THE DECLINE OF TITLE II COMMON-CARRIER REGULATIONS IN THE WAKE OF BRAND X: LONG-RUN SUCCESS FOR CONSUMERS, COMPETITION, AND THE BROADBAND INTERNET MARKET

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"[L]et there be no doubt: competition among broadband providers is flourishing. . . . I am confident that today's Order does much to fulfill our promise to the American people. . . ."¹

I. INTRODUCTION

The Federal Communications Commission ("FCC" or "Commission") has recently undertaken efforts to uniformly articulate the proper regulatory treatment of broadband Internet services.² The Commission's action directly re-


² See generally In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798 (Mar. 14, 2002) [hereinafter Cable Ruling] (holding that cable companies are not subject to common-carrier, a significant deci-
duced the applicability of the Telecommunications Act of 1996 ("1996 Act") Title II common-carrier requirements to broadband Internet providers—an action with far-reaching implications for the telecommunications market. In June 2005, the U.S. Supreme Court upheld the FCC’s ability to effect this change via statutory interpretation in National Cable & Telecommunications Ass’n v. Brand X Internet Services. The Supreme Court’s approval solidified broad FCC authority to create a new regulatory framework for broadband Internet services under the purview of existing telecommunications law. The Commission continues to exercise its authority since the Brand X decision, taking additional steps to reshape the broadband regulatory framework. However, throughout its actions, the FCC remains faithful to the original congressional intent of the 1996 Act: to foster a more competitive telecommunications market that encourages the deployment of advanced telecommunications capability with minimal governmental interference.

By taking steps to bring cable, DSL, and other wireline Internet providers outside of the common-carrier requirements, the FCC executed a policy shift that decisively reflects the competitive and deregulatory intent of Congress. This deregulation will benefit customers by promoting development of broadband technology and competition, which in turn will result in a decrease in prices and create more service options for consumers. In light of this anticipated result, consumers will benefit over the long-run from the FCC’s Title II deregulation.

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3 Id. ¶ 34-40.
5 See id. at 2708.
6 See generally DSL Ruling, supra note 1 (extending the changes promulgated in the Cable Ruling which will be discussed in detail in subsequent sections).
8 Brand X, 125 S. Ct. at 2695-99; Cable Ruling, supra note 2, ¶¶ 8-40; DSL Ruling, supra note 1, ¶¶ 12-17.
9 See In re Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384 ¶ 129 (Apr. 7, 1980) ("[R]egulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market.").
10 Even assuming that the rules in question initially were justified . . . it is plain that that justification has long since evaporated. The Commission’s general rulemaking power is expressly confined to promulgation of regulations that serve the public interest[. . .] . . . Even a statute depending for its validity upon a premise extant at the time of
However, critics fear that the FCC’s Title II deregulation opened the door to monopolies in the broadband Internet market. They contend that such monopoly power could create not only higher prices for consumers, but worse, restrict Internet content based on the will of a small group of providers. This criticism is extreme and misplaced.

Prior to the FCC’s policy shift, the broadband market was competitive. Consistent with that competition, Title II common-carrier deregulation is not a freedom that will cause providers to automatically create and exercise monopoly power to the detriment of consumers and Internet content. Rather, the opposite holds true: given the present competitiveness in the market and increas-

enactment may become invalid if subsequently that predicate disappears.
Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979) (per curium) (citations omitted) (holding that FCC regulations cannot continue after fulfillment of their purpose unless a fresh determination is made that the regulations continue to serve the public interest); see also Second Computer Inquiry, supra note 9, ¶ 129.

See, e.g., Supreme Court Decision Seen as Boon to Cable Companies, 23 No. 3 ANDREWS COMPUTER & INTERNET LITIG. REP. 3 (July 12, 2005) (noting that some commentators think the result of Brand X will stifle innovation and democracy on the Internet); Yuki Noguchi, Cable Firms Don’t Have to Share Networks, Court Rules, WASH. POST, June 28, 2005, at D1; Supreme Court Rules Cable Companies Not Required to Share Broadband Lines, DEMOCRACY NOW (June 28, 2005), http://www.democracynow.org/article.pl?sid=05/06/28/142258.

[T]he [Brand X] decision really creates a closed [I]nternet, diminishes the prospect of the [I]nternet being what it could be, and it’s an area where technology and its capabilities for democracy are delimited by thoughtless government action. And it is not only possible in Congress, but at the FCC, to get some of the safeguards that are necessary to protect that from happening. Those are uphill battles, but I think it’s going to shape the agenda of a lot of the progressive organizations . . . .”


This is much more than an argument about economics. It is an important test of the First Amendment in the age of the Internet. The outcome of this case will–quite literally–determine the future of the Internet as we know it. The right of citizens to send and receive any content over the Internet depends on rules which allow them to take full advantage of the open architecture of the Internet. If the Supreme Court rules against Internet open access, cable companies will be able to block content at will for political or financial reasons, and deny the public the ability to choose among competing Internet providers.

Id.

See generally sources cited supra note 11.

See Brand X, 125 S. Ct. at 2708 (finding that the FCC’s reinterpretation was a reasonable policy choice).

ing Internet access options from developing technologies, there is little threat of a monopoly developing that could exercise the price and content controls that critics fear. Furthermore, should the market fail and monopolies develop, critics’ fears will still not come to fruition given the myriad of other regulatory safeguards already in existence, such as antitrust law and the FCC’s Title I ancillary authority provided under the Communications Act of 1934 (“1934 Act”). Given the probable benefit to consumers, with minimal threats to price or content, the FCC’s deregulation of the broadband Internet market should be lauded as a benefit to consumers and allowed to continue without further interference.

This Comment will demonstrate how consumers stand to benefit from the FCC’s Title II deregulation of the broadband market. First, this Comment will provide the reader with a background on the development of broadband Internet technology and the regulations that accompanied that development. Second, this Comment will address competition in the broadband market and identify the benefits consumers are likely to experience under recent FCC deregulatory decisions. Third, this author will defend the FCC’s deregulatory approach in the context of other regulatory safeguards in both communications and antitrust laws and illustrate how criticism of the Commission’s decisions is misplaced. Finally, this Comment concludes with the proposition that because the FCC has created safe long-term benefits for Americans through a deregulated broadband marketplace, additional regulatory and legislative controls are unnecessary at this time.

II. BACKGROUND ON THE INTERNET MARKET

A. The Development of Internet Service as a Fungible Good

In the late 1960s, researchers in the Advanced Research Projects Agency (“ARPA”), a division of the U.S. Department of Defense (“DOD”), developed a computer network known as ARPANET. The network allowed defense cont-

15 See id.
16 See 47 U.S.C. §§ 151–161 (2000); see discussion infra Part IV.
17 DELOITTE TECH., MEDIA & TELECOMM., TMT TRENDS: PREDICTIONS, 2005 A FOCUS ON THE WIRELINE SECTOR (2005), http://www.deloitte.com/dtt/cda/doc/content/Wireline_FINAL_01FEB05_LR_FA_LOCKED.pdf (“On average, customers at the end of the year will pay less money for more bandwidth than they did at the beginning . . . .”).
18 A history of the Internet is available in many published sources. E.g., ACLU v. Reno, 929 F. Supp. 824, 830–31 (E.D. Pa. 1996), aff’d, 521 U.S. 844 (1997); Michael W. Louden-
tractors, universities, and DOD staff who worked together on defense projects to communicate electronically and share data between computers that were geographically separate but connected by wires.\(^\text{19}\)

Early in the development of this computer sharing technology, the National Science Foundation ("NSF") played a leading role in disseminating the technology beyond the DOD.\(^\text{20}\) By the late 1970s, the NSF had established its own computer network, the NSFNET, across the United States.\(^\text{21}\) The NSF’s work allowed data sharing not for defense work, but for academic research.\(^\text{22}\) Some universities developed local networks and NSFNET allowed those networks to interconnect.\(^\text{23}\) This interconnectivity broadened the universities’ data pooling capabilities by allowing them to connect their local networks directly to the NSFNET, which served as a hub for the larger system.\(^\text{24}\) The local networks connections, called Network Access Points ("NAPs"), unified the research efforts of various communities and fields.\(^\text{25}\)

By the 1990s, similar data-sharing networks had developed outside of the government and research fields.\(^\text{26}\) Commercial and private use of the network developed as interconnectivity increased.\(^\text{27}\) Individuals and homes would eventually also access the computer network.\(^\text{28}\) When NSFNET shut down in 1995, the existing NAP network became known as the Internet.\(^\text{29}\)

As use of the Internet proliferated throughout the various facets of society, problems arose when separately-developed computer networks attempted to connect. The networks communicated in different “languages” which affected


\(^{19}\) Loudenslager, supra note 18, at 257–58.

\(^{20}\) Id. at 260.

\(^{21}\) Id.

\(^{22}\) Id.

\(^{23}\) Id.

\(^{24}\) See id.


\(^{26}\) Loudenslager, supra note 18, at 261.

\(^{27}\) See id. at 260–61.


the efficacy of exchanged data.30 Tim Berners-Lee, a researcher at the European Laboratory for Particle Physics in Geneva, developed a uniform indexing scheme that standardized the way that computer networks communicated with each other.31 These standardizations vastly increased the navigability of the Internet by allowing computers in independently developed networks to transmit data in a common computer language.32

By 1996, use of the Internet was prevalent and President Clinton introduced the Next Generation Internet project—a plan to increase the reach and transmission speed of the national network.33 The increased Internet navigability afforded by standardization rendered Internet use considerably more appealing to private entities and businesses who began to place their computers in the public Internet domain.34 The number of users on the Internet grew rapidly from 10 million in 1995 to roughly 150 million worldwide by 1999.35 During this expansion, smaller firms and individual home Internet users did not necessarily desire, nor have the means, to pay the costs associated with creating their own local networks and NAPs.36 These smaller businesses and homes created a demand for shared NAPs to disperse these costs and in turn, gave birth to a new service industry.37

Firms and individuals soon began connecting to larger networks by using Internet Service Providers (“ISPs”) without having to create their own computer network and independent NAPs.38 ISPs capitalized on the new demand and lack of resources of smaller consumers by creating their own NAP, by selling shared access to local ISP-owned NAPs.39 By March 1999, there were about 5000 ISPs, compared to only 1500 in mid-1996.40 The commercialization of shared-NAP use has become very profitable over time as more and more consumers have been attracted by advances in Internet browser technology,

30 See Loudenslager, supra note 18, at 262; Kessler, supra note 25.
31 Berners-Lee created the modern text formatting system called the Hypertext Markup Language (“HTML”), a communication standard called the Hypertext Transfer Protocol (“HTTP”) and an addressing framework to locate websites called the Universal Resource Locator (“URL”). See generally TIM BERNERS-LEE, WEAVING THE WEB (1999).
32 TEHAN, supra note 29. HTTP is widely used a protocol or procedure for transmitting data that provides this common computer language. Id.
33 Id. (indicating that this was a novel approach compared to previous technology advances which increased speed by improvements to individual computers rather than the network).
34 Id.
36 See TEHAN, supra note 29.
37 Id.
38 Id.
39 Id.
40 Id.
transmission speeds, and the ability to send and process more complex data.\textsuperscript{41}

B. Internet Service and the Advantages of Broadband

Originally, the majority of residential Internet users in the United States accessed the Internet over the same telephone lines.\textsuperscript{42} Through the use of a computer modem, consumers could “dial up” and access a local ISP-owned NAP. The modem would convert the analog voice signals into digital data, allowing the transmission of data from one personal computer to another connected to the Internet.\textsuperscript{43} As Internet use increased, ISPs competed for business by offering service that allowed for faster data transmission speeds.\textsuperscript{44}

Broadband has developed as a type of high-speed Internet access that supports the transmission of data at speeds far greater than traditional dial-up access.\textsuperscript{45} For ISP customers, this service is particularly attractive since files and data that are transmitted across the Internet have become increasingly sophisticated and complex, thereby taking longer to transmit.\textsuperscript{46} Additionally, broadband service has the time-saving benefit of not requiring a “dial-up” to the local ISP, which is necessary with traditional, or narrowband, service.\textsuperscript{47} In effect, broadband service is always “on.”\textsuperscript{48} Increased transmission speed and constant connectivity allow for a larger variety of computer applications to operate over a broadband connection which increases the appeal of broadband Internet service, especially to businesses.\textsuperscript{49}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{41} Id.
\item \textsuperscript{42} DSL Ruling, supra note 1, ¶¶ 34–40.
\item \textsuperscript{43} See Verizon Commc’ns Inc. v. FCC, 535 U.S. 467, 489–90 (2002) (discussing how an incumbent local exchange carrier operates and structurally allows for Internet access).
\item \textsuperscript{44} See DSL Ruling, supra note 1, ¶¶ 34–40.
\item \textsuperscript{45} BROADBAND TODAY, supra note 35, at 19–21.
\item \textsuperscript{46} See ANGELE A. GILROY & LENNARD G. KRUGER, CONG. RESEARCH SERV., BROADBAND INTERNET ACCESS: BACKGROUND AND ISSUES 1–2 (2006), http://www.opencrs.com/rpts/IB10045_20060126.pdf [hereinafter BROADBAND INTERNET ACCESS]. To put this increased speed in context, whereas the download of a large software file, using the fastest dial-up modem available, a 56K, on traditional telephone or wireline service, could take several minutes, the download of that same file using broadband service would take mere seconds. Id.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} See BROADBAND TODAY, supra note 35, at 19–21.
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III. THE TREND TOWARD MORE COMPETITIVE REGULATION OF THE BROADBAND MARKET

A. Communications Act of 1934 and Initial Regulation of Telecommunications Services

Prior to 1934, the Interstate Commerce Commission ("ICC") regulated the communications industry, which at that time consisted primarily of telegraph companies.\textsuperscript{50} Ineffective industry oversight on the part of the ICC, however, caused Congress to pass the 1934 Act, marking the beginning of the current communications regulatory scheme.\textsuperscript{51} The 1934 Act established the FCC and conferred upon it the power to regulate interstate communications subject to certain limitations.\textsuperscript{52}

In the decades following the passage of the 1934 Act, the most dramatic regulation and policy changes regarding communications came from the U.S. Department of Justice's Antitrust Division ("DOJ") and private party suits under the antitrust laws.\textsuperscript{53} In 1974, MCI, Inc. ("MCI") filed suit against AT&T, which questioned the traditional mindset then prevalent in the communications field: that the public is best served by a single monopoly providing universal service throughout the nation.\textsuperscript{54} By the late 1980s, the development of numerous technologies in the communications field resulted in the scrutiny of this "natural monopoly" theory. Eventually, experts agreed that this theory was not in the public interest.\textsuperscript{55} Many of the new technologies were clearly the product of competitive innovation.\textsuperscript{56} The dramatic industry changes since 1934 thus

\textsuperscript{52} Id. § 152(b) ("[Excepting FCC regulation of] charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.").
\textsuperscript{53} There were several attempts to bring down the AT&T monopoly that were much more dramatic than some of the landmark FCC cases in this time period which dealt with less glamorous interpretations of the 1934 Act especially as it dealt with new hardware technology. See, e.g., Hush-a-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956) (dealing with FCC interpretation of the meaning of the 1934 Act with regard to add-on products for telephones not manufactured by the telephone company). For a discussion of the break of AT&T and antitrust regulation of the telecommunications industry in-between 1934 and 1996, see RAY G. BESING, WHO BROKE UP AT&T? FROM MA BELL TO THE INTERNET (2000).
\textsuperscript{54} See JAMES K. SHAW, TELECOMMUNICATIONS Deregulation and the Information Economy 3 (2001).
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 3; see Verizon Commc'ns v. FCC, 535 U.S. 467 (2002) (discussing the theory}
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prompted Congress to overhaul its legislation in the area of telecommunications.57

B. The Telecommunications Act of 1996 and Its Impact on Internet Regulation

Concern over the monopolistic nature of the telecommunications industry, along with the development of new technologies, motivated Congress to pass the Telecommunications Act of 1996 on February 8, 1996.58 The 1996 Act significantly modified, but did not replace, the 1934 Act. The 1996 Act declared a dual purpose: "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."59

Title II sought to further a more competitive telecommunications market by requiring that certain incumbent telecommunications companies open their facilities to competitors.60 This mandatory access afforded under the 1996 Act, however, imposed the restriction only on common-carriers—a pivotal classification.61 Traditionally, telephone companies were not regulated as purely private entities, but were considered public utilities.62 As public utilities, telephone companies were, and continue to be, treated as common-carriers in various regulatory schemes.63 By contrast, cable arose in the 1970s and, because of the type of subscription based service they offered, regulatory frameworks do not consider cable companies common-carriers to the same extent as telephone companies.64 The different origins and regulatory treatment of cable companies of a natural monopoly in dealing with telecommunications companies as a public utility wherein a certain level of costs from monopoly power are acceptable because of the universal need of the product that can best be filled by a single, uniform provider).


60 See Bruning, supra note 58, at 1255–58; 47 U.S.C. § 201 (2000); see also id. § 160 (granting the FCC power to suspend certain provisions if forbearance would promote competition).

61 See, e.g., Cable Ruling, supra note 2, ¶¶ 31–40.

62 See JoAnne Holman & Michael A. McGregor, The Internet as Commons: The Issue of Access, 10 COMM. L. & POL’Y 267, 279–81 (2005) (discussing how as early as the ICC regulations promulgated under the Interstate Commerce Act of 1897, regulations have effectively classified the telephone industry as a public utility and a common carrier).

63 See id.

64 See, e.g., 47 U.S.C. § 541(c)–(d).
and telephone companies did not raise concerns when their services were distinctly video programming and voice communication, respectively.\textsuperscript{65} Nevertheless, the different treatment has raised greater concerns in recent years as both traditional phone and cable companies have expanded and diversified their businesses by offering broadband services.\textsuperscript{66}

C. FCC Interpretations of Common-Carrier Requirements and the 1996 Act

The definitions provided by the 1996 Act significantly impact the applicability of Title II common-carrier regulations.\textsuperscript{67} The 1996 Act distinguishes firms as providing either telecommunications services or information services.\textsuperscript{68} Reading the 1996 Act definitions together, a telecommunications carrier is defined as offering “telecommunications services” and “shall be treated as a common carrier . . . .”\textsuperscript{69} Telecommunications service “means the transmission, between or among points specified by the user, of information of the user’s choosing, \textit{without change in the form or content} of the information as sent and received.”\textsuperscript{70} In contrast, an “information service” provider offers the “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 telecommunications service.”\textsuperscript{71} This definitional distinction creates a tangible difference between companies that act as mere conduits for telecommunications and ones that manipulate or enhance the communication provided.\textsuperscript{72}

With the 1996 Act amendments in place, the FCC had the responsibility to interpret exactly how to treat the various types of Internet access services un-

\textsuperscript{65} See DSL Ruling, \textit{supra} note 1, ¶¶ 47–64.
\textsuperscript{66} Id.
\textsuperscript{67} Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 125 S. Ct. 2688, 2706–08 (2005).
\textsuperscript{68} Generally the 1996 Act covers “all interstate and foreign communication by wire or radio” and seeing as how the whole point of the Internet was to connect geographically distant computers throughout the nation, the broadband Internet service at issue in this Comment certainly falls within the general applicability of the statute. 47 U.S.C. § 152(a).
\textsuperscript{69} Id. § 153(43).
\textsuperscript{70} Id. § 153(44) (emphasis added); see Cable Ruling, \textit{supra} note 2, ¶¶ 31–40 (discussing the statutory definitions of telecommunications and telecommunications service).
\textsuperscript{71} 47 U.S.C. § 153(20).
\textsuperscript{72} See, e.g., \textit{In re} Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), \textit{supra} note 9, ¶¶ 86–97 (distinguishing between basic service, which offers pure transmission capability, and enhanced service, which offers something more, such as computer processing applications that manipulate content, code, protocol, and other subscriber information).
In March of 2002, the FCC issued a Declaratory Ruling ("Cable Ruling") on the definitional treatment of cable modem services. The Cable Ruling held that cable modem service offered the end user more than data transmission capability. The Commission held that the integrated services provided through cable qualified as an information service.

In reaching this conclusion, the Commission reviewed its earlier categorization of ISPs. Previously, the FCC treated ISP providers that did not offer service over their own lines as "information service providers" under the 1996 definitions. Those offering service over their own lines were classified as "telecommunications carriers" under the 1996 Act definitions. Accordingly, under this old interpretation, cable companies would be subject to Title II regulations because the Internet access service they provide comes to customers over their own lines.

However, the FCC rejected this rationale in its Cable Ruling. Instead, the Commission decided that Internet access service offered by cable companies is a "single service" offered to its customers and it is merely incidental that the service is transmitted to customers over the cable company’s own lines. Nevertheless, the FCC attempted to reconcile this new approach with the old facilities-based distinction. The FCC determined that cable modem service involved data transport and access to its customers, thus a cable operators’ information service capabilities are inextricably intertwined with data transport. As a result of this inherent mix of services, the Commission distinguished ca-

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73 See Cable Ruling, supra note 2, ¶ 75.
74 At this time the FCC was also reviewing its position on how to treat wireline broadband providers in a separate action. See In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review–Review of Computer III and ONA Safeguards and Requirements, Notice of Proposed Rulemaking, 17 F.C.C.R. 3019, ¶¶ 16–29 (Feb. 14, 2002) (requesting comments on the FCC’s tentative position that wireline broadband Internet access service is an information service because the nature of accessing files over the Internet is something more than just pure transmission); accord DSL Ruling, supra note 1, ¶ 14 (ultimately finding that wireline broadband Internet access service is an information service).
75 Cable Ruling, supra note 2, ¶¶ 34–59.
76 Id. ¶ 38.
77 Id. ¶¶ 34–41.
79 Cable Ruling, supra note 2, ¶ 44.
81 Cable Ruling, supra note 2, ¶ 38.
82 See Brand X, 125 S. Ct. at 2708.
83 Universal Service Report, supra note 78, ¶¶ 80–81.
ble modem service from pure transmission service.84

Looking at only the broadband offerings of a cable company, the FCC ruled that despite being integrated with a pure transmission service, the Internet service offerings were the same as those offered by other non-facilities-based ISPs and should be similarly treated as an “information service” under the 1996 Act.85 The effect of categorizing cable broadband Internet service as an information service was to exempt the cable service from the Title II common-carrier requirements.86 Among other things, the decision removed any requirement for cable modem providers to make their facilities available to other ISPs.87

Facing a potential cost increase in a multi-billion dollar industry if Internet access rates were open to renegotiation, the ISPs chose to challenge the FCC’s Cable Ruling.88 Companies worried that the ruling would drastically reduce competition in the broadband market.89 The Ninth Circuit reviewed this challenge and vacated the FCC’s ruling, holding that the interpretation of the 1996 Act definitions was impermissible.90 The U.S. Court of Appeals for the Ninth Circuit justified its position by reasoning that principles of stare decisis bound them to follow its earlier decision in AT&T v. Portland, where the Ninth Circuit previously determined that cable modem service was a “telecommunications service” under the 1996 Act.91 The Supreme Court granted certiorari to fully address the validity of the FCC’s decision to classify cable modem service as a Title II information service.92

D. The Initial Impact of the Supreme Court’s Brand X Decision

National Cable & Telecommunications Ass’n v. Brand X93 challenged the FCC’s Cable Ruling and is perhaps most important not for the issue of administrative law it decided, but rather its effect on the broadband Internet marketplace. The case presented two legal questions to the Court: (1) what ability

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84 See id.
85 Cable Ruling, supra note 2, ¶ 7.
86 Brand X, 125 S. Ct. at 2698.
87 See Cable Ruling, supra note 2, ¶¶ 48–52.
88 See TELECOMMS. INDUS. ASS’N, TIA’s 2005 TELECOMMUNICATIONS MARKET REVIEW AND FORECAST 114, tbl.III-8.1 (2005) (showing 2004 Internet access revenues for all providers at $27.1 billion and forecasting that same number to be $35.2 billion by 2008) [hereinafter TIA MARKET REVIEW]; see also BROADBAND TODAY, supra note 35, at 16 (citing $300 billion in e-commerce revenues for 1998).
89 See Brand X, 125 S. Ct at 2708–09.
90 Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1132 (9th Cir. 2003).
91 Id. at 1128–29 (discussing AT&T v. Portland, 216 F.3d 871, 877–78).
93 125 S. Ct. 2688.
does an administrative agency have to refine its interstitial rule making; and (2)
whether the FCC's interpretation itself was permissible. Ultimately, the Court
decided that the FCC could effect a statutory reinterpretation and that the Ca-
ble Ruling was a valid exercise of this authority.\footnote{Id. at 2699 (considering what standard of deference to apply to the FCC's interpretation). Respondents in the case argued, in part, that the FCC could not change its position to be inconsistent with its previous rulings, but the Court expressly rejected this idea. See id. at 2711 (finding that it was permissible for the FCC to provide a fresh analysis of the definitional interpretation issue in light of the circumstances of cable Internet service). The Court upheld the FCC's Cable Ruling by relying on \textit{Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837 (1984). \textit{Chevron} prescribed a two-step analysis for reviewing a statutory interpretation: the first asking whether the statute "directly addres[ses] the precise question at issue" and second affording deference to the agency only if the interpretation is a "reasonable policy choice." \textit{Brand X}, 125 S. Ct. at 2702 (quoting \textit{Chevron}, 467 U.S. at 843, 845). The Court held that Congress left the 1996 Act definitions ambiguous as applied to broadband. Congress did so knowing the statute was meant for implementation by an agency, and thus must have intended for the agency to use its discretion in interpreting the definitions. \textit{See id.} at 2700. Moreover, after reviewing the broadband market, the Court decided that the FCC's Cable Ruling was reasonable. \textit{Id.} at 2708–10. In ultimately upholding the FCC Cable Ruling, the Court not only relied on the fact that the interpretation passed the \textit{Chevron} analysis, but also reasoned that applying stare decisis would produce too rigid a statutory system that did not allow agencies to revise "unwise judicial constructions of am-
biguous statutes." Thus, the Commission's interpretation was permissible. \textit{Id.} at 2701.}

The question of law the Supreme Court decided in \textit{Brand X} has great appli-
cability to the administrative law concept of judicial deference to agency inter-
pretations.\footnote{There have been numerous cases reviewing FCC decisions under the \textit{Chevron} test. \textit{See, e.g.,} Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc., 423 F.3d 1056, 1061 (9th Cir. 2005); Eurodif S.A. v. United States, 423 F.3d 1275 (Fed. Cir. 2005).} However, the major impact of the case lies not in administrative law, but in how the FCC's decision has altered the competitive structure of the broadband Internet market.\footnote{See DSL Ruling, \textit{supra} note 1, ¶ 1.} The primary criticism of the decision is that by failing to impose common-carrier requirements, cable companies will face less competition by refusing to share their networks with other ISPs and will sub-
sequently raise their rates.\footnote{See, e.g., \textit{Supreme Court Decision Seen as Boon to Cable Companies, supra} note 11 ("'The Supreme Court's holding that Internet access over cable systems is not a telecommu-
nications service is a huge and disappointing loss for the American public. There should be no mistake about that.'" (quoting Andrew Schwartzman, President & CEO, Media Access Project)); Noguchi, \textit{supra} note 11 ("A key concern is that phone and cable companies could potentially use their power over the network to act as gatekeepers of the Internet, discrimi-
nating and limiting consumers' access to certain services so that some Web sites and online services are favored. Opponents of yesterday's ruling said they would push the FCC and Capitol Hill to codify rules ensuring the "network neutrality" on the Internet.").} Some critics further suggest that broadband pro-
viders might gain sufficient power to censor the type of websites accessible on
the Internet based on content.\footnote{See generally sources cited \textit{supra} note 11. These criticisms will be taken up below. \textit{See discussion infra} Part IV.B.}
E. Extension of Brand X to Wireline Broadband Internet Service

On August 5, 2005, less than a month after the Supreme Court handed down the Brand X decision, the FCC issued a ruling analyzing and categorizing wireline broadband Internet access ("DSL Ruling").99 Similar to what the Commission’s Cable Ruling did for cable Internet providers, the DSL Ruling brought wireline broadband Internet providers, such as the traditional telephone companies, outside of Title II common-carrier regulations.100 Several factors led the FCC to this decision.101 First, the Commission desired to create a uniform regulatory scheme for broadband Internet access across multiple platforms.102 Acting on this desire, the Commission issued the DSL Ruling in part to match the regulatory treatment of cable broadband service with regard to Title II.103 The FCC also chose to deregulate wireline broadband Internet service because it served the purpose of the 1996 Act—to promote competition and encourage deployment of broadband technology.104 Moreover, the FCC applied some of the same reasoning utilized in the Cable Ruling. Since the broadband Internet service offered by wireline providers is not merely a single service, but rather a mix of computer processing applications and transmission, the service constitutes a telecommunications service, not an information service, under the 1996 Act.105

In the case of Brand X and the FCC’s Cable Ruling, the Commission had issued no previous classification of cable Internet service.106 By contrast, the

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99 DSL Ruling, supra note 1. Even before this time though, the Commission had been making other decisions about IP-related services that seemed to indicate its preference for deregulation and treating DSL as an information service. See generally In re Petition for Declaratory Ruling That Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, Memorandum Opinion and Order, 19 F.C.C.R. 3307 (2004) (finding the Internet application, Free World Dialup, to be an unregulated information service); In re Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, Memorandum Opinion and Order, 20 F.C.C.R. 9361 (2005) (considering Title II relief for IP Platform Services, though ultimately rejecting the petition because it was overly broad); In re Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, Order, 19 F.C.C.R. 7457, ¶ 13 (2004) (finding that the IP-service at issue to be a telecommunications service, but leaving the door open as to the issue of whether IP-service platforms may evolve into enhanced service platforms qualifying as an information service).

100 DSL Ruling, supra note 1, ¶ 169 (granting wireline providers “blanket certification” to discontinue providing ISPs access to their transmission lines).

101 Id. ¶¶ 1–4.
102 Id. ¶ 1–3.
103 Id. ¶¶ 1, 12.
104 Id. ¶ 1.
105 Id. ¶ 14 (relying on Cable Ruling, supra note 2, ¶ 38).
FCC had previously categorized the wireline industry's service as a telecommunications service.\textsuperscript{107} Faced with the disparate treatment of Internet providers, the Commission fully reviewed its previous rulings, along with the state of competition in the broadband market, and determined that a change bringing uniformity was appropriate.\textsuperscript{108} Given the high level of policy review the FCC conducted in arriving at the DSL Order and the sweeping authority that the Brand X case vests in administrative agencies to reevaluate its policies, there seems to be little chance of success for a challenge against the DSL Ruling.\textsuperscript{109}

IV. CONSUMERS STAND TO BENEFIT FROM COMPETITION IN A DEREGULATED BROADBAND MARKET

A. Consumers Already Enjoy Benefits from Wireline-Cable Competition and Will Continue to Benefit Under the Recent FCC Deregulatory Decisions

As of early 2005, coaxial cable and an enhanced telephone service known as a digital subscriber line ("DSL") constituted the primary methods of broadband service offerings to consumers.\textsuperscript{110} Cable companies traditionally offering video programming modified their lines in order to offer broadband Internet service.\textsuperscript{111} Cable broadband supports download speeds anywhere from 200,000 bits per second ("bps") to 6 million bits per second ("Mbps").\textsuperscript{112} Thus, broadband presents a drastic advance over narrowband, while dial-up service providers can offer only a maximum transmission speed of 45,000 bps.\textsuperscript{113} DSL technology converts existing copper telephone lines into high-speed transmis-

\textsuperscript{107} See DSL Ruling, \textit{supra} note 1, \textit{¶} 19-46 (reviewing past FCC classification of wireline services as a telecommunications carrier service in light of changed circumstances in the market leading it to find that its previous classification is no longer appropriate).

\textsuperscript{108} Id.

\textsuperscript{109} See Brand X, 125 S. Ct. at 2720 (Scalia, J., dissenting) (recognizing that the effect of the majority decision is to grant an administrative agencies the power to disregard any previous construction, even those made by a court).

\textsuperscript{110} For a more technical description of broadband architectures, see Nosa Omoigui et al., \textit{Comparing Integrated Broadband Architectures from an Economic and Public Policy Perspective, in THE INTERNET AND TELECOMMUNICATIONS POLICY: SELECTED PAPERS FROM THE 1995 TELECOMMUNICATIONS POLICY RESEARCH CONFERENCE} 167, 185 (Gerald W. Brock & Gregory L. Rosston eds., 1996) [hereinafter \textit{Broadband Architectures}] (discussing in great detail Hybrid Fiber-Coax ("HFC") and Fiber-to-the-Curb ("FTTC") delivery systems and concluding based on economic models that cable companies are well-positioned to compete with telephone companies for broadband networks).

\textsuperscript{111} See BROADBAND TODAY, \textit{supra} note 35, at 23–24 (stating that operatives have to build an entire Internet backbone network, including routers, servers and network management tools).

\textsuperscript{112} BROADBAND INTERNET ACCESS, \textit{supra} note 46, at 2.

\textsuperscript{113} Id. at 1 (calculating maximum for dial-up service using a 56k modem).
sion lines and can transmit at speeds varying from 768 thousand bits per second ("kbps") to 3 Mbps. Both voice communications and computer data can be transmitted over the same telephone lines because DSL uses frequencies that are much higher than those used for voice communication.

The cable infrastructure suffers a slight disadvantage since its lines are shared by all users. Sharing makes transmission speed variable based on the number of users accessing the Internet from the same point or "node" at any given time. Furthermore, sharing creates a vulnerability to cable service since third-parties may have the ability to access information intended to be secure. DSL, on the other hand, creates a direct unshared line between the customer and the ISP. As a result, the transmission speed remains constant, regardless of how many other users are active. Accordingly, DSL also lacks the shared line security issues of cable.

Based on the most recent FCC data, the overwhelming majority of U.S. citizens have a choice in broadband providers. The statistics show: 5% of Americans have no access to high-speed lines; 12% have access to high-speed lines but only through one service provider; and 83% of the United States may obtain high-speed access through more than one provider. Competition between broadband service providers created sufficient incentive for this high rate of deployment. This incentive will persist in a Title II-free broadband market where providers do not need to share the advantages of increased deployment with other non-facilities-based ISPs. The effects of deregulating DSL and cable will consistently continue until competition captures the last of the unclaimed market where service is unavailable. Consequently, Americans

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114 Id. at 3.
115 Id.
116 Broadband Architectures, supra note 110, at 188 (noting that HFC systems are highly sensitive to bandwidth requirements making FTTC-based service more competitive in the long run but contrasting that with the analysis that given the time it takes for telephone companies to modify its systems, cable would be able to offer competitive services and even at lower costs than the phone companies for some periods).
117 See, e.g., BROADBAND TODAY, supra note 35, at 19.
118 Id. at 2. However, as Internet browsers have increased their encryption level, this threat has been significantly reduced, if not complexly eliminated. See Dan Froomkin & Amy Branson, Deciphering Encryption, WASHINGTONPOST.COM, May 8, 1998, http://www.washingtonpost.com/wp-srv/politics/special/encryption/encryption.htm.
119 See BROADBAND INTERNET ACCESS, supra note 46, at 3.
121 Id.
122 See id.; see also DSL Ruling, supra note 1, ¶¶ 75–76 (discussing incentives for further development of broadband service offerings in the context of anticipated ISP agreements).
will reap the benefit of more complete high-speed Internet access deployment.  

Leaving the issue of deployment aside, the argument that a lack of competition in the broadband market will harm consumers is unsupported by current data to the contrary. Opponents of Brand X may argue that these numbers simply do not reflect "real" competition. Such an argument is predicated on the belief that cable companies dominate by achieving the advantage of first-entry into many areas. However, this argument is outdated because it is only supported by the early composition of the broadband market, prior to DSL investment and expansion. Based on early deployment data, it seems that cable did dominate broadband service in the United States at a two-to-one margin over DSL. This was understandable since cable companies could provide Internet service on their existing coaxial lines with only minor alterations. By contrast, telephone companies faced extensive infrastructure upgrades before they could provide broadband service—upgrades that were costly both in terms of time and money. Such an easy adjustment for cable companies, combined with mergers in the industry, allowed cable to become the dominant player in the broadband market and established a monopoly trend.

Nevertheless, cable companies have not maintained this dominance in the broadband market because of the strides taken by wireline companies in offering DSL. In 1999, DSL represented only 13.4% of the broadband service lines available. By December 2005, DSL had grown to 36.5% of the market and while this share is less than cable's 57%, it is large enough to present

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123 See BROADBAND TODAY, supra note 35, at 26–27 (discussing deployment trends resulting from cable and DSL competition).
124 See INDUSTRY ACCESS REPORT, supra note 120, tbl.13.
126 See id. at 272–73.
127 Id.
128 Id.
129 Id. at 273 (acknowledging the slow growth of DSL and that in limited areas it was beginning to offer "some competition to cable").
130 See id. at 276–77 (highlighting that cable companies merging to increase economies of scale were charging higher rates and not passing along the cost efficiencies along to consumers).
131 See TIA MARKET REVIEW, supra note 88, at 111 tbl.III-8.7 (showing how DSL has closed the gap in broadband subscribers from 5.3 million to 4.4 million and predicting the gap to continue to close).
132 INDUSTRY ACCESS REPORT, supra note 120, chart 2.
meaningful competition. The actual competition between cable and DSL broadband service directly undercuts criticism of the deregulated broadband market. With 352 DSL providers and 147 cable broadband providers, an increase from twenty-eight and forty-three respectively six years ago, fears that providers will collude to establish monopoly control over the Internet seems increasingly unlikely considering the number of players involved.

This real and significant competition has not only spread faster Internet services to more Americans through deployment efforts, but has also decreased consumer costs. Prices have dramatically decreased as DSL and cable modem services have competed for consumer dollars. DSL service decreased its average monthly prices by 13.7% in 2003 and cable promptly responded by lowering its prices by 9.5% in 2004. The FCC’s Title II deregulation has removed the remaining common-carrier barriers to competition between cable and DSL service. Consequently, consumers can expect to see continued advantages not just in price and deployment, but also in technological advancements as these service providers attempt to capture a larger share of subscribers by offering new, higher quality services.

B. Title II Deregulation Will Promote Advancements in Broadband Technology Beyond DSL and Cable, Bringing Mobility and Additional Price Benefits to Consumers

While cable and DSL are presently the primary means for consumers to purchase broadband access to the Internet, other broadband technologies are in development and promise to provide more broadband choices for consumers. The FCC’s decisions to remove cable and DSL service from Title II regulation will increase incentives to develop these other technologies, especially if cable and DSL providers imprudently raise prices or exclude ISPs from their transmission facilities.

One type of developing technology is wireless broadband Internet service offered through several technology options. One technology option termed “Wi-fi” allows for broadcast local multipoint distribution service—commonly

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133 Id.
134 Id.
135 See id. at tbl.6.
136 See TIA MARKET REVIEW, supra note 88, at 107–09.
137 See id. at 108–09.
138 See id. at 107–09.
139 See, e.g., id. at 4–5, 109–12; BROADBAND TODAY, supra note 35, at 21–22.
140 See DSL Ruling, supra note 1, at ¶ 75 (noting independent ISPs need for broadband transmission methods at reasonable prices).
141 See, e.g., TIA MARKET REVIEW, supra note 88, at 109.
referred to as "LMDS"—over an area of five km to 6.5 km. Another option
termed "Wi-max" allows for multichannel multipoint distribution service—
commonly referred to as "MMDS"—which has wireless line of sight coverage
of up to thirty miles. Wi-fi and Wi-max differ significantly in that Wi-fi is
available over greater distances but it requires line of sight to operate at maxi-
mum ranges, while Wi-max has shorter ranges but is not handicapped by line
of sight limitations. Given these differences, Wi-max service is an ideal
competitor for cable and DSL broadband service in an urban environment with
high population densities because the technology can provide service to many
customers within a small radius without wires and line of sight. On the other
hand, Wi-fi makes an ideal competitor for broadband service in rural settings.
Rural locations tend to have fewer obstacles interfering with the broadcast sig-
nal and lower population densities which increases the per capita cost of de-
ploying wireline or cable facilities. Wi-fi and Wi-max technologies are supe-
rior to cable and DSL broadband in some respects because they have lower
facility costs and can deploy quickly due to the inherent wireless nature of the
service.

Another wireless technology option is broadband service provided via satel-
lite. As of 2005, satellite broadband Internet service is offered principally by
two companies: Starband Communications Inc. and Hughes Network Systems,
LLC. Satellite service allows customers to connect to an ISP from virtually
anywhere. The drawback to this technology is that it is subject to compro-
mised performance in bad weather and it is also a shared technology that, like
cable, has some degree of inherent vulnerability to unauthorized access.
Furthermore, the current satellite offerings only allow for 56 kbps, which com-
pared with the 6 Mbps and 3 Mbps offered by cable and DSL broadband re-
spectively, is rather slow. Nevertheless, satellite high-speed Internet sub-
scribers are projected to increase from 400,000 in 2004 to 1.1 million in
2008. As subscribers increase, the revenues will provide these satellite com-
panies with the financial resources to expand further.

142 See id. at 109-10; BROADBAND TODAY, supra note 35 at 29-30.
143 See, e.g., TIA MARKET REVIEW, supra note 88, at 109-10.
144 Id. at 110.
145 Id. Line of sight here means "the straight path between a transmitting antenna (as for
radio or television signals) and a receiving antenna when unobstructed by the horizon."
146 Id.
147 Id.
148 Id. at 111.
149 See id.
150 BROADBAND INTERNET ACCESS, supra note 46, at 3.
151 TIA MARKET REVIEW, supra note 88, at 111.
152 Id.
A third wireless broadband service option is called mobile wireless and is provided over the existing wireless telephone service infrastructure. Known as third generation ("3G") service, this is a mobile wireless technology that offers broadband to consumers over cell phones, personal digital assistants, and wireless modem computers cards. Evolution Data Only ("EvDO") is one such technology and operates over mobile phone cell networks, allowing customers to receive continuous Internet service over great distances, to the same extent they receive cell phone service. Although EvDO technology requires cell phone companies to purchase additional bandwidth, several companies already offer such service.

There are also several types of wireline technologies entering the market and serving a growing share of subscribers. Fiber-to-the-Home ("FTTH") is one such wireline alternative to DSL and cable. FTTH is expected to become a direct competitor of other wireline services as the technology experiences decreasing costs and faster transmission rates. FTTH would be a vast improvement over current cable and DSL service offerings in terms of speed: FTTH has the potential to offer at least 0.6 billion bits per second, at least four orders of magnitude faster than voice grade modems. The major hindrance to this technology, however, is that it requires an outlay of entirely new wire-based facilities. Similar to the case of DSL, FTTH deployment can be slowed by high costs and even entirely impractical from a business standpoint in low subscription areas. However, the future of this technology looks promising as current bandwidth offerings available are reaching their limits and costs of FTTH deployment continue to fall.

The final significant developing broadband technology is called broadband over power lines ("BPL"). As the name suggests, the service allows customers...
to gain access to broadband Internet over power lines by simply plugging a modem into an electrical socket. The benefit of this technology is that it can be made available to every building that has electricity. In application, it is a service that could be far more prevalent than cable or DSL because electricity is so ubiquitous. The FCC has already issued a Notice of Proposed Rulemaking to investigate BPL deployment. With this technology growing, and expected to reach 300,000 customers by 2008, BPL represents yet another competitor in the broadband market over facilities completely different from traditional cable and DSL services. The greatest advantage of BPL is that the costs of deployment are low because electric lines are already deployed throughout America. Therefore, the service could compete wherever cable and DSL is offered. Furthermore, the technology could more easily achieve full deployment to the remaining areas of the country currently without broadband. BPL, if widely deployed, would certainly contribute to the competitive landscape offering service at speeds of 200 kbps for around $30 per month.

When viewed as a whole, the market for broadband service has many new entrants on the horizon. These competitors will place pressure on cable and DSL services not only to offer lower prices, but also to maintain content access. The FCC has been correct before when choosing to rely on market forces to promote development of new technologies and its reliance here is equally as justified. If DSL and cable were to exercise monopoly power ei-

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162 TIA MARKET REVIEW, supra note 88, at 111.
163 Id.
165 TIA MARKET REVIEW, supra note 88, at 112 (predicting more drastic growth to subscriber numbers beyond 2008 as changes are made to the power facilities to support a full strength broadband signal at greater distances from the source).
166 See FIGLIOLO, supra note 7, at 7.
167 See Maria L. Henriques, Electrifying Ease, if Not Speed, WASH. POST. July 10, 2005, at F06 (pricing based on select test markets).
168 See TIA MARKET REVIEW, supra note 88, at 109–12.
169 See discussion supra Part III.
170 In re Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc., Memorandum Opinion and Order, 13 F.C.C.R. 18,025, ¶ 64 (Sept. 14, 1998) [hereinafter WorldCom-MCI Merger]. In 1998, WorldCom sought to merge with MCI and concentrate the then existing facilities for the national Internet fiber network in the hands of but a few corporations. Id. ¶¶ 2–7. The FCC ultimately approved the merger but did so in part relying on the predictions that new technologies would see increased deployment and thus create competition capable of constraining any exercise of monopoly power by the dominant post merger entity. Id. ¶ 64. The reliance here in the broadband market forces is thus not a new concept, but rather one that has been tried and tested and thus a legitimate and effective method of constraining harmful monopoly effects. Id.
ther in regard to price or content after Title II deregulation with so many alternative providers emerging, demand would simply shift a larger market share to these new technologies. This shift would maintain low prices and freedom in Internet content that consumers currently enjoy.\textsuperscript{171}

The FCC’s Title II deregulation merely recognizes the fact that the broadband market has developed into a healthy, competitive, and efficient market.\textsuperscript{172} As seen in Chart 1, new broadband technologies are in their infancy, but they continue to compete against and curtail the growth of the DSL and cable market share. These new technologies will inevitably geographically overlap with existing DSL and cable service as their market shares grow, and incentives to lower prices and attract customers in these overlapping territories will continue to be strong.\textsuperscript{173}

\textit{Chart 1: Broadband Internet Subscribers in the United States (in Millions)}\textsuperscript{174}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{chart1.png}
\caption{Chart 1: Broadband Internet Subscribers in the United States (in Millions)\textsuperscript{174}}
\end{figure}

\begin{itemize}
\item \textsuperscript{171} See TIA MARKET REVIEW, supra note 88, at 111 tbl.III-8.8 (predicting continued growth of all broadband technologies).
\item \textsuperscript{172} See DSL Ruling, supra note 1, at 15,108 (Abernathy, Comm’r, concurring).
\item \textsuperscript{173} See id. ¶¶ 90–95.
\item \textsuperscript{174} TIA MARKET REVIEW, supra note 88, at 111 tbl.III-8.7.
\end{itemize}
C. Increased Competition Resulting from Title II Deregulation Will Have the Additional Benefit of Attracting More Capital Investment to Continue Advancing Service Options

One of the largest burdens associated with Title II common-carrier regulations was its deterrent effect on capital investments in the broadband market.\textsuperscript{175} The central rationale supporting this conclusion relies on the notion that firms will only invest when profits are certain.\textsuperscript{176} A company will aggressively seek to expand its services when it knows it can capture substantial revenues to cover the costs associated with expansion.\textsuperscript{177} However, the broadband situation under Title II regulations allowed unassociated, non-facilities-based ISPs to enjoy open access to transmission lines, effectively making them free-riders to broadband companies.\textsuperscript{178} Title II created only short-term superficial competition and price controls by forcing wireline providers to share their facilities. In creating only these short-term benefits, the regulation sacrificed the development of more sophisticated services by reducing long-term incentives to compete for a comparative advantage through expansion and capital investment.\textsuperscript{179} Title II common-carrier regulations eliminated the traditional competitive advantage incentives for capital investment by allowing ISPs to benefit from any network advancements made by the facilities owners without assuming any of the financial risk involved.\textsuperscript{180} Now free from Title II restrictions, DSL providers are more competitive with cable providers because the FCC provided DSL companies with the freedom to capture the appropriate returns on their investments.\textsuperscript{181}

\textsuperscript{175} See DSL Ruling, supra note 1, ¶ 89.
\textsuperscript{176} See, e.g., Verizon Commc'ns Inc. v. FCC, 535 U.S. 467 (2002).
\textsuperscript{177} See, e.g., Thomas M. Jorde, J. Gregory Sidak, & David J. Teece, Innovation, Investment, and Unbundling, 17 YALE J. ON REG. 1, 8 (2000) ("It makes no economic sense for [a facilities-based provider] to invest in technologies that lower its marginal costs, so long as competitors can achieve the identical cost savings by regulatory fiat."); J. Gregory Sidak & Daniel F. Spulber, Deregulation and Managed Competition in Network Industries, 15 YALE J. ON REG. 117, 124–25 (1998) ("If deprived of a return to capital facilities after capital has sunk in irreversible investments, or if faced with reduced returns to investments already made, any economically rational company will eliminate or reduce similar capital investments in the future."); AT&T Scoffs at Possible Common Carrier Statutes, T.R. DAILY, Nov. 9, 1998, 1998 WLNR 3886003 ("'No company will invest billions of dollars . . . if competitors who have not invested a penny of capital, nor taken an ounce of risk, can come along and get a free ride on the investments and risks of others.'" (quoting C. Michael Armstrong, Chairman & CEO, AT&T)).
\textsuperscript{178} See DSL Ruling, supra note 1, ¶ 71 (acknowledging Verizon's inability to deliver additional access capabilities because its regulatory obligations made it prohibitively expensive).
\textsuperscript{179} See id.
\textsuperscript{180} See id.
\textsuperscript{181} See DSL Ruling, supra note 1, ¶¶ 71–72.
With the removal of Title II restrictions under *Brand X*, consumers are certain to see more investment in infrastructure and the corollary tangible benefits of increased transmission speed and lower prices.\textsuperscript{182} Studies in other areas of telecommunications have already confirmed that deregulation produces positive economic effects similar to those that are anticipated in the broadband context.\textsuperscript{183}

As revenues have become more certain for wireline investment, revenues for non-facilities-based ISPs have become less certain now that they can be excluded from DSL and cable transmission facilities.\textsuperscript{184} The question is what choices do these ISPs have for the long-term viability of their companies? Existing cable and DSL broadband providers now have competitive incentives to form private agreements with independent ISP providers where these providers offer Internet options that customers value.\textsuperscript{185} In the event that ISPs cannot agree on terms with DSL and cable providers, they may also seek to fulfill their transmission and business needs by making similar agreements with developing technologies.\textsuperscript{186} To the extent that consumers desire independent ISP service, there will be significant incentive for DSL, cable, and developing technology service providers to add or keep ISPs in their network to attract more customers through a diverse service offering.\textsuperscript{187}

Just weeks after the *Brand X* decision, this predicted increase of capital investment in broadband facilities and ISP agreements came to fruition in the marketplace. Google, Inc., along with contributions from The Hearst Corporation and The Goldman Sachs Group, Inc., invested an estimated $100 million in Current Communications Group, a start-up company offering BPL service.\textsuperscript{188} *Brand X* provided an impetus for ISPs to assist in the development of additional technologies and advances in cable and DSL service.\textsuperscript{189} This potential increase in demand for additional technologies will be a windfall for consumers in that it will lead to lower prices and more service options through in-

\textsuperscript{182} *Supreme Court Decision Seen as Boon to Cable Companies*, supra note 11 ("'When telecommunications companies can be assured that they will control access to their own networks and be able to set prices accordingly, we can expect to see a significant increase in funds invested in broadband deployment ...'") (quoting Braden Cox, technology counsel for the Competitive Enterprise Institute, a non-profit public policy group)).


\textsuperscript{184} *See Broadband Today*, supra note 35, at 33–36.

\textsuperscript{185} *See DSL Ruling*, supra note 1, ¶¶ 72–73.

\textsuperscript{186} *Id*.

\textsuperscript{187} *Id*.


\textsuperscript{189} *See DSL Ruling*, supra note 1, ¶ 72.
creased competition.\textsuperscript{190}

V. FCC TITLE II DEREGULATION WAS AN APPROPRIATE COURSE OF ACTION

A. Title I Ancillary Jurisdiction Gives the FCC Authority to Intervene Should the Market Fail

As demonstrated, consumer interests have been favored by the \textit{Brand X} deregulation of cable and DSL broadband service through such potential tangible benefits as price reductions, deployment, and new technology options.\textsuperscript{191} Although \textit{Brand X} affirms Title II deregulation, it does not entirely subject consumers to the whims of the market.\textsuperscript{192} The Court has acknowledged that the FCC still retains the authority to make regulations under Title I ancillary jurisdiction.\textsuperscript{193} This ancillary jurisdiction gives the FCC flexibility to create additional regulatory safeguards on a case-by-case basis under the present system.\textsuperscript{194} Consequently, in the event that the Title II deregulation results in an unlikely and unforeseen market failure that is harmful to consumers, the FCC has the ability to take remedial measures under Title I—thus, any deregulation risks to consumers are minimal.\textsuperscript{195}

B. Antitrust Law Provides Another Safeguard in the Event the Market Fails to Provide Anticipated Benefits to Customers

While there is ample competition in the broadband market to sustain and expand broadband benefits for consumers, this Comment would not be realistic if it did not recognize the possibility that unknown variables could lead to a failure in the Internet market despite data trends to the contrary.\textsuperscript{196} The possibility

\textsuperscript{190} See id. at 15,108–09 (Abernathy, Comm’r, concurring) ("The result of such competition will be better and better services at lower and lower prices, with offerings designed to match customers' needs rather than regulators' preferences.").

\textsuperscript{191} See discussion infra Part III.

\textsuperscript{192} See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2711 (2005).

\textsuperscript{193} Id.


\textsuperscript{195} See DSL Ruling, supra note 1, ¶ 109 ("We recognize that both of the predicates for ancillary jurisdiction are likely satisfied for any consumer protection . . . that we may subsequently decide to impose on wireline broadband Internet access service providers."); see also id. ¶ 110 (extending Title I jurisdiction not just to DSL providers but all broadband Internet access services).

\textsuperscript{196} See generally TIA MARKET REVIEW, supra note 88, at 106–14 (providing statistical support for the present level of competition).
of failed competition resulting under Title II deregulation does not mean that consumers would suffer from an oppressive monopoly in the broadband market.\textsuperscript{197} Aside from Title I ancillary jurisdiction, consumers will be protected by the application of antitrust law to broadband service arrangements.\textsuperscript{198} Through the FCC's own review of anticompetitive behavior and the similar regulatory work of antitrust authorities, such as the DOJ and the Federal Trade Commission ("FTC"), sufficient oversight of the market exists to guard against abuses of the Title II deregulation.\textsuperscript{199}

Congress, in passing the 1996 Act, specifically included a provision that dealt with the 1996 Act's interaction with antitrust laws: "nothing in [the] Act or the amendments made by the [1934] Act or the amendments made by this [1996] Act shall be construed to modify, impair or supersede the applicability of any of the antitrust laws."\textsuperscript{200} Congress initially manifested its desire to prevent monopolies by imposing the common-carrier requirements, but the present Title II deregulation does not diverge from this intent. Instead, the present deregulation merely recognizes that market forces alone are now enough to prevent monopolies.\textsuperscript{201} As noted by the Supreme Court, the intent behind the 1996 Act is more "ambitious" than the intent of antitrust laws; the latter merely intended to prevent unlawful monopolization, whereas the 1996 Act attacks all monopolization.\textsuperscript{202} However, even the "less ambitious" antitrust laws are sufficient to prevent the same types of monopolies that the 1996 Act sought to prevent. \textit{A priori} consumers would abhor content restrictions on the Internet since freedom of content has been one of the Internet's most valuable attributes.\textsuperscript{203} Consequently, the incentives for a broadband provider to satisfy consumer preferences for free content would be so strong that to oppose them would ne-


\textsuperscript{198} Id.


\textsuperscript{201} See DSL Ruling, supra note 1, ¶¶ 77–80.

\textsuperscript{202} Curtis V. Trinko, 540 U.S. at 415.


Americans take pride in their Internet. From right to left, Republicans and Democrats, rural and urban, we view the Internet as a place of freedom where new technologies and business innovation and competition flourish. . . . This freedom has always been at the heart of what the Internet community and its creators celebrate.
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cessitate an unlawful monopoly under antitrust law norms. Therefore, even the minimal intent behind antitrust law to ban only “unlawful” monopolies provides a sufficient safeguard against content restrictions should the Title II deregulatory competition fail to eliminate monopolistic forces in the broadband market altogether.

Within the realm of antitrust law, the FCC has concurrent jurisdiction along with the DOJ and the FTC for review of mergers involving telecommunications companies. The merger of MCI and WorldCom in 1997 was the first major vertical merger in Internet infrastructure and illustrates how the FCC and antitrust law can protect consumers. In evaluating this merger, the FCC looked to whether it would “serve the public interest, convenience and necessity” before acquiescing to the transaction. Under the relevant statutes, the FCC concluded that “neither the present nor future public convenience and necessity will be adversely affected” by the merger. In reaching this determination, the burden of proof by a preponderance of the evidence rests with the parties applying for the merger. The FCC can conditionally approve a merger

204 See DSL Ruling, supra note 1, ¶ 79 (noting the sufficiency of marketplace incentives to offer new services).
205 See Curtis V. Trinko, 540 U.S. at 405–07. Whether or not additional legislation is needed to ensure net neutrality is currently a hotly debated issue. See, e.g., Greg Piper, Public Wants Govt. to Ensure Net Neutrality, Consumer Groups Say, COMM. DAILY, Jan. 19, 2006, at 7 (“Proposals on the Hill and at the FCC on net neutrality ‘fall far short of what is needed,’ said Consumers Union Senior Policy Analyst Jeannine Kenney.”); J.M., Comcast Executives focused on VoIP Plans During a Conference Call, COMM. DAILY, Feb. 3, 2006, at 11 (“[Comcast] CEO Brian Roberts lashed out. ‘We continue to believe that proponents of so called net neutrality are pursuing a solution in search of a problem,’ he said, adding Comcast has never blocked access to websites. ‘We’re certainly going to try to fight anything like that.’”); Anne Veigle & Edie Herman, Verizon Urges House to Split Franchising from Telecom Bill, COMM. DAILY, Jan. 30, 2006, at 2 (“[Verizon Executive Vice-President Tom] Tauke said Verizon backs net neutrality but wants it obtained through industry efforts.”); Jonathan Make & Anne Veigle, NCTA, Verizon Back Similar Video Franchise Reform Provisions, COMM. DAILY, Jan. 31, 2006, at 3 (“Net neutrality is another 2006 [National Cable and Telecommunications Association] priority . . . . New networks are being developed every single day”. . . . “This is not the time to pass a law that chills that kind of innovation.”); Free Press Slammed Verizon, AT&T and Comcast, COMM. DAILY (Jan. 25, 2006), at 14-15 (“After destroying TV and radio, mega-media corporations are scheming to control what content you can view and which services you can use online,’ Free Press said. . . . The group offered to write CEOs of supporters’ broadband providers and send copies to their members of congress, asking them to write net neutrality into law.”).

With regard to the antitrust aspects of the net neutrality, recently introduced legislation weeks to explicitly preclude unfair methods of competition and deceptive practices. S. 2119, 109th Cong. § 102 (2005).
207 WorldCom-MCI Merger, supra note 170, ¶ 149.
208 Id. ¶ 1.
210 WorldCom-MCI Merger, supra note 170, ¶10.
with additional provisions in an effort to cure any aspect of the merger that is against the public interest. So, while it is clear from the language of the 1996 Act that nothing shall curtail the antitrust law's application to the telecommunications industry, the FCC has also made it clear through its review of the WorldCom-MCI merger that it will freely exercise its concurrent antitrust jurisdiction to protect consumers.

C. Criticism That Brand X and Its Progeny Will Lead to Content Restrictions Is Misplaced

The fear of stifled competition raises two major concerns regarding the FCC's decisions to deregulate the broadband Internet market. Critics opine that without the Title II common-carrier restrictions on the broadband market, cable and DSL companies will be able to (1) raise prices in exercise of monopoly power; and (2) further exercise that power to restrict the current open nature of the Internet that allows for liberal access to legal content. However, what critics fail to realize is that even without intrusive common-carrier requirements, the broadband Internet market is still competitive today. This competition, along with the other safeguards previously mentioned, will prevent these circumstances from becoming a reality.

The competition that has already been discussed between DSL, cable, and developing technologies is sufficient to preserve Internet content neutrality. Given the high state of competition, it would simply be a bad strategy for broadband service providers to exclude certain content from its offerings because customers would easily be able to switch providers to satisfy their content preferences. The FCC has recognized that cable and DSL are likely to make private agreements with non-facilities-based ISPs to keep their content as benefits to their customers instead of excluding it from the Internet altogether. Such agreements would not only be allowed under Title II deregula-

211 Id. ¶ 10 ("Where necessary, the Commission may attach conditions to the approval of a transfer of licenses in order to ensure that the public interest is served by the transaction.").
213 See generally WorldCom-MCI Merger, supra note 170, ¶ 10-11 (acknowledging the concurrent jurisdiction of the DOJ and the FTC).
214 See, e.g., BROADBAND TODAY, supra note 35, at 11.
215 Id.
216 See discussion supra Parts III–IV.
217 See discussion supra Part IV.A. While this Comment contends that net neutrality is secured, it should be noted that the debate is very much alive on Capital Hill. See discussion, supra note 205.
218 See DSL Ruling, supra note 1, ¶ 88.
219 Id.
tion, but encouraged since such private agreements are a manifestation of free market power.\(^{220}\)

Additionally, with regard to ensuring Internet neutrality, if criticism of Title II deregulation were found to be persuasive, regulators would have to address not just Internet service providers' potential to restrict content, but also every other component industry involved with Internet access.\(^{221}\) This would include companies that provide products and services such as software and browsers that are essential to effective Internet access beyond the transmission aspects.\(^{222}\)

To go down the road of regulating every potential bottleneck in Internet service that has a remote potential to affect content, would be a long and slippery slope because there are so many technologies and industries that contribute to Internet use.\(^{223}\) Regulators, however, need not turn down this path. Just as is the case with cable and DSL service providers, these other Internet components face competition from the many substitute products that are available, and thus, any bottleneck restricting content is not a legitimate concern.\(^{224}\)

Along with the competition argument for ensuring content freedom, there is also a wholesale argument to be made as well.\(^{225}\) What is meant by wholesale is that service providers that offer a variety of ISP options can do so at lower prices rather than just offering each individually.\(^{226}\) Freedom from Title II regulation has created an incentive for broadband companies to include ISPs.\(^{227}\) By keeping these services and content tied to their own, cable and DSL providers can take advantage of wholesale offerings to consumers. Wholesale offerings translates into not only better prices for consumers but also more content choice.\(^{228}\) By offering many services together, customers will have choices within an individual broadband provider's products and find this provider more attractive both for short-term and long-term business.\(^{229}\) To this end, Title II deregulation is likely to keep many ISPs available, leaving only those with

\(^{220}\) See id. ¶ 87 ("[M]arket-based commercial arrangements will better serve the interests of ISPs, broadband providers, and consumers.").


\(^{222}\) See id.

\(^{223}\) See id.

\(^{224}\) See discussion infra Part III.A.

\(^{225}\) See DSL Ruling, supra note 1, ¶ 50 (finding there has been increasing competition for network access at the wholesale level).

\(^{226}\) See BROADBAND INTERNET ACCESS, supra note 46, at 9 (noting that with competitive contracts customers who want access to another would no longer have to also pay for their facility service provider's ISP, thus they can get their first choice without paying double).

\(^{227}\) See DSL Ruling, supra note 1, ¶¶ 87–88.

\(^{228}\) Id. ¶ 88 (recognizing that cooperative ISP arrangements can lead to more creative and differentiated service).

\(^{229}\) See BROADBAND INTERNET ACCESS, supra note 46, at 9.
little value to consumers by the wayside in a private agreement scheme. ISPs would only face exclusion under Title II deregulation if their services do not offer value in the eyes of the consumer and consequently offer no added value for transmission service companies who might retain them. The effect of this exclusionary threat will not be the restriction of valuable Internet content but rather motivation for those under-demanded ISPs to reinvent their services in hopes of regaining consumer value.

Broadband providers serve consumer preferences through the creation of innovative private agreements that were not available under Title II regulations. In the pre-Brand X world, broadband transmission facilities had to remain open pursuant to a fixed regulatory price, but now companies can experiment with new arrangements, such as profit sharing or a pricing scheme based on the number of people visiting a site. These creative agreement alternatives can establish the necessary revenue incentives for investment in deployment and improved the service speed—an incentive that was thwarted under the strict Title II price regulations. Under Title II, ISPs faced no substantive competition because they were guaranteed transmission access, but now they will be forced to provide quality services to consumers. After Title II deregulation, consumers should not fear monopolistic price or content harms because of the substantial incentive for broadband providers to continue offering varied content at a lower cost to consumers.

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230 See id.
231 See DSL Ruling, supra note 1, ¶ 88.
232 Id.
233 See id. ("[A] number of carrier commenters indicate that their preferred means of offering wireline broadband transmission service is through customized arrangements tailored to the particular needs of requesting ISP customers.").
234 See id. ¶¶ 72, 92–95.
235 Id.
236 Id.
237 Id.
VI. POTENTIAL BENEFIT TO CONSUMERS FROM DEREGULATION, ALONG WITH SAFEGUARDS AGAINST MARKET FAILURE, PRECLUDE THE NEED FOR FURTHER REGULATION OF THE BROADBAND MARKET

A. Universal Service Fund Requirements Should Not Be Imposed on the Broadband Market Since They Will Reduce the Advantages of Title II Deregulation

As part of the Cable and DSL Rulings, the FCC considered the Universal Service Fund ("USF") and what obligation cable and DSL firms should have to continue making contributions.\(^{238}\) Ultimately, however, the Commission left the issue unresolved in these decisions and instead issued a Notice of Proposed Rulemaking to continue discussion of the matter.\(^{239}\) Congress established the USF under 47 U.S.C. § 254. Pursuant to subsection (d), this statute requires telecommunications carriers to contribute money to a common account used to promote equal distribution of telecommunications service to all parts of the United States including rural areas.\(^{240}\) The FCC, however, is free to make exemptions if the contributions would be minimal. The agency also has the power to include additional providers in the requirements if the "public interest" so requires.\(^{241}\) In the case of DSL, the FCC required wireline companies to continue making contributions for a 270 day provisional period after the DSL Ruling to preserve the status quo.\(^{242}\)

The FCC need not continue to hold broadband providers to these requirements because they may actually thwart deployment objectives. With 95% of the United States having access to high-speed Internet lines, the FCC has done an excellent job of meeting its obligation of deployment under the 1996 Act.\(^{243}\) The increased competition between existing and emerging broadband provid-

\(^{238}\) See, e.g., id. ¶¶ 112–13.


\(^{241}\) Id. § 254(d).

\(^{242}\) DSL Ruling, supra note 1, ¶ 113.

\(^{243}\) See INDUSTRY ACCESS REPORT, supra note 120, tbl.13.
ers will provide ample competition that will inevitably seek to capture the remaining untapped portion of the market and fully complete broadband deployment. Currently, broadband is 99% available in rural areas with less than forty-one people per square mile; it would be a poor allocation of resources to continue to impose regulatory restrictions for such a minimal contribution to deployment. In these rural locations it may be argued that without the USF to provide the outlay of capital for broadband facilities, these citizens may never receive broadband service because the high costs of creating the infrastructure make the venture unprofitable especially given the limited number of customers available. Such rationale fails to recognize that any failure to deploy to these areas will be remedied as developing technologies, and wireless ones in particular, will likely supply this demand to establishing their initial market presence.

Additionally, any imposition of USF taxes on broadband services to support new technologies such as Voice over Internet Protocol ("VoIP") should also be discouraged. Such a use of the USF would also undermine deployment of new technologies, just as it would with broadband access deployment. The inherent value of Title II deregulation is that it allows for rapid deployment of new technologies by eliminating free-riding ISPs, solidifying profit margins, and facilitating the flow of investment capital. Thus, no action should be taken to extend USF contributions for broadband providers. Imposing USF restrictions increases the cost of implementing new services and makes it more difficult for businesses to financially justify the expansion. Look, for example, at the deployment possibilities of new wireless broadband technology. Wireless technology is ideal for providing service in rural areas because its inherent nature does not require the same outlay of capital investment that traditional ca-

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244 See discussion supra Part III.
245 See INDUSTRY ACCESS REPORT, supra note 120, tbl.13.
246 See id.
247 See DSL Ruling, supra note 1, ¶ 89.
249 See Anne Broache, New Taxes Could Slam Net Phone Users, CNET NEWS.COM, Aug. 23, 2005, http://news.com.com/New+taxes+could+slam+Net+phone+users/2100-7352_3-5842237.html ("[Requiring VoIP carriers to contribute to the USF] would effectively mean new taxes on customers of Net telephone companies that don’t currently pay into the USF. Companies that already pay into the fund indirectly may have to raise their rates because their contribution would likely have to increase.").
250 See DSL Ruling, supra note 1, ¶ 113.
251 See discussion supra Part III.B.
The Decline of Title II Common-Carrier Regulations

With a USF tax imposed to support some technologies such as VoIP, firms may face increased costs, making new technology deployment prohibitively expensive. Market forces will encourage technology deployment as broadband firms seek to offer their customers the most services possible, including VoIP. Thus, the USF is not necessary to fulfill the public interest in providing these new technologies and the market should be left to implement these new services without USF restrictions in accordance with Congress' deregulatory preference. Moreover, it should be remembered that if market forces fail, the FCC has not waived its authority to bring back USF requirements under § 254. For now, the Commission should allow its new policies to take effect and allow the market to close the gap on broadband deployment.

B. Net Neutrality Legislation Is Unnecessary Given Title I Ancillary Jurisdiction, Antitrust Law and Competitive Safeguards

In response to the recent FCC decisions that Title II common-carrier regulations do not apply to cable and DSL broadband providers, some have called for Congress and the FCC to explicitly mandate line sharing independent of the 1996 Act hoping that such action would protect consumers from monopolistically high prices and censorship. The issue, known as "net neutrality," revolves around a fear that big telecom and cable companies will no longer treat all ISPs—from start-ups to large established ones—equally, and instead will give favored status to the ISPs of their choosing based on the content of the websites they support. Senators Ensign and McCain introduced a bill called the Broadband Investment and Consumer Choice Act ("Ensign and McCain Bill") on July 27, 2005, just after the Supreme Court handed down the BrandX decision. This is just one recent bill out of many that attempts to address net neutrality issues. However, at this point, additional regulation of broadband

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252 BROADBAND TODAY, supra note 35, at 22 ("With their unlimited coverage area, satellite systems will offer broadband access to virtually any part of the United States and may be the best method for serving remote regions . . .").
253 See Broache, supra note 249.
254 See, e.g., DSL Ruling, supra note 1, 14,856 n.8 (quoting the preamble of the 1996 Act and the notes to 47 U.S.C. § 157 (2000)).
256 See discussion supra note 11.
257 Robert J. Samuelson, When the Net Goes From Free to Fee, NEWSWEEK, Feb. 27, 2006, at 14. The concern over keeping the Internet neutral is, in part, that new start-ups will be relegated to narrow-band providers and innovative services will be competitively handicapped making the Internet a zero-sum game where some Internet services will have to be forced out before new ones can emerge. Id.
259 See S. 1063, 109th Cong. (2005); S. 2113, 109th Cong. (2005); H.R. 2418 109th
service is an unnecessary action that would decrease the competitive incentives for broadband.260 The Ensign and McCain Bill proposes that consumers cannot be denied access to any Internet content unless it is illegal, allowed to be prohibited by federal or state law, or cannot be supported by the technical limitations of a consumer's purchased service.261 This limit, and similar ones in other proposed net neutrality legislation, would negatively impact the ability of broadband providers to create private wholesale agreements with consumer-valued ISP service providers and undercut incentives for ISPs to improve the quality of their service, both of which are significant benefits of Title II de-regulation.262

The major motivations behind the 1996 Act were to “promote competition, reduce regulation and encourage[] the rapid deployment of telecommunications technologies” such as broadband Internet service, and the FCC’s recent Cable and DSL Rulings further those goals.263 The Ensign and McCain Bill and other net neutrality legislation would force broadband providers to offer services even in cases where consumers do not value or demand a particular ISP’s content.264 A better approach would be to let the market forces decide what ISPs consumers desire just as the FCC’s new policy allows.265 Private agreements can help determine which ISPs are desirable, especially since these

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260 See S. 1504 § 7.
261 Id. § 7.
A consumer may not be denied access to any content provided over facilities used to provide broadband communications service and a broadband service provider shall not willfully and knowingly block access to such content by a subscriber, unless—
(A) such content is determined to be illegal;
(B) such denial is expressly authorized by Federal or State law; or
(C) such access is inconsistent with the terms of the service plan of such customer including applicable bandwidth capacity or quality of service constraints.

Id.
262 DSL Ruling, supra note 1, ¶ 89; see also NCTA, Verizon Back Similar Video Franchise Reform Provisions, COMM. DAILY, Jan. 31, 2006, at 3 (“Net neutrality is another 2006 [National Cable and Telecommunications Association] priority. . . . New networks are being developed every single day.” . . . “This is not the time to pass a law that chills that kind of innovation.”).  
263 DSL Ruling, supra note 1, 14,856 n.8 (quoting the preamble of the 1996 Act and the notes to 47 U.S.C. § 157 (2000)).
265 See Cable Ruling, supra note 2, ¶ 48; DSL Ruling, supra note 1, ¶¶ 88–95.
agreements can be performance-based.\textsuperscript{266} As discussed, even in the event of an Internet market failure, monopoly content and price fears will still not be realized because the Commission can take remedial measures under Title I ancillary jurisdiction or the antitrust laws.\textsuperscript{267} Accordingly, net neutrality legislation is presently unnecessary and potentially harmful.

VII. CONCLUSION

\textit{Brand X} and the related FCC decisions have significantly modified the broadband landscape and this change is for the best.\textsuperscript{268} Consumers can and will benefit from the recent changes toward a free and competitive broadband market.\textsuperscript{269} While common-carrier requirements have now been cast aside for cable and DSL broadband providers, numerous regulations and statutes still remain in place that will prevent monopoly control of broadband service.\textsuperscript{270} Moreover, consumers stand to reap long-run benefits from this deregulation because common-carrier deregulation will lead to more broadband service options and continued price decreases as developing technologies further compete with DSL and cable broadband providers.\textsuperscript{271} While there will certainly be pressure on Congress to counteract the FCC’s deregulation,\textsuperscript{272} the FCC’s push toward a free broadband market is in the public interest because of the variety of benefits it brings to consumers.\textsuperscript{273} Accordingly, fears of Internet censorship should be discounted in light of these benefits and the protections that free market forces and competition inherently provide.\textsuperscript{274} The FCC has made a deregulatory choice for the broadband market after careful consideration of the public interests, and having chosen wisely, lawmakers should give great deference to the agency’s expertise, just as the Supreme Court did in its \textit{Brand X} decision, before hastily imposing new laws that could undo the long-term benefits secured by the FCC for consumers.\textsuperscript{275} Internet service has been, and will continue to be, a rapidly changing product, and the FCC’s Title II deregulation has ensured

\textsuperscript{266} See DSL Ruling, supra note 1, ¶¶ 88–89.
\textsuperscript{267} See discussion supra Part IV.
\textsuperscript{268} See discussion supra Part III.D.
\textsuperscript{269} See discussion supra Part IV.
\textsuperscript{270} See discussion supra Part IV.
\textsuperscript{271} DSL Ruling, supra note 1, ¶¶ 74–76 (noting that many wireline broadband service providers have demonstrated their commitment to keeping their transmission lines available to unaffiliated ISPs).
\textsuperscript{272} See, e.g., S. 1504 109th Cong. (2005).
\textsuperscript{273} See discussion supra Parts III–IV.
\textsuperscript{274} See generally sources cited supra note 11.
\textsuperscript{275} Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 125 S. Ct. 2688, 2712 (2005) (showing deference to the FCC by admitting they are experts and thus “in a far better position to address these” complex issues).
that consumers will be able to experience the benefits of these changes in an efficient long-term manner without the burden of reactionary regulatory lag.