" services from Title II thus is not faithful to Congress' purpose in regulating telecommunications services in the first instance.[12]

Second, the government nevertheless asserts that there may be policy reasons to refrain from subjecting service provided over cable facilities, or over broadband facilities, to Title II regulation. U.S. Br. at 29-31. But these policies are not derived from the Act. Congress drew no regulatory distinction between cable or telephone transmission, or broadband and narrowband transmission. Accordingly, the FCC has previously concluded that cable telephony *is* a telecommunications service that falls within the ambit of Title II. *See, e.g.*, *In re New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, 19 F.C.C.R. 16,830, ¶ 115 n.335 (2004). It has likewise concluded that stand-alone broadband services

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[12] For example, petitioners' assertion that its construction advances the policy goals of universal service, U.S. Br. at 26, is contradicted by its assertion, four pages later, that it adopted the construction in part to assure that cable operators would not "be required to contribute to federal universal service support mechanisms." *Id.* at 30. The *Declaratory Ruling* advances the goal of universal service only in the perverse sense that the FCC apparently believes that Congress' universal service requirements are unwise.

are subject to Title II.[13] And it has acknowledged in the very *Declaratory Ruling* under review that a cable provider that offered stand-alone broadband service would probably be providing a regulated telecommunications service. U.S. Br. at 24 (citing *Declaratory Ruling* ¶¶ 40-41, Pet. App. 97a).

Indeed, the distinction upon which the Commission relies between cable and telephone transmission media is expressly *proscribed* by the Act. The Act requires instead that transmission services be considered "telecommunications services" "regardless of the facilities used." 47 U.S.C. §153(46). The FCC therefore is not permitted under the Act to decide that the telecommunications component of telephone Internet access service is subject to Title II, but the same service offered over cable facilities is not. Yet that is precisely what it has done

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[13] *Broadband Framework NPRM* ¶ 26 & n.60 (citing *Advanced Services Declaratory Ruling* ¶ 35); *see also In re Federal-State Joint Board on Universal Service, Report to Congress*, 13 F.C.C.R. 11,501, ¶ 15 (1998) ("*Universal Service Report*") ("[T]he provision of transmission capacity to Internet access providers and Internet backbone providers is appropriately viewed as 'telecommunications service' or 'telecommunications . . . .'"); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 Communications Reg. (P&F) 407, ¶ 21 (1999) ("*Second 706 Report*") ("[B]ulk DSL services sold to Internet Service Providers are . . . telecommunications services, and as such, [I]LECs must continue to comply with their basic common carrier obligations with respect to these services."), *aff'd in part, vacated in part and remanded, GTE Servs. Corp. v. FCC*, 204 F.3d 416 (D.C. Cir. 2000); *Advanced Services Declaratory Ruling* ¶ 35 ("xDSL and packet switching are simply transmission technologies"); *In re GTE Telephone Operating Cos. GTOC Tariff No. 1*, 13 F.C.C.R. 22,466, ¶ 16 (1998) ("*GTE DSL Tariff Declaratory Ruling*"); *see also, e.g.*, Brief in Support, *In re Joint Application by SBC Communications Inc. et al., for Provision of In-Region InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, at 54-58 (FCC filed Aug. 20, 2001) (DSL transport service is a telecommunications service).

here through the construction of the definitions and its assertedly discretionary decision to apply the *Computer Inquiry* rules to one transmission medium and not to another.

Third, even if the FCC had the authority to distinguish in this way between cable and telephone, or between broadband and narrowband, the FCC's rule is not tailored to accomplish that goal. Both telephone and cable transmission services are equally capable of being bundled with information services, and both narrowband and broadband transmission services also are equally capable of being bundled with information services. Consequently, the FCC's rule does not promote deregulation of cable or broadband any more or less than it promotes deregulation of telephone and narrowband. There is no fit at all between Petitioners' asserted policy goals and the regulation at issue here.[14]

In each of these ways, the FCC's regulation is at cross purposes with the Act which it is supposed to implement.

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[14] In fact, the FCC's *Declaratory Ruling* does not advance a policy of deregulation in the first instance. To the contrary, the FCC remained agnostic about the need for regulation of cable modem service, putting the question out for notice and comment. As the United States is forced to acknowledge, "the Commission is evaluating in a pending proceeding what federal regulatory obligations, if any, it should impose on cable modem service providers under its regulatory authority." Brief 32. Since it is the FCC's position that under its preferred definition it can and may impose the full panoply of Title II regulation on the cable operators under its Title I authority, and that it could have avoided all regulation under its Title II forbearance authority if it had construed the definitions differently, it cannot rationally maintain that its construction of the definitions was in furtherance of a policy of leaving the Internet "unfettered by Federal and State regulation." Brief at 29 (quoting 47 U.S.C. § 230(b)(2)).

B. The FCC's Construction Unlawfully Negates Title II of the Communications Act

Worse still, as a practical matter, the FCC's rule would negate Title II altogether.

Any carrier subject to Title II may easily add an information service to its telecommunications service offering. Just as Internet access providers here offer the ability to create web pages, regular telephone providers can easily add an "integrated" voice mail service, or a weather report, to plain old telephone service. If that is all it takes to convert a "telecommunications service" into an "information service," the former category has effectively been negated. That is no doubt why the Bell Telephone Companies are vigorously supporting this FCC rule that ostensibly is protecting their competitors from regulatory responsibilities that apply to them. They understand that the inevitable consequence of this ruling is the elimination of Title II for them as well as for the cable companies.

There is no such thing as a "simple, transparent transmission path without the capability of providing enhanced functionality," U.S. Br. at 22 (quoting *Universal Service Report* ¶¶ 43, 59), except perhaps a string held taught between two Dixie cups. Ordinary phone service, for example, requires computer functionality in switches to route the calls. It includes computer look-ups to bill the calls. It relies on "signaling," which consists of data to indicate that the caller has picked up the phone and is now able to dial, to route the call, to disconnect the call, or to rapidly determine whether a particular transmission route is busy, for example. In the same way, routing of Internet traffic requires use of a technology called "DNS" to direct messages to their proper destination. Yet the FCC said that use of DNS was one reason that cable modem service is an information service.

Declaratory Ruling ¶¶ 37-38, Pet. App. 93a-94a. If that is so, then the provision of ordinary phone service is also an information service exempt from Title II. In fact, neither the signaling functions in an ordinary phone call, nor the DNS functions in cable modem service, make the service an information service. The statute explicitly exempts from the definition of information service capabilities used "for the management, control, or operation of a telecommunications system or . . . service." 47 U.S.C. § 153(20).

Even aside from features intrinsic to every phone call, if the FCC prevails, there will be no stand-alone transmission services left to regulate. Here ISPs "complement[]" their Internet access services with services such as e-mail. *Declaratory Ruling* ¶ 18, Pet. App. 68a. Wireline carriers will do the same, offering bundled services that include an information service component, and so escape the burden of Title II regulation. For example, voice mail is an information service. *In re Schools and Libraries Universal Support Mechanism*, 18 F.C.C.R. 9202, ¶¶ 28 nn.44 & 49, 29 (2003). Provision of information such as time, weather or sports scores also is an information service.[15] Under the interpretation provided by the FCC, a carrier selling basic phone service over either traditional telecommunications facilities or cable facilities could "incorporat[e] the active information-processing capabilities" of voice mail as a component of a bundled service provided for a set fee, U.S. Br. at 22 (quotation omitted), or could add an announcement of the time of day at the beginning of each call, and the combined service would be considered a single information service exempt from the statutory requirements of Title II. Similarly, a local exchange carrier providing broadband

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[15] FCC News Release, *Common Carrier Scorecard Report Released On-Line*, 1997 FCC LEXIS 7170 (Dec. 24, 1997) ("Examples of information services include medical, stock market, sports and product information.").

Internet access services could turn it into an information service by including a home page as part of its service (as they typically do, and as the cable companies have done here).

Nor can Petitioners claim that the announced rule is more limited and will apply in some principled way to some "mixed" services and not to others. The government says that "it would be incorrect to conclude that Internet access providers offer subscribers separate services—electronic mail, Web browsing, and others—that should be deemed to have separate legal status," and instead asserts that the service offered is a single "Internet access service." U.S. Br. at 20. But the FCC offers no means to distinguish between those services that "should be deemed" to be a single service, and those that "should be deemed" to include multiple services with separate legal status.

Instead, the *Declaratory Ruling* holds that *all* mixed services are information services. It maintains that the critical factor is the intention of the provider: if it *wishes* to offer a set of services together, at a single price, the offering is a single information service offering. *See, e.g.*, *Declaratory Ruling* ¶ 38, Pet. App. 94a-95a (The classification "turns on the nature of the functions that the end user is offered . . . . As currently provisioned, cable modem service . . . is an information service."). The implication of that rationale is that there can be no such thing as a bundled service that is not "integrated." This is a sweeping rule, and easy to apply. But it leaves the decision whether to regulate a service entirely within the hands of the regulated party, and in that situation a regulated party will always choose to "integrate" its service to avoid regulation. For that reason, the FCC and the courts have long held that status as a common carrier cannot be based on "the intentions of a service provider," *Computer II* ¶ 122. *Cf. Semon v.*

Royal Indem. Co., 279 F.2d 737, 740 (5th Cir. 1960) ("The common carrier's duty to serve all indifferently cannot be lessened by a violation of that duty.").

Petitioners sometimes imply a more limited characterization of the "integrated" nature of the service. They suggest that a cable modem service should be deemed an inseparable information service because the subscriber cannot use the service "*without* a corresponding change in the form or content of the information transmitted." U.S. Br. at 24; *see also id.* at 28 (suggesting that transmission "occurs *only* in connection with the further processing of the information"). The consumer assertedly always accesses the cable modem providers home page, for example. This is a post hoc rationalization that the FCC does not rely upon in its *Declaratory Ruling*. *SEC v. Chenery*, 318 U.S. 80 (1943). It is also factually inaccurate. The FCC acknowledges that a consumer can "click through" to the home page of an ISP other than the cable modem provider. *See Declaratory Ruling* ¶¶ 18 n.83, 25, 38, Pet. App. 69a, 78a, 95a (noting that customer can choose to use only the transmission part of the service).

Moreover, any such distinction (even if the FCC had relied upon it, and even if it had some factual basis) would be arbitrary. The cable modem provider's decision that, unless the consumer requests otherwise, the cable provider's home page will appear at the beginning of each session has nothing to do with the importance of regulating transmission. It is no different than a decision of a traditional telephony provider to add a time-of-day announcement at the beginning of every call, which also would mean the customer could not use the service without a "corresponding change in the content of the information."

Notably, the FCC's categorization of cable modem service is not based on the conclusion that information and telecommunications components are inherently intertwined and could not be separated. Indeed, the FCC acknowledged that cable companies might well offer pure transmission to ISPs. *Declaratory Ruling* ¶¶ 40, 46, 54, Pet. App. 97a, 102a-103a, 111a. The FCC based its ruling instead on the fact that cable modem providers had *chosen* to bundle information processing and telecommunications components together.

At other times, the government attempts to avoid the implications of the conclusion that all mixed services are purely information services by suggesting that cable modem service is different from other mixed services because cable modem providers do not offer any separate stand-alone transmission service. U.S. Br. at 24, 37-38; Cable Br. at 5. But that too is false. Many cable companies offer stand-alone voice telephony products. *Declaratory Ruling* ¶¶ 44, 46, Pet. App. 101a-103a. In any case, the reason cable providers did not previously offer any stand-alone transmission services is that they did not previously offer any transmission services at all, but rather a one-way television product, which explains why they were not historically regulated as telecommunications carriers. *Declaratory Ruling* ¶¶ 61-62, Pet. App. 120a-122a.

Nor can the FCC properly rely on the assertion that cable operators "have never been viewed as common carriers," U.S. Br. at 36, as a basis for its ruling here. If the FCC is suggesting that it is under no obligation to acknowledge "new" common carriers even if they otherwise meet the statutory criteria, that once again is inconsistent with the Act. Application of Title II turns on whether the service is a transmission service, not whether it is offered by a "traditional" common carrier.

Finally, each of these proposals suffers from the same defect: no matter how supposedly "integrated" or "novel" the service is, it indisputably contains a transmission component, and all of Congress's reasons for imposing common carrier regulation on transmission services apply equally to that transmission component, regardless of the degree of its "integration" with an information service, and regardless of its vintage. None of the shifting rationales offered in the *Declaratory Ruling* and the briefs addresses these fatal defects.

C. The FCC's Construction of the Act Unlawfully Gives It Absolute Discretion To Apply or Negate Title II

This is not to suggest that the Commission has no authority to promote deregulatory policies. It does. Congress expressly gave it that authority in the 1996 Act's "forbearance" provision. 47 U.S.C. § 160. Here, however, the FCC has not relied on its statutory forbearance authority, and has not attempted to apply the statute's criteria for forbearance. *See Declaratory Ruling* ¶ 95, Pet. App. 152a (requesting comment on "tentative conclusion" that forbearance would be appropriate). Instead, it has accomplished its deregulation through construction of statutory definitions and invocation of its *Computer Inquiry* rules. But "[courts] (and the FCC) are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of these purposes." *MCI Telecomms. Corp. v. Am. Tel. & Tel.*, 512 U.S. 218, 231 n.4 (1994). An agency "may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri,* 484

U.S. 495, 517 (1988)). That is precisely what the FCC has done here.

This case is on all fours with *MCI v. AT&T.* There, too, the FCC determined that given the increasingly competitive nature of the telephone industry, and in furtherance of Congress's policy of deregulation, it made sense to construe a statutory term such that the practical effect was to eliminate a requirement in the Communications Act it viewed as anachronistic—in that case a requirement that tariffed rates be filed. But this Court rejected the FCC's statutory construction, since among other reasons, Congress in other parts of the Act had limited the FCC's ability to lengthen the notice period for tariffed rate changes. That limitation would make no sense, this Court concluded, if the FCC could simply do away with the rate-filing requirement altogether. 512 U.S. at 228-29. Here, too, Congress imposed strict statutory "forbearance" criteria on the FCC before it could eliminate Title II regulation of the owners of transmission networks. 47 U.S.C. § 160. It makes no sense that Congress would have intended that application of those requirements be completely discretionary. More generally, here, as in *MCI,* "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, []regulated to agency discretion." 512 U.S. at 231. The holding of *MCI* is that a construction of a statutory term whose sole virtue is that it renders application of the statute's operating provisions optional is not a rational construction of that term. That holding fully applies here.

The FCC's invocation of its *Computer Inquiry* rules, *Declaratory Ruling* ¶¶ 43-45, Pet. App. 100a-102a, merely underscores its error here. Those rules implement the FCC's decision to leave information services unregulated. They give the FCC no discretion to deregulate telecommunications

services. The decision to regulate those services was one that Congress made in Title II of the Act. The FCC thus has discretion to implement or change a rule to assure that the unregulated provision of information services does not inadvertently get caught up in the regulation of telecommunications services. It has no discretion to implement a rule to deregulate telecommunications services when they are bundled with information services, which is what it purports to do here.

D. Concluding That Cable Modem Service Includes a Telecommunications Service Would Not Lead to Regulation of All Information Services

As we have demonstrated, the critical defect with the FCC's interpretation is that it undermines the statutory framework by permitting telecommunications carriers to ensure their services are unregulated through the inclusion of an information service component in all service offerings. The cable companies contend that the opposite problem will beset an interpretation under which mixed services are considered, even in part, telecommunications services. They argue that under such an interpretation all information services would be considered telecommunications services and thus all would be regulated, contrary to Congress's intent to leave such services unregulated. Cable Br. at 30. That is incorrect.

To begin, most information service providers do not offer independent transmission capabilities to their customers. Information service providers that provide only the capability to store and manipulate data—such as Lexis or Westlaw, for example, or web page creators—are not providing independent telecommunications capabilities to their customers as part of their service. They are providing

information services "via telecommunications." These services are not telecommunications services subject to Title II under any conceivable definition of that term. They use telecommunications (which are provided by others) exclusively to deliver information they have stored or manipulated.

Even for companies that do offer mixed services (such as independent ISPs), the statutory mandate is that the telecommunications component must be regulated. Although nothing in the Act prohibits regulation of information services, the FCC could readily subject *only* the telecommunications component of the service to regulation either through appropriate tailoring of the regulations, or through application of the *Computer Inquiry* rules. And regardless of what the FCC did, the companies could voluntarily offer the "raw" telecommunications service components of their services so that only that service would be subject to regulation. Thus, with cable modem service, the provision of a home page or the ability to create a personal web page, would not be regulated, for example.

III. The FCC's Interpretation Represents a Radical And Unexplained Departure From Commission Precedent

The United States asserts that the *Declaratory Ruling* is grounded in past Commission precedent. In fact it is a radical departure from all previous Commission rulings on the topic.

Petitioners rely on the FCC's *Universal Service Report*, in which the FCC held that an enhanced service provider that makes use of another telecommunications carrier's transmission facilities is not itself providing a "telecommunications service." U.S. Br. at 21-25;

Declaratory Ruling ¶¶ 40-41, Pet. App. 97a-98a. The United States fails to acknowledge that in that very order the FCC went on to address the precise situation present here—in which an enhanced service provider makes use of its *own* transmission facilities. In that situation, the Commission concluded that the enhanced service provider is at once an enhanced service provider and at the same time a telecommunications service provider, subject to the Title II common carrier obligations. "[I]n every case, *some* entity must provide telecommunications to the information service provider. *When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications.*"[16] Thus, that portion of the FCC's decision upon which petitioners rely applied only to enhanced services providers using other carriers' facilities. It simply prevents *double* application of Title II requirements—both to the company from which the ISP obtained telecommunications and to the ISP itself. It did not allow transmission networks to go unregulated altogether.

A. Pre-1996 Act Precedent

In so ruling, the Commission was not breaking new ground. The treatment of facilities-based carriers that the FCC here abandons is as old as the Communications Act.

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[16] *Universal Service Report* ¶ 69 n.138 (emphasis added); *see also In re Implementation of the Non-Accounting Safeguards of Section 271 & 272 of the Communications Act of 1934, As Amended*, 16 F.C.C.R. 9751, ¶ 38 (2001) ("*Non-Accounting Safeguards Remand Order*") ("In fact, the *[Universal Service] Report to Congress* recognized that in cases in which an information service provider owns the underlying transmission facilities, and engages in data transport over those facilities in order to provide an information service, one could argue that the information service provider is 'providing' telecommunications to itself by furnishing raw transmission capacity for its own use.").

Building on the history of common carriage regulation, Congress in 1934 imposed a series of duties on providers of transmission services. *See supra* p. 2. Although the nature of those duties has changed over time, the Act (and, until this *Declaratory Ruling*, the FCC's regulations implementing the Act) consistently has imposed these duties on the owners of transmission networks.

In 1934, there was no concern with "information services," and the 1934 requirements applied to all transmission services made generally available to the public.

As computer processing applications developed in the 1970s, and data from those applications were transmitted over transmission facilities, the FCC considered whether common carrier regulation applied to these new services. As the cable companies explain, the FCC decided not to regulate these new services based on a "reluctan[ce] to regulate competitive parts of the economy only indirectly related to its communications mandate." Cable Br. at 26. But as the cable companies further acknowledge, this reluctance was coupled with a concern that telephone companies would violate their statutory obligations and "deny computer-service rivals essential telephone inputs." *Id.* For that reason, the FCC required continued regulation of transmission facilities. *See supra* pp. 2-4.

It would have been inconsistent with the Act's pre-1996 regulation of common carriage for the FCC to have concluded that transmission became exempt from statutory requirements when combined with a computer processing application. For while the FCC was entitled to conclude that the new computer services fell outside the regulatory framework, it was not entitled to rely upon this principle as a pretext for undermining Congress's requirements concerning transmission. As the Commission has long made clear,

"since the *Computer II* regime, we have consistently held that the addition of . . . enhancements . . . to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations." *In re Filing and Review of Open Network Architecture Plans*, 4 F.C.C.R. 1, ¶ 274 (1988).

Until this decision the FCC never even considered this issue to be open to question. Thus, in the *Frame Relay Order* ¶ 52, the Commission determined that AT&T's frame relay service, a high-speed data service similar to a broadband service, was a basic telecommunications service. In reaching that conclusion, the Commission responded to the argument that the particular frame relay service in question had an enhanced service component (protocol processing) and that this enhanced service component "contaminated" the basic frame relay service such that there was no longer any basic transmission service that needed to be made available to competitors—the very claim the FCC makes in the *Declaratory Ruling* under review here.[17]

In the *Frame Relay Order,* the Commission rejected this claim out of hand, concluding that it was "obviously an undesirable and unintended result." *Id.* ¶ 44. The Commission made clear that the contamination theory did *not* apply to carriers such as AT&T that owned their own facilities. Were it otherwise, the Commission concluded, any carrier could escape the statutory requirements applicable to

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[17] The Commission had previously applied the contamination theory to hold that value-added networks that *resold* transmission but added an enhanced service component provided enhanced services, not basic services. *Frame Relay Order* ¶ 5. In those cases, the carrier from which the value-added networks purchased transmission was already subject to regulation, rendering additional regulation of the transmission unnecessary.

its transmission facilities by combining them with an enhanced service. *Id.*

B. Post-1996 Act Precedent

In adopting the 1996 Act, Congress did not evidence any intent to eliminate this regulatory paradigm. Nothing in the words that Congress chose could plausibly be read to work the radical constriction of common carrier principles that would result from the conclusion that a service such as cable modem service *stops* being a "telecommunication service" merely because a company bundles the service with an information service. To the contrary, as we have seen, the language and statutory structure establish the contrary. Nor does the legislative history even hint at such a revolutionary purpose.[18] Indeed, the Commission previously has acknowledged that "Congress intended the definitions of 'telecommunications,' 'telecommunications service' and 'information service' to build upon the frameworks

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[18] The only relevant legislative history is the Senate Report describing the version of the bill that adopted the "telecommunications service" and "information service" distinction. Petitioners acknowledge that this legislative history makes clear that Congress intended the Ninth Circuit's construction and rejected the construction adopted by the FCC. U.S. Br. at 27. Petitioners claim weakly that the legislative history nevertheless should be ignored because the precise language of the definitions was altered in minor respects in the Act as passed. But the adopted language is not materially different from the language in the Senate Bill. As the government notes, the Senate version of the 1996 Act stated that telecommunications service included "the transmission, without change in the form or content, of information services and cable services," but not, "the offering of those [information or cable] services." U.S. Br. at 27 (quoting S. Rep. No. 104-23, at 79 (1995)). The change to the final version was a minor one that simply made the definition's characterization more accurate. Since it is information, not information or cable services, that is actually transmitted, Congress removed the word "services."

established prior to the passage of the 1996 Act, including . . . Commission precedent."[19]

Accordingly, until the *Declaratory Ruling*, the Commission's post-1996 precedent was consistent with its earlier precedent. Indeed, the very example the Commission first used in reaffirming its longstanding view that the telecommunications component of a "mixed" service remains subject to Title II was broadband Internet access service:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.

Advanced Services Declaratory Ruling ¶ 36.

The FCC reached the same conclusion in the *GTE DSL Tariff Declaratory Ruling*, concluding that "an otherwise interstate basic service . . . does not lose its character as such simply because it is being used as a component in the provision on a[n enhanced] service that is not subject to Title II." *GTE DSL Tariff Declaratory Ruling* ¶ 20 (quoting *ONA Plans Declaratory Ruling,* 4 F.C.C.R. 1, ¶ 274 n.617 (1988)).

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[19] *Non-Accounting Safeguards Remand Order* ¶ 29; *see also Universal Service Report* ¶ 45 ("Congress intended the 1996 Act to maintain the Computer II framework."); *id.* ¶ 39 ("[I]n defining 'telecommunications' and 'information services,' Congress built upon . . . *Computer II*.").

More recently, the Commission directly considered the regulatory status of "bundled" broadband Internet access service. Far from holding that information services are "integrated" or "unified" services without an identifiable transmission component, in the *CPE/Enhanced Services Bundling Order* the Commission held precisely the opposite. It held that "all enhanced services are 'bundled' services" made up of a separately identifiable "telecommunications service and the computer processing that is necessary to offer the information-based portion of the service." *CPE/Enhanced Services Bundling Declaratory Ruling* ¶ 41. The Commission reiterated that "the separate availability of the transmission service is fundamental to ensuring that dominant carriers cannot discriminate against customers who do not purchase all the components of a bundle from the carriers themselves." *Id.* ¶ 44.

The Commission accordingly held that when an information service provider makes use of its own transmission facilities, those facilities constitute a distinct telecommunications service, and for that reason the information service provider must pay contributions to the FCC's universal service fund. And the United States' assertion to the contrary notwithstanding, the FCC grounded this understanding not exclusively on its *Computer Inquiry* rules, but on the core Title II requirements of "section 202 of the Act [that carriers] not discriminate in their provision of transmission service to competitive internet or other enhanced service providers." *Id.* ¶ 46.

Indeed, only a month before it concluded in the *Declaratory Ruling* that cable modem providers (a type of facilities-based ISP) are providing a "unified" information service without any distinct telecommunications service component, the Commission once again reiterated its longstanding view to the contrary, that owners of

transmission networks that "provide broadband transmission services or other telecommunications services to . . . affiliated . . . Internet service providers" must contribute to the universal service fund because they are providing a separate, identifiable, "telecommunications service." *Broadband Framework NPRM* ¶ 72. This is so, the Commission stressed, even when the provider is not required to separately offer the transmission service to the public for a fee, but instead offers "broadband Internet access to end-users for a single price," as part of a "bundled package" of telecommunications and information services, the exact situation present here. *Id.* (quotation omitted). Petitioners' assertion that these common carrier Title II rules apply only when a provider "made a 'stand-alone offering of transmission for a fee directly to the public,'" U.S. Br. at 24, quoting *Declaratory Ruling* ¶ 40, Pet. App. 97a, has never been the law.

To be sure, the FCC previously had drawn a distinction between regulated facilities-based providers of information services, and unregulated non-facilities-based providers. The government asserts that nothing in the Communications Act requires the Commission to maintain such a distinction. U.S. Br. at 24-26. That may well be so. As we demonstrated above, *supra* pp. 15-17, the statutory language is best read as requiring *all* providers of mixed services to be categorized in part as telecommunications service providers. But if the government is correct that the statute is ambiguous on this point, the language would still have to be interpreted consistently with the statutory framework. An interpretation under which mixed services provided over a carrier's own facilities are considered telecommunications services, but other services are not, meets this standard. In contrast, the FCC's new

interpretation, under which all mixed services are considered purely information services, does not.

C. The FCC Misconstrues the *Computer Inquiry* Rules

Finally, petitioners assert that the evident inconsistencies between the *Declaratory Order* and earlier decisions are the consequence of the fact that it has declined to apply the *Computer Inquiry* rules to cable operators, a choice it claims it is free to make. But as we just demonstrated, the Commission's previous refusal to allow the owners of transmission networks to shield themselves from regulation by adding an information service to their product was based on Title II itself, and not exclusively on the *Computer Inquiry* rules. *See supra* pp. 36-37.

Petitioners' arguments to the contrary not only ignore past Commission precedent, they also are based on a misunderstanding of the source and reach of the FCC's regulatory authority. The requirement that transmission networks be regulated under Title II as common carriage is not a product of the *Computer Inquiry* rules. That requirement instead is a necessary consequence of Title II itself, and its application was never a matter of Commission discretion.[20] The *Computer Inquiry* rules addressed the *de*regulation of enhanced services, a matter that *is* within the Commission's discretion. To the extent the rules create a dividing line between basic and enhanced services, the line allows the Commission to carry out its deregulation of the information service features of bundled information services. It does not give the Commission authority it never had to

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[20] *See, e.g., Computer II,* ¶ 7 ("The common carrier offering of basic transmission services are communications services and regulated as such under traditional Title II concepts.").

deregulate basic telecommunications services. *See supra* pp. 28-29.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

JEFFREY A. RACKOW
MCI, INC.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6000

MARK D. SCHNEIDER*
MARC A. GOLDMAN
THOMAS G. PULHAM
JENNER & BLOCK LLP
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Respondent MCI, Inc.

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**Counsel of Record*