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Federal Communications Commission Lacks the Authority to Reclassify Broadband Services as Telecommunications Services

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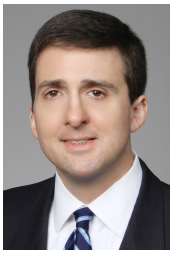

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On May 6, 2010, Federal Communications Commission Chairman Julius Genachowski proposed what he called a "Third Way" of broadband regulation. The proposal would reclassify broadband Internet access service as a "telecommunications service" subject to certain common carrier-style requirements of Title II of the Communications Act—obligations long associated with the early 20th Century telephone monopoly and 19th Century railroads.[1] On December 1, after several months of controversy, Chairman Genachowski circulated a new proposal, suggesting that the Federal Communications Commission (the "Commission") could achieve its goals without reclassifying broadband services.[2] Nonetheless, some observers on both sides of the so-called network neutrality debate have argued that the Commission's authority to impose network management obligations on broadband providers under Title I of the Communications Act is not legally sustainable in the wake of the *Comcast* decision.[3] As a result, it is conceivable that the Commission may once again revisit the Chairman's proposal to regulate broadband services under Title II.

Previously, the Commission has been reluctant to impose legacy regulatory obligations on the dynamic information service market. For 30 years, the Commission has distinguished between basic telecommunications services and enhanced services that offer consumers access to information and computer processing. Congress enacted that distinction into law in the Telecommunications Act of 1996.[4] Ever since then, the Commission has understood broadband Internet access to fall outside its Title II regulatory authority—an interpretation that has been sustained by the US Supreme Court. The basic facts underlying that judgment have not changed. Internet access services provide consumers far more than just the ability to send information from one place to another, and are thus not properly classified as telecommunications services.

If the Commission reverts to its previous proposal to reclassify broadband services as telecommunications services,

courts would cast a skeptical eye on such a drastic break with three decades of precedent, especially after the Commission's 2010 about-face.

As the Supreme Court has explained, agencies must meet a high burden before disregarding their own factual judgments, particularly when their decisions have produced substantial reliance. The factual judgments made by the Commission regarding Internet access since the enactment of the Telecommunications Act remain correct today, and broadband providers have made significant investments in reliance on the flexible market that the Commission has allowed to emerge. Imposing traditional common-carrier regulations on broadband Internet access services would not only be a significant step backward for the Internet market, but would substantially exceed the Commission's statutory authority.

The Pre-History of Internet Regulation

For most of the last century, ordinary telephone service was a regulated monopoly. Title II of the Communications Act regulated telephone companies as common carriers, subjecting them to Commission oversight to determine whether their charges, practices, and classifications of service were "just and reasonable."[5] As early as 1980, however, the Commission recognized that this kind of regulation was inappropriate for the growing field of advanced information services.

That year, in the *Computer II Order*, the Commission required common-carrier regulation of "basic service" (such as ordinary telephone service), which offered "a pure transmission capability" and did not involve meaningful computer processing or storage of information.[6] By contrast, the Commission declined to impose the same regulations on the "fast-moving, competitive market" in "enhanced services," which combined transmission with computer processing "to act on the content, code, protocol and other aspects of the subscriber's information."[7] For example, a dial-up database service such as LexisNexis did not merely transmit messages unaltered from one place to another; instead, it enabled customers "to obtain access to stored information," even if they had to first "dial[] a number" to do so.[8] Thus, there was no reason to regulate LexisNexis as if it were merely an indifferent common carrier of information, rather than a supplier of information.

The federal government continued to distinguish between these advanced services and ordinary telecommunications services when it forced AT&T to divest the Bell Operating Companies in 1982. As regulated monopolies, the Bells were permitted to offer local telecommunications services, but not "information services"—defined in a manner that closely resembled the "enhanced services" already identified by the Commission.[9]

When Congress enacted the Telecommunications Act of 1996, it drew on these established models to distinguish ordinary telecommunications services from more information-intensive services. Congress applied Title II's common-carrier requirements to telecommunications carriers "only to the extent that [they are] engaged in providing telecommunications services," defined as "the offering of telecommunications for a fee directly to the public."[10] "'[T]elecommunications,' in turn, was defined narrowly to include only 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."[11] Consistent with the Telecommunications Act's deregulatory purpose, Congress declined to extend common-carrier obligations to providers of an "information service"—defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[12] Instead, these advanced services would be given breathing room to develop in the absence of restrictive Title II regulations.

The Commission's Approach to Internet Access

Since Congress enacted the Telecommunications Act, the Commission has consistently classified Internet access as an information service, free from common-carrier obligations.

In its first discussion of the issue in a 1998 report to Congress,[13] the Commission concluded that Congress intended the definitions of "information service" and "telecommunications service" to be mutually

exclusive. A single service might provide one or the other, but not both; an Internet access service could not transform or process information and, at the same time, simply transmit that information without changing its form or content. A contrary reading would mean that anyone providing information *via* telecommunications also was providing telecommunications itself—a result that would overturn the regulatory regime that "had been in place for 16 years," during which "a broad variety of enhanced services were free from regulatory oversight, and enhanced services saw exponential growth."[14]

Applying these definitions to Internet access services, the Commission noted that the statutory language focuses on what, exactly, is being *offered* to the public. Internet Service Providers (ISPs) offer subscribers "the ability to run a variety of applications, including World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients," and more—all of which involve acquiring, storing, or processing information.[15] By processing users' information and caching data for later retrieval, ISPs "do not offer a pure transmission path," but rather "combine computer processing, information provision, and other computer-mediated offerings with data transport."[16] Consumers do not regard these functions as separate add-ons to Internet access: They *are* Internet access. As a result, the Commission concluded that these information-processing functions have no "separate legal status" distinct from the communications path through which they are delivered; rather, "the service that Internet access providers offer to members of the public is Internet access," a service with information-processing capabilities "inextricably intertwined with data transport."[17]

The Commission's reasoning made eminent sense. At the time, many consumers accessed the Internet through dial-up ISPs that did not own any communications lines. If an ISP leased telephone lines in order to provide Internet access, the telephone company was the one offering "telecommunications"—it supplied a pipe over which communications traveled unaltered between the ISP and end-users. But the dial-up ISP was not offering its customers simple transmission: it was offering access to information, *via* telecommunications. That is the very definition of an information service.

As the Commission recognized, the statutory language requires the same result even if the ISP owns the telephone lines outright. The customers' experience with that ISP is exactly the same—they contract with the ISP and obtain the package of services traditionally constituting Internet access. The ownership structure governing the phone line does not affect the *customers* at all. And although the ISP is supplying the telecommunications input directly, it is not *offering* telecommunications to the public; the customers do not receive pure transmission with an extra serving of Internet access on the side. At most, as the Commission noted, the facilities-based ISP may be supplying telecommunications to *itself*—which does not render it a common carrier under Title II.[18]

Indeed, only a few months after the Commission's 1998 report, Congress acted with the understanding that Internet access and telecommunications services are distinct. In enacting the Child Online Protection Act, Congress treated "a telecommunications carrier engaged in the provision of a telecommunications service" as belonging to a separate category from "a person engaged in the business of providing an Internet access service"—defined to "not include telecommunications services."[19]

The Commission reaffirmed these conclusions in 2002, when the agency classified high-speed cable modem service as an information service. Although cable Internet providers typically own the lines over which they provide service, they offer consumers not just "a physical connection," but also "protocol conversion, IP address number assignment, domain name resolution through a domain name system (DNS), network security, and caching," along with a suite of "traditional ISP services such as email, access to online newsgroups, and creating or obtaining and aggregating content."[20] As the Commission recognized, any "telecommunications component" of cable modem service is not "separable from [these] data-processing capabilities," but is rather "part and parcel of [the] service" and "integral to its other capabilities."[21]

In 2005, the Supreme Court sustained the Commission's classification of cable modem service as an information service. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[22] the six-Justice majority rejected the argument that a company that "offer[s]" a service "via telecommunications," as the definition of information service requires, necessarily "offer[s]" a telecommunications service on its own. Instead, the Court concluded that "in common usage" the term "offer" refers to "what the consumer perceives to be the integrated finished product": A car dealership may include engines in all of its cars, but it would be "odd" to describe the dealership as offering not just cars, but engines too.[23] Thus, the statutory categorization depends on "whether the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering"—a question that "turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided."[24]

On this factual question, which the Commission must resolve "in the first instance," the Court agreed with the agency. Because advanced services such as domain name resolution are "essential to providing Internet access," any transmission conducted through Internet access "always occurs in connection with information processing."[25] The Court thought it "no misuse of language" to say that broadband providers do not "offer" such services separately, any more than telephone companies "offer" trunks, switches, or copper wires to consumers.[26] Rather, "[w]hat cable companies providing cable modem service * * * 'offer' is Internet service"—that is, "the finished service[ ], although they do so using (or 'via') the discrete components" of that service, such as data transmission.[27] These "functionally integrated components," the Court concluded, "need not be described as distinct 'offerings.'"[28]

The Commission's About-Face

Since *Brand X*, the Commission has determined that other methods of Internet access also constitute a single, integrated information service. The Commission reached this result when classifying wireline broadband service in 2005, broadband over power lines in 2006, and wireless broadband service in 2007.[29] Indeed, until Chairman Genachowski's statement last April after the *Comcast* decision, the Commission had never suggested that it might change course, or that the nature of the Internet access market had changed in some fundamental way. Why, then, has the Commission considered such a drastic shift?

The answer has nothing to do with facts about the provision of Internet access and everything to do with the Commission's desire to regulate broadband network management. In October 2009, the Commission proposed expansive regulations on broadband providers to achieve its vision of "network neutrality." At the time, the Commission argued that such regulations could be imposed on the basis of its "ancillary" authority under Title I of the Communications Act—that is, the Commission's power to implement regulations that support or enable its other, specifically authorized activities.[30] It was only after the Commission's theory for the basis of its authority under Title I was rejected in court that the Commission proposed to reclassify broadband services as telecommunications services.

The genesis of the *Comcast* decision informs the current reclassification debate. Comcast had sought to manage the bandwidth demands on its network by limiting its subscribers' use of certain peer-to-peer file sharing programs. The Commission found that this action violated its "Internet Policy Statement," a 2005 declaration of general principles regarding consumers' use of the Internet—parts of which were later incorporated in the October 2009 network neutrality proposal.

But because Comcast's cable modem service was neither a telecommunications service nor a "cable service" under the Communications Act, the Commission had no specific statutory authority to require Comcast to abide by the Policy Statement. As a result, the Commission asserted jurisdiction based on its "ancillary" authority under Title I. In a unanimous opinion in *Comcast Corp. v. FCC*, the DC Circuit rejected the Commission's assertion of authority to regulate Comcast's network management.[31] In particular, the court foreclosed the Commission's attempt to treat the Telecommunications Act's general policy statements—such as those favoring "the continued development of the Internet" or "rapid" and "efficient" national

communications—as independent "delegations of regulatory authority," which would enable the Commission to take any measure to achieve those goals.[32] The court likewise rejected the agency's other efforts to tie its particular action against Comcast to existing regulations of common carriers, broadcasters, or cable rates.

As the DC Circuit's decision emphasized, the Commission is bound by the requirements imposed by Congress, and cannot invoke general policy preferences to justify regulating activities that Congress has not subjected to the agency's authority. As a result, the *Comcast* decision highlights the substantial doubt surrounding the Commission's ability to rely on the same theories of ancillary authority to impose even more-intrusive regulations on ISPs' network management.

In the wake of the *Comcast* decision, when Chairman Genachowski suggested reclassifying broadband access as a telecommunications service subject to Title II, he did not cite any changes in consumers' understanding of what broadband providers offer, but suggested that the Commission could reclassify the transmission component of a broadband service as a "telecommunications service" in order to obtain the strongest "legal grounding to let the FCC carry out" its existing regulatory program.[33] Although Title II imposes on telecommunications carriers "extensive regulations ill-suited to broadband,"[34] Chairman Genachowski suggested that the Commission could "forbear" under Section 10 of the Communications Act from applying most of those regulations to broadband providers. But the Commission would still retain, for example, a blanket prohibition on any charges and practices that it *later* decides are "unjust or unreasonable," and restraints on practices that it *later* decides constitute unlawful "discrimination."[35] While described as a "Third Way," the proposal was in large part simply a return to the old system of monopoly-era regulation, this time applied to the Internet.

The FCC's Authority after *Fox*

After so many years and so many decisions to exempt broadband from legacy regulation, it might seem a little late for the Commission to change course now. In fact, it's far too late. As the Supreme Court recently explained, agencies do not have a free hand to ignore their previous factual findings or the reliance interests engendered by their decisions. ISPs, which have invested billions of dollars in building broadband networks, have placed heavy reliance on the Commission's previous classification of broadband services.

When an agency changes course, just like when it regulates on a blank slate, its action must not be arbitrary or capricious. The Court recently illustrated that test in *FCC v. Fox Television Stations, Inc.*, which addressed the Commission's reversal of policy on the broadcast of "fleeting expletives."[36] In a 5 to 4 decision, the Court held that "an agency need not always provide a more detailed justification" for a policy change "than what would suffice for a new policy created on a blank slate."[37] Rather, in most cases, the agency need only recognize the change in position and show that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better" than the old.[38]

But the Court's opinion in *Fox* was anything but a rubber stamp for agencies. The central holding of *Fox* is that an agency need not *always* provide a more detailed justification when changing course. As the opinion's very next sentence explained, however, "[*s*]*ometimes* it must"—such as "when . . . its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."[39] The Court made clear that "[i]t would be arbitrary or capricious to ignore such matters," or to "disregard[] facts and circumstances that underlay or were engendered by the prior policy."[40]

Indeed, on this point, the deeply divided Court was unanimous. Justice Kennedy, who provided the crucial fifth vote, wrote a separate concurrence to emphasize the careful scrutiny that courts must apply to agency decisions. As he explained, courts should impose greater scrutiny on a subsequent change of heart when an agency's prior decision had been based on factual findings—and should reverse the agency's decision if it fails to provide a reasoned explanation for abandoning those findings. "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more

than it can ignore inconvenient facts when it writes on a blank slate."[41] Likewise, the four dissenting Justices agreed that when an agency "rested its previous policy on particular factual findings," courts should expect an explanation of why "those earlier views . . . are no longer controlling."[42]

The Facts About Broadband Access

Fox's caveats are crucial with respect to the Commission's authority over broadband services. As the Court recognized in *Brand X*, the real questions about the manner in which the Communications Act treats broadband access are questions of fact. The Commission has never adopted an interpretation of "offer" that looks to anything other than how consumers perceive the product. Indeed, as the Court noted, such a reading would be "odd" and inconsistent with common usage. Thus, whether or not broadband service is a "single, integrated offering"—and thus an information service under the Act—depends on the "factual particulars" of how the Internet works, how access is provided, and how customers perceive it. And although the Commission must answer such technical questions "in the first instance," its judgments will be reviewed by courts.

Moreover, after *Fox*, the Commission cannot simply retreat from its previous factual findings about the nature of Internet access. The agency has repeatedly determined since 1998 that broadband service's transmission component is "inextricably intertwined" with the storage and processing of information. These factual determinations may be "inconvenient" for the reclassification of broadband services as telecommunications services, but they cannot easily be ignored or overturned. The Commission may be entitled to its own opinion, but it is not entitled to its own facts.

Chairman Genachowski's proposal to reclassify broadband services is devoid of any facts demonstrating that the market for Internet access had changed. Instead, the main rationale for the proposal was that only reclassification could restore the Commission's regulatory aspirations to their pre-*Comcast* levels. But "an agency rule [is] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider."[43] The desire to expand regulation is not a view of the facts or an interpretation of the statute. Under the Communications Act, how broadband service is classified depends on what ISPs offer and what consumers receive—not whether the Commission finds it useful to extend aspects of common-carrier regulation to the Internet.

The facts have not changed: consumers still look to their ISPs for DNS processing, caching, security protections, and a variety of other information processing, storage, and retrieval functions. As the Commission's 2005 order regarding wireline broadband services made clear, Internet access is more than pure transmission, it "inextricably combines the offering of powerful computer capabilities with telecommunications."[44] This remains true whether or not subscribers use every function typically offered as part of that service, such as an email access or file-storage space. In fact, the vast majority of subscribers of an ISP use that ISP's DNS functionality, which translates between natural-language Internet addresses (such as www.example.com) and their equivalent numeric IP addresses (such as 192.0.32.10). The ISP's computer obtains these addresses by querying a database of stored information—a classic function of an information service. Similarly "invisible" functions that ISPs provide to aid their subscribers include caching of popular content, security monitoring, and malware protection. As the Commission explained to the Court in *Brand X*,[45] ISPs do not provide this functionality merely for their own network management, but rather to improve the subscriber's experience by loading content faster and preventing infection. These functions are invoked with every click on an Internet link, with the result that "[t]he end user therefore receives more than transparent transmission whenever he or she accesses the Internet."[46]

Moreover, many customers do depend on their broadband provider for email access or file storage. Broadband providers compete over these functions, which are highlighted in their marketing materials and well-understood to be part of the standard package of Internet access. These functions clearly bear all the hallmarks of information services—they involve capabilities for storing, processing, and retrieving information and they are not merely a useful addition to broadband access, but typical and often-crucial features.

The Commission's Notice of Inquiry regarding the reclassification of broadband services suggested that these functions could be separated from Internet connectivity *per se*, and that many consumers in fact obtain them from other sources. For example, some consumers obtain DNS service on a standalone basis from independent providers (such as OpenDNS).[47] But the fact that consumers can go elsewhere for a replacement DNS service does not prove that DNS is offered separately *by broadband providers*, any more than the fact that car buyers can go elsewhere for tires proves that dealerships are offering tires separately from cars. These features come standard; they are not upgrades. To separate them out, that is, to "find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II," would, as the Commission explained in 2002, require far more "radical surgery" than Congress intended.[48]

Even if this surgery were attempted, there is no guarantee what the result would be. In its Notice of Inquiry, the Commission never defined the "Internet connectivity service" that the agency suggested might be a telecommunications service; rather, it asked for comment on what that term might be defined to mean.[49] But the statutory text makes the nature of the offered service the very essence of the classification decision. The treatment of broadband access under the Communications Act depends on what kind of service is being "offer[ed]." In ordinary experience, there is no separate "connectivity" component to broadband service that consumers can purchase, or a "connectivity" line item on a consumer's bill. There simply is no pure-transmission "offering" that can be usefully separated from the rest of the functions that constitute broadband Internet access.

Depending on how "connectivity" is defined, moreover, a reclassification decision could have serious consequences far beyond consumer access to the Internet. From the network's perspective, there is little difference between a home user on the one hand and an Internet application provider on the other—both sit at the "edge" of the network. If providing broadband service to a home user is a "telecommunications service," no matter what other information-processing functions are part of that service, then so is the transmission of an Internet application. As the Supreme Court noted in *Brand X*, the argument that broadband service is a telecommunications service "would subject to mandatory common-carrier regulation all information-service providers that use telecommunications * * * to provide information service to the public"—including entities "that the Commission never classified as 'offerors' of basic transmission service, and therefore common carriers, under the *Computer II* regime" of the early 1980s.[50]

Finally, any attempt to reclassify broadband service would also depart from the facts to the extent that it focused on ISPs that own, rather than lease, their transmission facilities. The Commission's Notice of Inquiry concentrated on such "facilities-based broadband Internet service,"[51] presumably out of a belief that providers who control the pipe into a given home pose a greater threat to competition. But as the Court noted in *Brand X*, nothing in the statutory definition of an information service turns on who owns the facilities.[52] If an ISP that owns transmission facilities is providing a telecommunications service, then so is an ISP that leases them; in either case, the end user receives the same integrated package of transmission and information-processing.

As recently as 2007, the Commission concluded that an "end user subscribing to wireless broadband Internet access service expects to receive (and pay for) a finished, functionally integrated service that provides access to the Internet, rather than . . . two distinct services—Internet access service and a distinct transmission service."[53] There is no reason to doubt that this conclusion was accurate in 2007—and no reason to suspect that anything has changed since.

Industry Reliance

The Court in *Fox* also required agencies to justify a change in course in light of the "serious reliance interests" created by their prior decisions. The Commission's decades-long policy of allowing information services to develop free of monopoly-era regulation has engendered an enormous degree of reliance; today's existing broadband networks were built on that foundation.

In its 2005 order concerning wireline broadband access, the Commission explained that its decision was driven not only by the broadband market's

current features, but also by judgments about how that rapidly-evolving market might develop. Fundamental changes in networking technologies—with broadband Internet delivered over cable, DSL, wireless, and satellite networks—were "breaking down formerly rigid barriers that separated one network from another," and were developing in ways that did not fit neatly into a single statutory category.[54] Super-imposing on this flexible environment "the additional costs" of common-carrier regulation would "diminish a carrier's incentive and ability to invest in and deploy broadband infrastructure investment"—a "particularly troubling" conclusion given "Congress's clear and express policy goal of ensuring broadband deployment."[55]

The Commission's own studies describe more than $30 billion in private capital expenditures for broadband networks every year.[56] But many broadband providers would not have made these extensive investments if they had known that their rates, services, or business practices could, at any future time, be declared "unjust and unreasonable" in the eyes of the Commission. Broadband providers relied on the *absence* of such regulation when they made their multi-billion dollar investments. These reliance interests caution strongly against subjecting broadband Internet access services to Title II's common carrier obligations, and demonstrate the substantial burden the Commission would face in defending against a challenge to reclassification.

Conclusion

For three decades, the Commission has steadfastly refused to subject advanced information services to the kind of common-carrier regulation developed in the monopoly-telephone era. The growth of the information economy has been in large part a reflection of this deregulatory approach. Congress adopted that approach in the Telecommunications Act of 1996, and the Commission has repeatedly reaffirmed its wisdom. Having defended that approach for all this time, including before the Supreme Court, it would be extraordinary for the Commission to abandon its traditional understanding now. The constraints that Congress imposed on the Commission are not barriers to be overcome, but the legal boundaries of the agency's authority. The Court has made clear that classifying broadband Internet access service as an information service is within those boundaries. The Court has also demonstrated that reclassification, especially given the absence of changed circumstances and the industry's reliance on the original classification, would be subject to substantial scrutiny and would likely be unsustainable. ◆

Endnotes

1 FCC Chairman Julius Genachowski, "The Third Way: A Narrowly Tailored Broadband Framework" (May 6, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf.

2 FCC Chairman Julius Genachowski, "Remarks on Preserving Internet Freedom and Openness" (Dec. 1, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303136A1.pdf.

3 *See, e.g.*, Aparna Sridhar, "Restoring FCC Authority to Make Broadband Policy: A Way Forward After *Comcast v. FCC* 3" (Nov. 2010), http://www.freepress.net/files/Restoring_FCC_Authority_to_Make_Broadband_Policy.pdf; Reply Comments of Verizon and Verizon Wireless, In re Preserving the Open Internet, Broadband Industry Practices, GN Docket No. 09-191 (Apr. 26, 2010), http://fjallfoss.fcc.gov/ecfs/document/view?id=7020436839.

4 Telecommunications Act of 1996 § 3(a)(2), Pub. L. No. 104-104, 110 Stat. 56.

5 47 U.S.C. § 201(b); *see also* §§ 202(a), 208.

6 In re Amendment of Section 64.702 of the Commission's Rules and Regulations (*Second Computer Inquiry*), 77 F. C. C. 2d 384, 420, ¶ 96 (1980).

7 *Id.* at 420–421, 434, ¶¶ 97, 129.

8 *California v. FCC*, 905 F.2d 1217, 1223 n. 3 (9th Cir.1990).

9 *United States v. AT&T Co.*, 552 F. Supp. 131, 227, 229 (D.D.C. 1982).

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11 § 153(43).

12 § 153(20).

13 In re Federal-State Joint Board on Universal Service, *Report to Congress*, 13 F.C.C. Rcd. 11,501 (1998).

14 *Id.* at 11524, ¶ 45.

15 *Id.* at 11537, ¶ 76 (1998).

16 *Id.* at 11536, ¶ 73; cf. id. at 11,538, ¶ 76.

17 *Id.* 11,539-40, ¶¶ 79-80.

18 *Id.* at 11,534, ¶ 69.

19 47 U.S.C. § 231(b)(1)-(2), (e)(4) (enacted 1998).

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21 *Id.* at 4823, ¶ 39.

22 *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

23 *Id.* at 990.

24 *Id.* at 990–991.

25 *Id.* at 990–992.

26 *Id.* at 990.

27 *Id.* at 991.

28 *Id.*

29 In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C. Rcd. 14,853 (2005); In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, *Memorandum Opinion and Order*, 21 F.C.C. Rcd. 13,281 (2006); In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, 22 F.C.C. Rcd. 5901 (2007).

30 In re Preserving the Open Internet, *Notice of Proposed Rulemaking*, 24 F.C.C. Rcd. 13,064, 13,099, ¶ 83 (2009).

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32 *Id.* at 651–652, 654 (quoting 47 U.S.C. §§ 151, 230(b)).

33 Genachowski, *supra* n.1, at 4.

34 *Id.*

35 *Id.* at 5; cf. 47 U.S.C. § 201-202

36 *FCC v. Fox Tele. Stations, Inc.*, 129 S. Ct. 1800 (2009).

37 *Id.* at 1811.

38 *Id.*

39 *Id.* (emphasis added).

40 *Id.*

41 *Id.* at 1824 (Kennedy, J., concurring).

42 *Id.* at 1831 (Breyer, J., dissenting).

43 *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

44 20 F.C.C. Rcd. at 14,864, ¶ 15.

45 Reply Brief for the Federal Petitioners at 5 n.2, *Brand X*, 545 U.S. 967 (Nos. 04-277, 04-281) (2005).

46 20 F.C.C. Rcd. at 14,864, ¶ 15.

47 25 F.C.C. Rcd. at 7892, ¶ 58.

48 17 F.C.C. Rcd. at 4825, ¶ 43.

49 25 F.C.C. Rcd. at 7894, ¶ 64.

50 *Brand X*, 545 U.S. at 994–995.

51 25 F.C.C. Rcd. at 7867, ¶ 1; see also id. at 7909, ¶ 106.

52 *Brand X*, 545 U.S. at 996–997; see also 20 F.C.C. Rcd. at 14,865-66, ¶ 16.

53 22 F.C.C. Rcd. at 5913, ¶ 31.

54 20 F.C.C. Rcd. at 14,872, ¶ 32.

55 *Id.* at 14,877-78, ¶ 44.

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