

BRAND X INTERNET SERVICES V. FCC: THE CASE OF THE MISSING POLICY ARGUMENT

By Steven Aronowitz

People seeking Internet access through their cable lines may soon have new choices. Today, a consumer with Comcast Cable can only purchase cable modem service from Comcast or a Comcast-affiliated provider, usually a Comcast subsidiary.¹ If the decision in *Brand X Internet Services v. Federal Communications Commission*² is upheld by the United States Supreme Court, that consumer will eventually be able to choose from other cable Internet Service Providers (ISPs) operating on Comcast's connection to the customer's home.

Regulatory consistency and open access to cable Internet is at stake in *Brand X*. Access to the Internet requires two basic components: a last mile connection and an ISP. The last mile is a physical connection linking a personal computer to the network of computers that make up the Internet. For cable modem Internet service, the connection is a cable line; for Digital Subscriber Line (DSL) service, it is a phone line. An ISP provides a software connection allowing a personal computer to communicate with the network. Telecommunications law and the Federal Communications Commission (FCC) require phone companies to open the last mile of DSL service to competition among ISPs, but do not require cable modem service providers to open their last miles.

The *Brand X* decision harmonizes the regulation of cable modem Internet and DSL by mandating open access to cable Internet. Under an open access system, telecommunications service owners can not create information service monopolies through the restriction of access to telecommunication services. In other words, just because you own the pipes does not mean you can control what is flowing through them.

The United States Court of Appeals for the Ninth Circuit's decision in *Brand X* redefines how cable modem service is classified by the FCC under the Telecommunications Act of 1996.³ If cable modem service is a telecommunications service, it will be subject to open access require-

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1. STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 892 (2001).

2. 345 F.3d 1120 (9th Cir. 2003) (per curiam), *reh'g and reh'g en banc denied*, 2004 U.S. App. LEXIS 8023 (9th Cir.), *cert. granted*, 124 S. Ct. 655 (2004).

3. *See infra* Part I.C.

ments, but if it is an information service, cable companies will not have to open the last mile to unaffiliated ISPs. The Ninth Circuit, reversing an FCC ruling, held that cable modem Internet provides a telecommunications service in part and so must allow ISPs to compete on cable lines.⁴ The Supreme Court has granted certiorari.⁵ The outcome will have profound effects on the Internet access industry and consumers while setting a precedent for the regulation of emerging technologies. This Note suggests the correct result will uphold the Ninth Circuit's decision.

The *Brand X* court reached the right result while ignoring the most important rationale for this decision: public policy. The FCC has the best institutional capability to define cable modem service under the Telecommunications Act, but the FCC made a choice that will negatively affect telecommunications regulations and consumers. The Ninth Circuit is properly bound by a previous Ninth Circuit decision, *AT&T v. City of Portland*,⁶ because that case took place before any FCC action and so the court did not improperly review the FCC's decision.⁷ *Brand X*, however, is not only defensible under the *Portland* precedent; it sets out good telecommunications policy by putting cable modem service and DSL on a level playing field and benefits consumers by creating competition among cable modem ISPs.

This Note explores the rationale and implications of *Brand X*, from the standpoint of both institutional competence and policy concerns, for harmonized telecommunications law and open access to the Internet. Part I reviews the legal and factual background of the *Brand X* decision, including various Internet access technologies, telecommunication regulatory history, the FCC's response to cable modem service, and the procedural history of the Ninth Circuit's decision. Part II summarizes the court's analysis, the reliance on *Portland*, and the concurring opinions. Part III argues that the Ninth Circuit's decision is good for rational regulation and consumer interests alike, even if the court based its holding on a somewhat wooden adherence to precedent rather than the sound policy of offering a level playing field to Internet access providers and a competitive market to consumers.

4. 345 F.3d at 1132.

5. 124 S. Ct. 655 (2004).

6. 216 F.3d 871 (9th Cir. 2000).

7. See *infra* Part II.A.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Brand X addresses how telecommunication regulation should respond to a new method of Internet access. An understanding of the regulatory background and the nature of the new cable technology that challenges the efficacy of previous rules clarifies the import of this decision.

A. Connecting to the Internet

There are several ways to connect a home computer to the network of computers that constitute the Internet. Each way consists of connecting a computer in a customer's home to a computer operated by the ISP, which serves as a portal to the Internet for the computer at home. Different access technologies—dial-up, DSL, and cable—utilize different connections between the users' computer and the ISP's computer. Utilizing "dial-up" service, a user's home computer connects to the ISP with a traditional modem over a phone line.⁸ The computer dials the phone number for the ISP and communicates using audio tones. DSL service also utilizes phone lines, but without dialing; the connection is digital and always on.⁹ The drawback of DSL is that a customer must be within a certain geographic proximity to a central station, which makes DSL expensive for rural areas. Cable modems, unlike dial-up and DSL connection to the Internet, do not use a phone line as the last mile. Instead, cable modems connect the home computer to the ISP through the coaxial cable originally installed to deliver television content.¹⁰ Prior to the *Brand X* decision, cable line providers enjoyed the monopoly right to exclude ISPs from their networks.¹¹ Thus, most cable companies provide the Internet connection themselves or through an affiliated ISP created and owned by the cable operators.¹²

Dial-up Internet access service illustrates the separation between the physical last mile connection and the software connection to the ISP. The last mile for dial-up service is existing phone lines, which can be used by any consumer to connect to any ISP for the price of an ordinary phone call. For DSL and cable modem service, the distinction is more theoretical because consumers do not normally make independent data connections over high-speed digital phone or cable lines; in addition, specific software and hardware connections are required that go beyond normal phone or cable service. Creating multiple physical last mile connections for DSL or cable modem service would be just as inefficient as creating multiple con-

8. *Brand X*, 345 F.3d at 1123.

9. *Id.* at 1124.

10. *Id.*

11. *See id.* at 1124-25.

12. *Id.* at 1124.

nections for each home to the telephone network. Thus, the first company to install the last mile enjoys a natural monopoly over the connection that makes the open access question particularly pressing.

Cable modems and DSL provide "broadband" access¹³ with data transfer rates significantly higher than dial-up or "narrowband" access rates. Broadband speeds the sending and receiving of information, allowing customers to view streaming media, transmit large files, and load websites more quickly. With the rising customer demand for the advantages of broadband access, regulatory differences between DSL and cable modem services are causing increasing market effects.¹⁴

B. Telecommunications Regulatory History and the Common Carrier

The idea of a common carrier began before modern telecommunications.¹⁵ The United States inherited the idea of a common carrier as a service provider that was open to all and, in exchange, was immune from certain liabilities and competition.¹⁶ Today, telecommunication common carrier regulations include the requirement that service providers allow competitors to use their lines, but that was not always the case.

The regulation of the telecommunication industry began in 1910 with the passage of the Mann Elkins Act of 1910,¹⁷ which defined telecommunications companies as common carriers but did not require them to carry the information of other carriers on their lines.¹⁸ This omission, combined with the network effect of telephone service, created a strong monopoly effect.

A network effect occurs when technology is more useful as an increasing number of people use it. For example, a single telephone has no value, but it becomes more useful as it is connected to more and more tele-

13. *Id.*

14. See *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4799-800 (2002) [hereinafter *Inquiry Concerning High-Speed Access*] (recognizing the increasing demand for broadband and the legal pressure that has created).

15. In England, the King granted exclusive monopolies to transportation companies operating services like ferryboats or a commercial pier. English common law evolved to constrain Crown monopolies while protecting their control of the market. See BENJAMIN ET AL., *supra* note 1, at 608.

16. *Id.*

17. Pub. L. No. 218, ch. 309, § 7, 36 Stat. 539 (1910) (amending Interstate Commerce Act of 1887, ch. 104, § 1, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.))

18. BENJAMIN ET AL., *supra* note 1.

phones. Telecommunications companies, like Bell, were not forced to carry the signals of competing companies over their lines, so they established an exclusive network. Thus, a Bell consumer could only communicate with other Bell consumers. Customers had a large incentive to purchase telephone service from the company with the largest network, eventually leading to a monopoly.¹⁹ The federal government removed the monopolistic impact of the network effect in the Telecommunications Act of 1996 by requiring telecommunications companies to carry and deliver signals of competitors on their networks.

Even with a requirement to carry competitors' signals, parts of the telecommunications industry are natural monopolies, including, of particular relevance to the Internet access question, the so-called last mile. The fixed costs associated with installing local wires between customers' homes and nearby aggregation centers make multiple competing networks, each with a last mile wire connection to all consumers, inefficient.²⁰ Economies of scale, demand variability, and equity concerns also argue for a telephone monopoly.²¹

The natural monopoly inherent in the last mile connection creates economic reasons to require providers to carry the information of competitors. This open access requirement preserves the efficiency of limited last mile wires while creating competition in the consumer market. To this end, Congress created an open access telecommunication system by enacting the Telecommunications Act of 1996. Suddenly, the Telecommunications Act gave companies the right to purchase services from a telecommunication provider at wholesale rates and resell those services to consumers in competition with the original provider.²² In the past, telecommunications policy focused on controlling monopoly power regulation, but the Telecommunications Act of 1996 sought to control monopoly power with market power. This shift to open access set the stage for new consumer choice and competition in telecommunications service.

19. *Id.* at 616.

20. *Id.* at 614.

21. Constructing one large network is less expensive than constructing several small networks. In addition, putting one company in charge allows that company to realize economies of scale as the network grows. One large network can equalize demand variability over more customers. More customers in a network reduce the expense per customer to provide subsidies aimed at equity. *See id.* at 617-18.

22. *See* 47 U.S.C. § 251(b)(1), (c)(4) (2000); BENJAMIN ET AL., *supra* note 1, at 717.

C. The FCC Responds to Cable Modem Service

The Telecommunications Act of 1996²³ distinguishes cable services, telecommunication services, and information services. The three services are subject to different levels and kinds of regulation, which has proven to have important and unforeseen effects on the Internet access market. The Act defines cable service as transmission of video content to subscribers and interaction involving the selection and use of the content.²⁴ For instance, a cable television company provides cable service when it transmits television programs into customers' homes and allows them to select pay-per-view programs through the cable connection. Telecommunication service is defined as provision of telecommunications to the public for a fee through any facilities.²⁵ This classification covers phone companies and any other company that creates the infrastructure for people to communicate. Finally, the Act defines information service as provision of the use of information through telecommunications but specifically does not cover the operation or management of a telecommunications system.²⁶ An example of an information service is a stock quote company that provides information about stocks by phone, fax, e-mail and/or a website but is not engaged in operating any of those telecommunication systems.

The FCC did not immediately categorize cable modem Internet service.²⁷ Regulators and commentators believed that market forces and improving technology were changing the industry too quickly to make regulation effective at the time, but as cable modem Internet service became a

23. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

24. 47 U.S.C. § 522(6) (defining cable service as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service").

25. *Id.* § 153(46) (defining telecommunications service 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").

26. *Id.* § 153(20) (defining information service as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunication service").

27. The FCC took a hands-off approach to regulating cable modem Internet service. See William E. Kennard, *The Road Not Taken: Building a Broadband Future for America*, Remarks Before the National Cable and Television Association (June 15, 1999), available at <http://www.fcc.gov/Speeches/Kennard/spwek921.html>.

viable form of Internet access and communication, the need to formulate a regulatory response became increasingly clear.²⁸

On September 28, 2000, the FCC took up the call, issuing a notice of inquiry and taking comments on "what regulatory treatment, if any, should be accorded to cable modem service and the cable modem platform used in providing this service."²⁹ On March 15, 2002, the FCC issued its Declaratory Ruling and a notice of proposed rulemaking.³⁰ In the ruling, the FCC classified cable modem service as solely an information service and ruled that cable modem service was neither cable service nor a telecommunications service, thus exempting cable modem service from open access requirements.³¹

The FCC ruling first identified three core principles it strove to uphold: attempting to provide broadband to all Americans; minimizing regulatory interference with the market; and creating a rational framework across technological platforms.³² Avoiding regulation of broadband in particular is a longtime goal of the FCC.³³ The ruling next looked to the Telecommunications Act and case law on classifying cable modem service, and concluded the statute and case law are unclear, leaving the classification of cable modem service unresolved.³⁴

In the absence of statutory or case law guidance on cable modem Internet service, the agency looked to an earlier FCC decision, the *Universal Service Report*,³⁵ which classified Internet access service over the phone as an information service.³⁶ In light of this earlier classification the FCC ruled that cable modem service, like Internet access service, was a single integrated service offering use of the Internet.³⁷ It is notable that the *Universal Service Report* raised but did not decide the issue of how to classify Internet access services that own the telecommunication facilities

28. The FCC may have been too late, according to the Ninth Circuit. By this time cable modem Internet service had already been defined in *Portland*. See *AT&T v. City of Portland*, 216 F. 3d 871, 877 (9th Cir. 2000).

29. *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 15 F.C.C.R. 19287, 19287 (2000).

30. *Inquiry Concerning High-Speed Access*, *supra* note 14.

31. *Id.* at 4802.

32. *Id.* at 4901-02.

33. In 1999, then-FCC Chairman Kennard discussed the importance of letting early cable modem service develop free of government intervention. See Kennard, *supra* note 27.

34. *Inquiry Concerning High-Speed Access*, *supra* note 14, at 4819.

35. *In re Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11501, 11535 (1998).

36. *Inquiry Concerning High-Speed Access*, *supra* note 14, at 4821.

37. *Id.*

used to access the Internet. This scenario fits a cable modem service run by a cable company. While the *Report* noted that such facilities may merit classification as a separate telecommunications service, the FCC pointed out that no decision was reached on that issue.³⁸ In regards to cable modem service, the agency reached its ruling by finding that the telecommunications facilities are used only to provide access as part of an integrated Internet access service that cannot be separated into a telecommunications service.³⁹

Indeed, the FCC ruling explicitly rejected the idea that cable modem service offers a separate telecommunications service for purposes of classification under the Telecommunications Act of 1996.⁴⁰ Instead, the FCC found that cable modem capabilities are merely provided "via telecommunications" and that such telecommunications are not offered separately from the Internet access.⁴¹ The agency reasoned that no cable operator has made an independent offer of transmission of information for a fee directly to the public or wholesaler as a common carrier would.⁴² The FCC further found that cable companies offering multiple ISPs act as private, not common, carriers because the companies decide which ISPs to work with on an individual basis and are not offering transmission over cable lines to all ISPs.⁴³

The FCC ruling was also careful to distinguish cable modem service from Internet access over telephone wires through dial-up or DSL.⁴⁴ When an information service is being offered by a traditional telecommunications provider—that is, when a telephone company also acts as an ISP—a separate telecommunications service exists, but the FCC found there is no such separate service in Internet access service over cable wires.⁴⁵ Even where cable companies also offer telephone service, the FCC waived the common carrier requirements. This move was designed to prevent uneven application of open access to the limited number of cable modem providers that also offer telephone service, while encouraging cable companies to stay in the telephone market.⁴⁶

38. *Id.* at 4823-24.

39. *Id.* at 4824.

40. *Id.* at 4823.

41. *Id.*

42. *Id.*

43. *Id.* at 4830.

44. *Id.* at 4825.

45. *Id.*

46. *Id.* at 4826.

Immediately following the ruling, ISPs and other Internet industry groups filed for review of the FCC's action. The petitions were filed in the Third, Ninth, and District of Columbia Circuit Courts of Appeals. On April 1, 2002, the Judicial Panel on Multi-District Litigation transferred and consolidated the related petitions for review before the Ninth Circuit with the Brand X petition.

On May 8, 2003, the Ninth Circuit panel vacated the FCC ruling in part and held that cable modem service had a telecommunications service component.⁴⁷ The court held that the FCC's ruling was incomplete because it did not include telecommunication service in the definition of cable modem service and, therefore, vacated that portion of the ruling. The full Ninth Circuit denied rehearing and en banc rehearing of the case.⁴⁸ On August 31, 2004, the FCC filed a petition for a writ of certiorari with the United States Supreme Court.⁴⁹ On December 3, 2004, the Supreme Court granted the petition and is expected to hear arguments on March 29, 2005.⁵⁰

II. THE NINTH CIRCUIT'S ANALYSIS

Currently, *Brand X*⁵¹ provides the final word in the definition of cable modem services under the Telecommunications Act of 1996. The decision focuses on the precedent set by the Ninth Circuit in *AT&T v. City of Portland*,⁵² which found that cable modem Internet service incorporated both information and telecommunication services for purposes of regulation by local franchising authorities. *Portland* left unanswered questions about the status of cable modem service and the future of open access.⁵³ The *Brand X* decision finalizes the definition of cable modem service as partially a telecommunications service under the Telecommunications Act and overrules the FCC definition. This decision clears the way for open access to cable modem service. The *Brand X* court restated the *Portland* facts and

47. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003) (per curiam), *reh'g and reh'g en banc denied*, 2004 U.S. App. LEXIS 8023 (9th Cir.), *cert. granted*, 124 S. Ct. 655 (2004).

48. *Brand X Internet Servs. v. FCC*, Nos. 02-70518, 02-70684, 02-70686, 02-70879, 02-71425, 02-72251, 2004 U.S. App. LEXIS 8023 (9th Cir. Mar. 31, 2004) (denying rehearing and rehearing en banc).

49. United States Supreme Court Docket No. 04-281, *available at* <http://www.supremecourtus.gov/docket/04-281.htm> (last visited Jan. 24, 2005).

50. *Id.*

51. *Brand X*, 345 F.3d at 1132.

52. 216 F.3d 871 (9th Cir. 2000).

53. BENJAMIN ET AL., *supra* note 1, at 901.

analysis and used the previous interpretation to craft a new rule defining cable modem service for the FCC.⁵⁴ This Part explains the *Portland* rationale, details why the court in *Brand X* was bound by this precedent, and summarizes the *Brand X* concurring opinions.

A. *AT&T v. City of Portland*

In *AT&T v. City of Portland*, the Ninth Circuit addressed the open access conditions placed on a cable franchise sale by a local franchise authority.⁵⁵ The *Brand X* court found that *Portland* held cable modem service did not qualify as a cable service and that it incorporated both information service and telecommunications service.⁵⁶

The *Brand X* court reiterated the logic behind the *Portland* decision and then outlined why *Portland* was indeed the controlling definition of cable modem services. The dispute in *Portland* arose from the merger of AT&T with TCI.⁵⁷ TCI was a cable provider that operated in Portland under a franchise from the Local Franchising Authority (LFA), which grants cable companies right of way and other rights in exchange for providing cable service to its residents at negotiated terms. Under the Telecommunication Act, local franchising authorities have the power to include local approval requirements in the franchise agreements.⁵⁸ The City of Portland attempted to condition the merger of AT&T with TCI on the provision that AT&T provide open access to cable modem ISPs over the broadband cables in Portland.⁵⁹ AT&T brought suit, claiming that an open access requirement was illegal under the Telecommunications Act of 1996 and other statutes and agreements.⁶⁰ AT&T eventually won nullification of the open access franchise agreement transfer condition because the court held that cable modem services were not cable services and so could not be directly regulated through the cable franchise authority.⁶¹

In *Portland*, the court distinguished between the two activities undertaken by a cable modem service provider. One is to provide an informa-

54. *Brand X*, 345 F.3d at 1128-29.

55. 216 F.3d 871.

56. *Brand X*, 345 F.3d at 1131.

57. *Portland*, 216 F.3d at 873.

58. 47 U.S.C. § 537 (2000). The franchise agreement between Portland and TCI included language allowing the city to "condition any Transfer upon such conditions, related to the technical, legal and financial qualifications of the prospective party to perform according to the terms of the Franchise, as it deems appropriate." *Portland*, 216 F.3d at 875.

59. *Portland*, 216 F.3d at 875.

60. *Id.* at 876.

61. *See id.* at 877.

tional service by sharing data with customers, allowing them to use programs like e-mail and web design—that is, to act as an ISP.⁶² But cable modem services also provide a “pipeline” component, transmitting data between customers and other Internet computers without any transformation of the form or content.⁶³ The court found this component of cable modem service to be a telecommunications service.⁶⁴

Applying these classifications to the dispute at hand, the *Portland* court held that the Telecommunications Act prohibits an LFA from regulating cable modem services because the transmission of Internet service is a telecommunications service,⁶⁵ and LFAs are only entitled to regulate information services.⁶⁶ AT&T was able to move forward with the merger and ignore the open access requirement put in place by the City of Portland, but the *Portland* decision would come back to haunt AT&T in *Brand X*. In *Portland*, cable companies won a battle to keep the last mile closed, but in the process may have lost the war over open access.⁶⁷

B. *Portland* as Binding Precedent over the FCC Rulemaking

The Ninth Circuit held the *Portland* statutory interpretation to be binding in reviewing the FCC rulemaking at issue in the *Brand X* case. Because the court had already ruled that cable modem service is defined as both an information service and a telecommunications service when the FCC made its ruling on cable modem service, that definition was binding and would be decisive in *Brand X*.⁶⁸

In finding *Portland* to be binding, the court first rejected the argument that the *Portland* discussion of cable modem service definitions was mere dicta.⁶⁹ The court held that the definition of cable modem service was necessary to the conclusion of *Portland*,⁷⁰ pointing to language in the decision which said the court “must determine how the Communications Act defines [‘cable modem’],” and a sentence reading, “We hold that subsection 541(b)(3) prohibits a franchising authority from regulating cable broad-

62. *Id.* at 877-78.

63. *Id.* at 878.

64. *Id.*

65. 47 U.S.C. § 541(b)(3) (2000).

66. 216 F.3d at 880.

67. See Christian R. Eriksen, *Cable Broadband: Did the Ninth Circuit Beat the FCC to the Punch in Last Mile Regulation?*, 6 TUL. J. TECH. & INTELL. PROP. 283, 291 (2004).

68. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003) (per curiam), *reh'g and reh'g en banc denied*, 2004 U.S. App. LEXIS 8023 (9th Cir.), *cert. granted*, 124 S. Ct. 655 (2004).

69. *Id.* at 1130.

70. *Id.*

band Internet access, because the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communication Act."⁷¹ This language does imply the court believed deciding the classification question was essential to the ruling. However, as an FCC declaratory ruling pointed out, such a finding was not logically required to decide the narrow question presented in *Portland*.⁷² The court could have resolved the scope of local franchise authority by finding that cable modem service was not cable service. Anything beyond cable service is not subject to local franchise authority regulation. This initial holding, possible without the language quoted above, answers the question at the heart of *Portland* without reaching the issue of whether telecommunications service was the correct classification under the Telecommunication Act.

The court next rejected the contention that the previous holding was not binding under an exception detailed in *Mesa Verde Construction Co. v. Northern California District of Laborers*.⁷³ *Mesa Verde* crafted an exception to stare decisis in which precedent can be ignored in favor of a later federal agency ruling but "only where the precedent constituted deferential review of [agency] decision making."⁷⁴ At the time *Portland* was decided, the FCC had not yet classified cable modem service, suggesting the exception might apply. The *Portland* decision, however, was not a deferential review; rather, it was new law and so the court rejected the argument that the *Mesa Verde* exception applied.⁷⁵ The court also pointed to *Neal v. United States*,⁷⁶ which holds that once a court has found the meaning of a statute, that is the law against which subsequent agency decisions will be measured.⁷⁷

Brand X sets out an important regulatory definition but avoids a discussion of the policy implications of classifying cable modem service as both information service and telecommunication service. The court relies on the *Portland* decision to define the nature of cable modem service, discussing stare decisis and evading an analysis of the ramifications of this decision.

71. *Id.*

72. See Inquiry Concerning High Speed Access, *supra* note 14, at 4829-30.

73. 861 F.2d 1124 (9th Cir. 1988) (en banc).

74. *Id.* at 1136.

75. *Brand X*, 345 F.3d at 1131.

76. 516 U.S. 284 (1996).

77. *Brand X*, 345 F.3d at 1131-32.

C. Judge O'Scannlain's Concurrence: Institutional (In)Competence

Judge O'Scannlain's concurrence agreed that the result of *Brand X* must be dictated by the precedent of *Portland*, but nonetheless pointed out the incongruity this outcome has with the policy motivating the Supreme Court's decision in *Chevron v. Natural Resources Defense Council, Inc.*⁷⁸ Judge O'Scannlain was concerned that *Brand X* truncates the policy debate over cable modem regulation and usurps the authority of the FCC.⁷⁹ The FCC is the agency charged with implementing legislation governing communication policy. In this complex and technical area, Judge O'Scannlain contended that a statutory interpretation should have been left to the FCC.⁸⁰ He was also concerned that this decision will result in more preemptive and binding interpretation by courts in areas of interpretation that should be left to agencies.⁸¹ In a footnote, he even brought up the idea of possible "nonacquiescence" by agencies in responding to decisions such as *Brand X*.⁸²

D. Judge Thomas's Concurrence: Statutory Interpretation Supports the Ruling Without *Portland*

In his concurrence, Judge Thomas likewise found the *Portland* definition of cable modem service to be binding in *Brand X*, but further argued that defining cable modem service as partially a telecommunications service is correct regardless of *Portland*.⁸³ He first pointed out that *Chevron* deference to agencies only applies when there is statutory ambiguity.⁸⁴ In this case, he believed that the Telecommunications Act is not ambiguous and that the court can determine what Congress intended from the statute itself.⁸⁵ Judge Thomas then engaged in traditional statutory interpretation, addressing the language question, other interpretations of the statute, other provisions in the act, the act as a whole, the regulatory context, and finally the legislative history.⁸⁶ Judge Thomas found everything from the plain language of the statute to the legislative history to support the interpretation of "telecommunications services" as inclusive of cable modem ser-

78. *Id.* at 1132 (O'Scannlain, J., concurring); *see also* *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

79. 345 F.3d at 1133 (O'Scannlain, J., concurring).

80. *Id.* at 1133-34 (O'Scannlain, J., concurring).

81. *See id.* (O'Scannlain, J., concurring).

82. *Id.* at 1133 n.1 (O'Scannlain, J., concurring).

83. *Id.* at 1134 (Thomas, J., concurring).

84. *Id.* (Thomas, J., concurring).

85. *Id.* at 1135 (Thomas, J., concurring).

86. *Id.* at 1136-39 (Thomas, J., concurring).

vices.⁸⁷ Even without *Portland*, he believed an accurate statutory interpretation requires cable modem service to contain a telecommunications service component.⁸⁸

III. DISCUSSION

The court in *Brand X* answered the question of how to define cable modem service under the Telecommunication Act without directly addressing the policy dispute over cable modem regulation and open access. The court made a good choice for telecommunications regulation and consumers alike. However, absent explicit consideration of the regulatory and consumer policy implications inherent in this decision, the court may have reached the right result without the right reasons.

A. The Missing Policy Discussion

Brand X makes a good policy decision without a policy discussion. This omission may have been a deliberate choice, as providing a policy rationale for *Brand X* could have exceeded the court's area of competence and ability to reach agreement.

Regulation of cable modem service is an intensely political issue with interested parties on all sides.⁸⁹ The courts are not equipped to address input from large numbers of interested parties and are not designed to create policy compromises between interests. Generally, agencies such as the FCC are deemed to have the institutional capability to handle such policy debate. However, in this case, the FCC's conclusion was unpersuasive and at odds with the Ninth Circuit's decision in *Portland*.

There are several problems with the FCC ruling. The decision ignored the impact on consumers and did not balance the benefits and risks of possible classifications. Although the decision succeeded in limiting regulation, the effect on increasing broadband availability or creating a consistent framework across platforms is unclear. The ruling left the status quo in place, so any growth in broadband distribution can be attributed to normal expansion and not the FCC ruling. Also, as Commissioner Copps pointed out in his dissent, this categorization scheme is difficult to understand and apply.⁹⁰ The ruling did not standardize regulation and did not necessarily improve broadband access. The only policy goal identified by

87. *See id.* (Thomas, J., concurring).

88. *See id.* at 1140 (Thomas, J., concurring).

89. *See Inquiry Concerning High-Speed Access, supra* note 14, at 4872 (listing more than 250 filings received while developing a ruling).

90. *Id.* at 4870.

the FCC and directly furthered by this decision is a limitation on regulation. The FCC also sidestepped how open access requirements will favorably impact consumers by pointing out that some cable companies are voluntarily providing consumers with multiple ISPs.⁹¹ This proactive solution by some cable companies does not address the basic monopoly cable companies will enjoy without open access, or how that will affect consumer choice, price, and service.

Despite the problems with the policy discussion in the FCC ruling, it would have been unconvincing for the court to argue telecommunication policy with the agency created to implement it.

A policy discussion might have also moved beyond the scope of judicial agreement. The concurrences show a varying degree of enthusiasm for the outcome announced, and the Ninth Circuit panel may have been unable to agree on a policy rationale. Judge O'Scannlain had serious reservations about the decision and warned of negative consequences for federal agency independence, while Judge Thomas was so satisfied with the result that he provided additional support in the form of statutory interpretation.⁹² This divergence suggests that the panel was only able to agree on the outcome and the binding nature of *Portland's* precedent.

B. Harmonizing Regulation of New Technologies

The Ninth Circuit's definition aligns the regulatory treatment of DSL and cable modem service, currently the two most popular forms of broadband Internet access. Such alignment is good regulatory policy. *Brand X* extends the regulatory scheme for a traditional technology, telephone lines, onto a new communication method, cable lines. This decision provides symmetry in the regulation and creates a level playing field for providers of Internet access.

Under the FCC classification plan, phone companies providing Internet access through DSL are subject to open access requirements, while cable companies providing Internet access through cable modems are immune because they are using a different technological platform. Whereas cable modem service evolved in the world of cable television providers who, as providers of cable service, were not subject to telecommunications regulation, today the services offered by DSL and cable modem service providers are virtually indistinguishable from a consumer perspective.

As data and communication technologies converge, it becomes more problematic to make regulatory distinctions based on prior technological

91. See *id.* at 4815-18.

92. See *infra* Parts II.C, II.D.

differences.⁹³ New technologies must be regulated, and those new regulations should be consistent with existing regulatory schemes.⁹⁴ Regulatory asymmetry between cable modem service and DSL causes economic harm by distorting the market for broadband Internet and violates basic fairness by giving one group of Internet providers a regulatory advantage.

Harmonization creates an efficient and fair market by not advantaging newer, unregulated technologies.⁹⁵ If cable modem providers are not held to common carrier requirements, they may engage in anti-competitive practices such as attracting DSL customers by bundling Internet service with television service. Cable providers would also have an advantage over DSL providers who have to compete within the DSL market and also with cable providers for broadband customers.

Applying old regulations to new technology, however, could also create inefficiencies and discourage the development of new solutions to old problems. Part of the incentive for creating Internet access service over cable wires might have been to escape the telecommunications regulations. The old rules might also have detrimental impact on the technical effectiveness of a new technology. For example, supporting multiple ISPs on one cable system as required by common carrier regulations could reduce the speed and quality of the connection.⁹⁶

In this case, the advantages of a symmetrical regulatory scheme outweigh the risks. Treating all Internet access technology the same will create fair competition and allow market forces to decide which technologies prosper. Cable modem service is past its developmental stage, when it needed to be sheltered from regulation, and should have to compete with other Internet access services on a level playing field.

93. Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41, 41-42 (2003).

94. See Christopher T. Hill, *The Impact of Technological Change in the Canada/U.S. Context: The Public Dimension of Technological Change: Impact on the Media, The Citizenry, and Governments—A U.S. Perspective*, 25 CAN.-U.S. L.J. 153, 159-60 (1999) (discussing regulation as a response to new technology from the progressive era forward).

95. See Jack Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 CHI.-KENT L. REV. 1119, 1121 (1998) (arguing that self-regulation of the Internet has negative consequences for the real world by creating double standards in areas like gambling and copyright).

96. See Elizabeth Clampet, *Excite@Home Fires Back at Open Access Cable Proponents*, INTERNETNEWS.COM, July 15, 1999 (discussing the back and forth over the technical limitations of cable modem Internet supporting several ISPs), at <http://www.internetnews.com/xSP/article.php/138271>.

C. The Open Access Debate

Even absent the regulatory alignment concern, granting open access to cable modem services is a positive development for consumers.⁹⁷ The court made the right policy choice without considering policy concerns. Open access can improve quality and lower price for broadband Internet access through competition. Open access may reduce the incentive for innovation and infrastructure improvements, but in this case extending cable operators' monopoly to Internet access would be a windfall that the cable companies do not need.

Requiring cable companies to open their lines to competing ISPs could benefit and harm the public. Without open access, cable providers could limit cable modem service to affiliated ISPs, giving them a monopoly within the cable ISP market. Although cable providers would face broadband competition from DSL providers, in some areas cable modem service is the only broadband Internet access choice and, even in areas with access to DSL, it can be costly to switch between services.⁹⁸ Without competition in the ISP market, cable providers could charge higher access rates and would have no reason to improve the customer service or quality provided by their affiliated cable modem ISPs. It is interesting that cable television monopoly problems are currently addressed by allowing LFAs to oversee cable providers through negotiated franchise agreements. LFAs negotiate rates and service improvements before granting cable providers access to the local market. But, as the dispute that led to *Portland* illustrates, LFAs are not authorized to negotiate terms for cable Internet access because cable modem service is not a cable service, and is therefore not subject to the LFA authority. Thus, the checks on cable monopolies for television content do not extend to Internet access service.

Cable modem competition also comes with a set of risks. By forcing cable modem providers to compete within the cable modem market, the incentive and financial support for innovation could be reduced. Consumer

97. Open Access also may benefit the entire Internet. See Mark A. Lemley & Lawrence Lessig, *Open Access to Cable Modems*, 22 WHITTIER L. REV. 3, 4-5 (2000) (arguing that the "end to end" architecture of the Internet is threatened by control exercised over content in the "last mile" by cable modem service providers); see also Jerome H. Saltzer, *Open Access Is Just the Tip of the Iceberg* (Oct. 22, 1999), at <http://mit.edu/Saltzer/www/publications/openaccess.html>.

98. See Jerry A. Hausman, *Residential Demand for Broadband Telecommunications and Consumer Access to Unaffiliated Internet Content Providers*, 18 YALE J. ON REG. 129, 168 (2001) (explaining and criticizing the FCC's decision that the AT&T and MediaOne merger did not limit competition in broadband because alternatives to cable modem service exist).

choice between cable modem, DSL, and other developing forms of Internet access might be enough competition to keep cable modem prices from skyrocketing. Allowing cable companies to reap the profit from a cable modem service monopoly would provide money and motivation for cable infrastructure expansion and improvement. Forcing cable companies to compete for cable modem dollars could cause a race to the bottom, leading to lower prices but bringing reduced investment in infrastructure and lower quality service within the cable modem section of the Internet access industry.

One question at the center of the debate over open access is whether cable companies would be poised for a windfall without open access or if ISPs will get a free ride with it.⁹⁹ Each side in the debate accuses the other of trying to gain an economic advantage through regulation.¹⁰⁰ ISPs argue that cable modem services are trying to increase profits by putting in place a government sanctioned monopoly that is unnecessary to the success of cable modem Internet.¹⁰¹ Cable companies can just as easily argue that ISPs should not profit from the cable lines they did not install and do not maintain.

Despite their arguments to the contrary, cable companies do not need an ISP monopoly to recover their investments in infrastructure. The cable industry claims to have invested more than eighty-four billion dollars between 1996 and 2003 to upgrade cable systems, making broadband available to eighty-eight percent of the homes passed by cable (ninety-five million homes).¹⁰² Cable companies will earn a profit on this investment by charging fees for use of the last mile, even without an ISP monopoly. Cable companies will improve the profitability of cable modem service through open access.¹⁰³ An ISP monopoly on top of the last mile fees

99. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 42, 107 (3d ed. 2000) (explaining free riders are consumers seeking to use a public good without paying because there is no way to capture the cost of the good from the consumers).

100. See CABLEMODEM.NET, *Open Access: What It Means To You*, at http://www.cable-modem.net/features/fea_open_access.html (last visited Jan. 23, 2005) (setting out the industry arguments by cable modem providers and ISPs).

101. See Lee L. Selwyn, *Market Failure in Open Telecommunication Networks: Defining the New "Natural Monopoly"*, in NETWORKS, INFRASTRUCTURE, AND THE NEW TASK FOR REGULATION 73 (Werner Sichel & Donald L. Alexander eds., 1999) (explaining why network firms seek monopolization and barrier to entry).

102. See National Cable and Telecommunications Association, at <http://www.ncta.com/Docs/PageContent.cfm?pageID=37> (last visited Oct. 10, 2004).

103. See Jeffrey K. MacKie-Mason, *Investment In Cable Broadband Infrastructure: Open Access Is Not An Obstacle* (Nov. 5, 1999) (arguing that open access increases the value of the last mile and reduces risk while not threatening cable companies monopoly).

would be profit from an unnecessary monopoly.¹⁰⁴ Even without additional profits from last mile or ISP fees, these upgrades help cable companies offer advanced services like video on demand to compete with satellite television systems.¹⁰⁵

Telecommunications monopolies have negative consequences for consumers, and the *Brand X* decision makes the right choice in not allowing cable modem services to develop into entrenched monopolies. Cable companies, and even independent ISPs, have an incentive to continue innovating and improving cable modem service to compete with DSL and other forms of Internet access. There is no need to create a reward in the form of an ISP monopoly for cable modem operators.

IV. CONCLUSION

The court in *Brand X* defined cable modem service as part information service and part telecommunications service. This decision significantly changed the market for broadband Internet access by bringing cable modem service into the same regulatory scheme as DSL and forcing cable providers to allow competing ISPs to use the cable last mile. Though ostensibly based on precedent from the Ninth Circuit holding in *Portland*, the decision nonetheless has important consequences for the future of new technology regulation and open access to the Internet. The Supreme Court should uphold *Brand X* because it is good law and good policy.

over the transport fees, and that open access will not slow investment in cable broadband), available at <http://www-personal.umich.edu/~jmm/papers/broadband.pdf>.

104. *See id.*

105. David Lieberman, *Cable Could Rule If It Plays Its Cards Right*, USA TODAY, Jan. 24, 2005, at B1.

