

What Do Pizza Delivery and Information Services Have in Common? Lessons From Recent Judicial and Regulatory Struggles with Convergence

Rob Frieden
Professor, Penn State University
102 Carnegie Building
University Park, Pennsylvania 16802
(814) 863-7996; rmf5@psu.edu

Congressionally crafted definitions of cable,¹ information² and telecommunications³ service used by the Federal Communications Commission (“FCC”) to make key policy and regulatory decisions no longer provide clear direction in light of technological and marketplace convergence. The FCC cannot make bright line, either/or distinctions between services, and

¹ Cable service is defined as: (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service. 47 U.S.C. § 522(6).

² Information service is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20).

³ Telecommunications is defined in the Communications Act of 1934, as amended, as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). Telecommunications service means “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46). The Communications Act defines telecommunications carrier as “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.” 47 U.S.C. § 153(44).

because vastly different regulatory burdens apply based on which classification the Commission picks, marketplace competition can become distorted. Often operators in the information, communications and entertainment (“ICE”) marketplace can secure a competitive advantage by successfully qualifying for classification that triggers less regulatory burdens.⁴ Such regulatory arbitrage tilts the competitive playing field when competitors offering functionally equivalent services bear higher and lower regulatory burdens based on which service classification they receive.⁵

Technological convergence has outpaced the ability of both Congress and the FCC to anticipate and respond to changed circumstances. In the absence of a rewrite of the Communications Act of 1934,⁶ last substantially amended in 1996,⁷ the FCC must apply a

⁴ See, e.g., Rob Frieden, *The FCC’s Name Game: How Shifting Regulatory Classifications Affect Competition*, 19 BERKLEY TECH. L. J., No. 4, 1275-1314 (Fall, 2004); Rob Frieden, *Regulatory Arbitrage Strategies and Tactics in Telecommunications*, 5 N.C. J. L. & TECH., No. 2, 227-275 (2004); available at: http://www.jolt.unc.edu/Vol5_12/pdf/Frieden%20v5i2.pdf.

⁵ “Initial telecommunications regulatory reform has also been marked by regulatory arbitrage, whereby network carriers would seek to take advantage of inconsistent telecommunications regulations to sustain their businesses. Examples of early regulatory arbitrage include international callback routines designed to take advantage of excessive international accounting rates, and bypass facilities of Competitive Access Providers - competing local exchange carriers, designed to avoid local exchange access charges. Recent examples of regulatory arbitrage include IP telephony services designed to avoid universal service charges, and reciprocal compensation terminating fees for terminating calls to Internet Service Providers, designed to take advantage of the alleged local nature of Internet traffic. Such regulatory arbitraging has been tacitly approved by regulatory authorities, to encourage certain social policy agendas and to avoid political obstacles that have favored existing monopoly network infrastructures.” Benjamin Lipschitz, *Opportunities and Challenges in the Digital Era*, 7-FALL Media L. & Pol’y 14, 20 (Fall 1998).

⁶ 47 U.S.C. §151 *et. seq.* (2005).

⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.) [hereinafter cited as ’96 Act].

limited number of mutually exclusive service definitions to new services that frustrate compartmentalization. Converged ICE services may incorporate two or more regulatory classifications depending on how service providers and end users configure services. Increasingly software and other applications, riding on top of basic digital bitstream transmission,⁸ can generate services that integrate previously discrete telecommunications, information and cable services. Similarly ICE ventures seek to achieve economies of scale and

⁸ Several academics and practitioners have advocated a fundamental shift in telecommunications regulation from one based on service definitions and mutually exclusive regulatory silos to one that subdivides services into two or more horizontal layers based on functionality. See Richard S. Whitt, *A Horizontal Leap Forward: Formulating A New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L.J. 587 (May, 2004); Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561 (2000); Scott Marcus, *The Potential Relevance to the United States of the European Union's Newly Adopted Regulatory Framework for Telecommunications*, Federal Communications Commission, Office of Plans and Policy Working Paper Series No. 36 (July, 2002); available at: <http://www.fcc.gov/osp/workingp.html>; Douglas Sicker, *Further Defining a Layered Model for Telecommunications Policy* (2002); unpublished paper available at: <http://intel.si.umich.edu/tprc/papers/2002/95/LayeredTelecomPolicy.pdf>; Kevin Werbach, *A Layers Model for Internet Policy*, 1 J. ON TELECOM. & HIGH TECH. L., 37 (2002); John T. Nakahata, *Regulating Information Platforms: The Challenge of Rewriting Regulation From the Bottom Up*, 1 J. ON TELECOM. & HIGH TECH. L., 95 (2002); Phillip J. Weiser, *Law and Information Platforms*, J. ON TELECOM. & HIGH TECH. L., 1 (2002); Craig McTaggart, *A Layered Approach to Internet Legal Analysis* (Dec. 21, 2002); available at <http://www.innovationlaw.org/cm/ilg2002/reading/layered1.pdf>; Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 FED. COMM. L.J. 167 (2003); Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 FED. COMM. L.J. 207 (2003).

This horizontal approach typically uses layers based on an Open System Interconnection model for conceptualizing the stack of protocols and technological functions that combine to provide computer and communications networking such as that provided via the Internet. See Lawrence B. Solum and Minn Chung, *The Layers Principle: Internet Architecture and the Law*, University of San Diego School of Law, Public Law and Legal Theory, Research Paper No. 55 (June 2003); available at: <http://www.ssrn.com/abstract=416263>.

scope through vertical integration that combines basic transmission of digital bits with software and other value adding enhancements.

Additionally the apparent duty to shoehorn all services into one category⁹ has forced the FCC to make decisions that reclassify a service.¹⁰ For example the FCC recently reclassified telephone company provided Digital Subscriber Link service as an information service,¹¹ despite having previously identified it as a telecommunications service.¹² By ignoring or subordinating the telecommunications component in DSL the Commission assumes it lawfully can reclassify it as an information service like cable modem service, with necessary telecommunications bit

⁹ “[T]he language and legislative history of [the Communications Act of 1996] indicate that the drafters ... regarded telecommunications services and information services as mutually exclusive categories.” Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11501, 11522 (1998); *see also* Vonage Holdings Corp., 290 F. Supp.2d at 994, 1000 (following the guidelines of the Stevens Report).

¹⁰ “Although the Commission has not been entirely consistent on this point, we agree for the wireline broadband Internet access described in this Order with the past Commission pronouncements that the categories of ‘information service’ and ‘telecommunications service’ are mutually exclusive. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150, 2005 WL 2347773, n. 32 (rel. Sep. 23, 2005); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.doc[hereinafter cited as DSL Reclassification Order] (citations omitted).

¹¹ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150, 2005 WL 2347773 (rel. Sep. 23, 2005); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.doc.

¹² *See* GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd. 22,466 (1998), *on recon.*, 17 FCC Rcd 27409 (1999) (providing Internet Service Providers and their end user customers with high-speed access to the Internet deemed an interstate service that is properly tariffed at the federal level).

transport considered an integrated and subordinate component.¹³

Having static and limited regulatory classifications to work with also has forced the FCC to acknowledge inconsistency in how it applies the same Congressionally crafted service definition. For example, the FCC already has deemed some types of Internet-mediated telephone services as fitting within the information service classification.¹⁴ Other more sophisticated and versatile forms of Internet telephony, commonly referred as Voice over the Internet Protocol (“VoIP”) also may fit within this category,¹⁵ even though the FCC may impose specific public safety and public interest obligations under Title I authority. Notwithstanding existing and likely future information service designations for VoIP, the FCC recently acknowledged that for purposes of cooperation with law enforcement agencies as mandated by federal law, VoIP

¹³ “We conclude, consistent with Brand X, that such a transmission component [in a DSL service] is mere ‘telecommunications’ and not a ‘telecommunications service.’ As stated above, the Act defines telecommunications service as ‘the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.’ Thus, whether a telecommunications service is being provided turns on what the entity is ‘offering ... to the public,’ and customers’ understanding of that service. End users subscribing to wireline broadband Internet access service expect to receive (and pay for) a finished, functionally integrated service that provides access to the Internet. End users do not expect to receive (or pay for) two distinct services -- both Internet access service and a distinct transmission service, for example. Thus, the transmission capability is part and parcel of, and integral to, the Internet access service capabilities. Accordingly, we conclude that wireline broadband Internet access service does not include the provision of a telecommunications service to the end user irrespective of how the service provider may decide to offer the transmission component to other service providers.” DSL Reclassification Order at 35, ¶104.

¹⁴ Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, Docket No. 03-45, Memorandum Opinion and Order, 2004 WL 315259 (F.C.C.), 31 Communications Reg. (P&F) 1341 (rel. Feb 19, 2004); *see also* Petition for Declaratory Ruling that pulver.com’s free World Dialup Service is Neither Telecommunications nor a Telecommunication Service, WC Docket No. 04-45, Petition (filed Feb. 5, 2003).

¹⁵ *See* IP-Enabled Services, Notice of Proposed Rulemaking, WC Docket No. 04-36, 19 FCC Rcd 4863 (2004).

operators provide telecommunications services and must cooperate with law enforcement officials seeking wiretaps.¹⁶

Adding to the confusion, the Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. ___, 125 S.Ct. 2688, slip op. 04-277 (June 27, 2005), evidenced significant confusion in understanding converging telecommunications and information processing technologies. The Court had to determine whether cable television companies providing access to the Internet offer an information service, subject to quite limited regulation, or a telecommunications service, subject to possibly more government oversight. Both the majority opinion and a dissenting opinion used curious analogies involving packaged services in automobile manufacturing, pet stores and pizzerias, as a way to conceptualize converging telecommunications and information processing services.

The use of simplistic, but competing analogies within Supreme Court opinions demonstrates how experts in the law struggle to conceptualize information processing even as they appear to have little sense of how most consumers soon will access ICE services and what kinds of traditional consumer safeguards remain essential. The *Brand-X* case will provide the legal foundation for the FCC to abandon most regulations of both telephone and cable television companies, based on the Supreme Court's endorsement of limited regulation for information service markets.

How the FCC and the Supreme Court have responded to ICE convergence provides a key case study for assessing the consequences of having to apply Congressionally crafted definitions

¹⁶ See, e.g., *IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116, 2005 WL 1323217, 36 Communications Reg. (P&F) 1 (rel. Jun 3, 2005).

that no longer provide the foundation for different regulatory treatment. This article will identify problems in the Communications Act of 1934 and suggest how a revised law might promote full and fair competition with limited governmental interference. The article will consider the viability of antitrust scrutiny in lieu of ex ante, service specific regulation, and initiatives in the European Union that rely on structural safeguards that the FCC first used, but later abandoned. Additionally the article will recommend that legislatures and regulators combine greater granularity and specificity in service definitions with more timely, certain and calibrated assessment of market dominance and market failure.

Finding Similarity in Pizza Delivery and Information Services

In *Brand X* a majority of the Supreme Court endorsed the FCC's information service classification for cable modem service. Using the *Chevron* standard,¹⁷ which supports deferral to administrative agency decision making that reasonably interprets and implements statutory language,¹⁸ the Court has cleared the way for the FCC to create a lightly regulated information service "safe harbor" for both cable modem and DSL high speed, broadband access services.

A majority of the Court agreed that the FCC could reasonably have concluded that cable modems solely provide an information service, despite the use of telecommunications to link subscribers with content. Accordingly the Court reversed the Ninth Circuit Court of Appeal's prior determination that a separate and identifiable telecommunications service element existed on grounds that the *Chevron* precedent supported the FCC's statutory construction:

¹⁷ *Chevron U.S.A. v. National Resources Defense Council, Inc.* 467 U.S. 837 (1984).

¹⁸ "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, slip op. at 8 *citing* *Chevron* at 843-844 and n.11.

A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from unambiguous terms of the statute and thus leaves no room for agency discretion.¹⁹

The Court concluded that the Communications Act, as amended by the Telecommunications Act of 1996, contained ambiguities whether cable companies offered telecommunications in conjunction with their cable modem service.

The majority used several analogies to support the view that the FCC lawfully could ignore or subordinate the telecommunications function. The majority's analogies provided examples where a venture offers a number of services, many of which combine into a consolidated offering, and others that are made available, but are not essential. In the former the majority noted that car dealers sell cars and not a collection of integrated components, such as an engine and chassis.²⁰ The majority also rejected Justice Scalia's analogies by noting that customers can pick up pizzas rather than have them delivered and at pet stores buy dog leashes without also having to purchase a dog.²¹ Because ambiguity exists as to the functional integration or separateness of telecommunications, the Court majority gladly deferred to the FCC. The nature and scope of integration between telecommunications and information processing:

¹⁹ Brand X slip op. at 10.

²⁰ "One might well say that a car dealer 'offers' cars, but does not 'offer' the integrated major inputs that make purchasing the car valuable, such as the engine or chassis." Brand X slip op. at 18.

²¹ "We also do not share the dissent's certainty that cable modem service is so obviously like pizza delivery service and the combination of dog leashes and dogs that the Commission could not reasonably have thought otherwise. For example, unlike the transmission component of Internet service, delivery service and dog leashes are not integral components of the finished product (pizza and pet dogs). One can pick up a pizza rather than have it delivered, and one can own a dog without buying a leash." Brand X slip op. at 20.

turns not on the language of the [Communications] Act, but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leave to the Commission to resolve in the first instance.²²

While engaging in the use of “warring analogies”²³ the majority appears content on deferring to the FCC’s technical expertise in determining how best to implement Congressional intent.

In a dissenting opinion, Justice Scalia did not agree that the FCC could lawfully and practically treat the telecommunications link as not separable from the predominate information processing services provided. He disputed the FCC’s view that cable television companies do not provide a telecommunications service when linking subscribers physically apart from the content they access.²⁴ Justice Scalia used pizzerias and pizza delivery for his primary analogy and asserted that one could not ignore the fact that pizza baking and pizza delivery constitute two separate elements of the pizza business:

It is therefore inevitable that customers will regard the competing cable-modem service as giving them *both* computing functionality *and* the physical pipe by which that functionality comes to their computer—both the pizza and the delivery service²⁵

The use of simplistic, but competing analogies within Supreme Court opinions demonstrates how experts in the law struggle to conceptualize converging telecommunications and information processing technologies. The Court’s decision will provide the legal foundation for the FCC to reclassify as an information service telephone company provision of Internet

²² Brand X slip op. at 19-20.

²³ Brand X slip op. at 20.

²⁴ “The important fact, however, is that the Commission has chosen to achieve this [result] through an implausible reading of the statute, and thus exceeded the authority given it by Congress.” Scalia Dissenting Opinion at 1.

²⁵ Scalia Dissenting Opinion at 6.

access via DSL, despite having previously identified a discrete and stand alone telecommunications service component. Apparently the desire to achieve deregulatory parity trumps the need for consistency in interpretation of terms created by the '96 Act.²⁶ Justice Scalia chided the majority for its undiscerning acceptance of an FCC bureaucratic sleight of hand that changes the facts to achieve an outcome not contemplated by law.

Regardless whether one considers the majority decision judicial activism or appropriate restraint, deference to the FCC's liberal interpretation of Congressionally crafted definitions makes it possible for the Commission to eliminate much of the ex ante regulatory burdens imposed on telecommunications common carriers. One school of thought applauds this outcome as belated recognition that "legacy" command and control, heavy handed regulation makes no sense in a competitive marketplace increasingly focused on high speed, broadband delivery of digital bits. An opposing view suggests that the FCC has engaged in results-oriented decision making seeking to eliminate much needed interconnection and access pricing mandates fully consistent with what the '96 Act requires. The former camp emphasizes that unbundling the existing telecommunications network at below market rates robs incumbents of necessary incentives to invest in new plant and confiscates their property.²⁷ The latter camp continues to

²⁶ See Rob Frieden, "The FCC's Name Game: How Shifting Regulatory Classifications Affect Competition," 19 *Berkeley Technology Law Journal*, No. 4, 1275-1314 (Fall, 2004).

²⁷ The FCC clearly sides with this view: "[T]he record shows that the existing regulations constrain technological advances and deter broadband infrastructure investment by creating disincentives to the deployment of facilities capable of providing innovative broadband Internet access services." DSL Reclassification Order at 7, ¶19.

see market failures and the lack of sustainable and robust facilities-based competition in light of a likely shared cable television-telephone monopoly.

Self-Fulfilling Prophecies or Strategic Thinking?

Through litigation, active participation in FCC notice and comment proceedings and aggressive lobbying incumbent stakeholders, such as SBC and Verizon, have expressed resentment with the FCC's interpretation and implementation of the '96 Act. Litigation has resulted in a mixed bag with some decisions chiding the FCC for overly expansive and aggressive interpretation of what it should do to promote local exchange competition,²⁸ while other decisions affirm the Commission's basic strategies including controversial rate setting of unbundled network elements at levels far below what incumbent local exchange carriers ("ILECs") would seek to charge new carriers in a commercial, arm's length transaction.²⁹

While the ILECs may some day secure a legislative remedy to their liking, they already have begun to fare much better at the FCC after having convinced the Commission that it should dismantle ex ante regulation of next generation physical plant, e.g., fiber optic networks, put a time limit on policies supporting local telecommunications services through the unbundling and favorable network element pricing and consider services with the most growth potential, e.g., broadband services, as fitting within the largely unregulated information services classification.

²⁸ See, e.g., **Error! Main Document Only.** AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 119 S.Ct. 721 (1999); United States Telecom Ass'n v. Federal Communications Commission, 290 F.3d 415, (D.C. Cir. 2002); United States Telecom Ass'n v. Federal Communications Commission, 359 F.3d 554, 580-82 (D.C. Cir. 2004) (USTA II), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

²⁹ See, e.g., Veriuzon Communications v. Federal Communications Commission, 535 U.S. 467, 122 S.Ct. 1646 (2002).

Abandoning Proactive Efforts to Stimulate Local Exchange Competition

For almost ten years the FCC has struggled with crafting regulations that promote local exchange carrier competition by requiring incumbent carriers to lease portions of their networks to competitors. Such network element unbundling provides market entrants with the opportunity to provide service and generate competition well before completing construction of their own facilities. Incumbent have successfully argued that instead of jumpstarting competition, the FCC's policies made it possible for market entrants to thrive simply by reselling existing facilities and services, in light of the attractive forward looking prices the FCC has required incumbents to charge. Through several instances of review courts have admonished the FCC for failing to craft regulations that support competition without unfairly burdening incumbent carriers and removing incentives for investment in next generation networks.

On August 21, 2003, the FCC released a 600 plus page Order revamping its attempt to craft incumbent local exchange carrier ("ILEC") cost-based network unbundling requirements that would pass muster with an appellate court.³⁰ The Commission's *Triennial Review*³¹ responded to a July 2002 decision of the D.C. Circuit Court of Appeals that vacated the FCC's prior unbundling rules on the grounds that the agency had failed to articulate properly which

³⁰ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd. 16,978 (2003)[hereinafter cited as Triennial Review Order], *errata*, 18 FCC Rcd. 19020 (2003), *vacated in part and remanded sub nom.*, U.S. Telecom Ass'n v. F.C.C., 359 F.3d 554, __ U.S. App. D.C. __ (D.C. Cir. 2004)[hereinafter cited as USTA-2].

³¹ The Commission integrated its work upon remand from the D.C. Circuit Court of Appeals with its ongoing Triennial Review of UNE requirements. *See* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline

network elements ILECs must provide to competitive local exchange carriers (“CLECs”).

Section 251 of the '96 Act requires that in determining whether ILECs must provide a UNE to CLECs, the FCC must consider whether CLECs otherwise would be “impaired” in the provision of competing telecommunications services. In addition to impairment, the FCC may consider other factors, including the impact of its unbundling rules on broadband investment and deployment by ILECs.

The D.C. Circuit Court of Appeals again strongly rebuked the FCC for failing to establish unbundling policies with sufficient narrowness, granularity and flexibility to respond to market conditions and for delegating to state regulators the duty to make specific market condition assessments that would reduce ILEC unbundling obligations in light of competitive alternatives. Showing great displeasure with the apparent willingness of the FCC to fetter ILECs with greater unbundling burdens than it considered necessary, the court imposed a 60 day deadline, starting after the court denies any petition for rehearing, for the Commission “after eight years, to develop lawful unbundling rules, and [in light of] its apparent unwillingness to adhere to prior judicial rulings.”³²

The court emphasized that in light of the quite favorable access pricing rules, based on Total Element Long Run Incremental Costs (“TELRIC”)³³ the FCC requires ILECs to charge for access

Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001). In 1999 the Commission created a three year cycle for reviewing its ILEC-CLEC interconnection requirements. *See* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, ¶ 151 (1999).

³² USTA-2, 290 F.3d at 595.

³³ The FCC has interpreted the '96 Act as requiring ILECs to provide network access to CLECs on a forward looking basis using an estimate of future incremental costs to provide service instead of using actual facilities investment costs. “TELRIC obliges both incumbents and state regulators to set prices based on the long-run costs that would be incurred to produce

to their networks, the ILECs should have to provide such access on favorable terms only under extraordinary circumstances. The court in the current case and in a prior case³⁴ reversed the FCC for interpreting too loosely what constitutes impairment of a CLEC's ability to provide competitive telecommunications services pursuant to Section 251(d)(2) of the '96 Act. Prior to its third attempt at shaping rules, the FCC had received instructions to consider CLECs impaired in their ability to compete with ILECs if CLECs had no ability to self-provision or acquire needed network elements from a third party of similar quality and at comparable, but not necessarily equal rates. The D.C. Circuit Court wanted the FCC to establish network access limits based on both quantitative and qualitative factors which balanced the likely diminished competition against the likelihood that any unbundling requirement at TELRIC rates would create disincentives for ILECs to invest in infrastructure, including facilities that the FCC expressly exempted the ILECs from having to make available to CLECs. The court also rejected the FCC's decision to determine CLEC impairment on a national basis and applicable to all consumers. Additionally the court rejected the Commission's requirement that ILECs share copper local loops with CLECs, particularly in light of the existence of now widespread intermodal competition from broadband cable television networks.

the services in question using the most-efficient telecommunications technology now available, and the most efficient network configuration. Incumbents that have aging and inefficient equipment thus must sell for less than their historical cost; the old system that calculated rates based on actual cost of equipment plus a reasonable rate of return on capital is out the window.” *AT&T Communications of Illinois, v. Illinois Bell Telephone Co.* 349 F.3d 402, 405 (7th. Cir. 2002).

³⁴ See *United States Telecom Ass'n v. Federal Communications Commission*, 290 F.3d 415, U.S. App. D.C. , 28 Communications Reg. (P&F) 1417 (D.C. Cir. 2002) [hereinafter cited as USTA-1]. The Supreme Court invalidated the first FCC attempt in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 119 S.Ct. 721 (1999).

On remand from *USTA-1*, the FCC determined that impairment would exist only if “lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.”³⁵ In response to the court’s remand that it use a more “nuanced” application of the impairment standard by applying a “granular” approach to determine where and how impairment existed the Commission specified by service where impairment existed subject to the possibility of specific exclusions created by state regulatory commissions under authority delegated to them by the FCC.

The FCC determined that impairment existed on a national basis for “mass market” residential and small business switching based on its view that manual cut overs, referred to as “hot cuts” from ILEC to CLEC service would cause delays and consumer perceptions that CLEC service was inferior, or not worth the inconvenience in changing carriers. The Commission ordered the elimination of this unbundling requirement if three competitors existed in addition to the ILEC, or at least 2 non-ILEC third parties offered access to their switches on a wholesale basis. The D.C. Circuit rejected as legally impermissible any such impairment assessment delegation from the FCC

to state regulatory agencies:

We therefore hold that, while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they not subdelegate to outside entities-private or sovereign-absent affirmative evidence of authority to do so.³⁶

³⁵ Triennial Review Order, 18 FCC Rcd. at 16986.

³⁶ *USTA-2*, 290 F.3d at 566.

Even though state regulatory agencies typically have a better sense of market conditions in specific markets and hence might make the kinds of market-specific competitive assessments required by the court, the lack of specific legislative mandate prevented such delegation. The court noted that the '96 Act authorizes such delegation for other assessments but not in Section 251(d)(2).³⁷ The court implied that the Commission should not have found impairment to exist on a national basis in light of the affirmative steps taken by the ILECs to open their networks, albeit without TELRIC pricing requirements, as preconditions to receiving authority under Section 271 of the '96 Act to provide long distance services and the fact that the FCC had not found the cut over process inadequate. Additionally the court took it upon itself to provide advice on how the Commission could have narrowed the impairment standard to pass muster.

The court implied that the Commission should find impairment only for natural monopoly ILEC services, but then obliquely provided some wiggle room for still finding impairment for situations “a bit beyond natural monopoly.”³⁸ However the court clearly stated that the Commission has to flesh out what it means when it determines that market entry would be rendered uneconomic for lack of access to a specific ILEC network element. The court warned the FCC not to use an open-ended standard for assessing the viability of competition, particularly in light of the court’s apparent disdain for access pricing decisions using TELRIC that “cut further into ILEC revenues in areas where ILECs’ service is mandated by state law--and

³⁷ “[T]he fact that other provisions of the statute carefully delineate a particular role for the state commissions, but '251(d)(2) does not, reassures us that our result is consistent with congressional intent.” *Id.*, 290 F. 3d at 568.

³⁸ *Id.* 290 F. 3d at 572.

mandated to be offered at artificially low rates funded by ILECs' supracompetitive profits in other areas.”³⁹

The court appears to infer that the '96 Act induces competition by forcing the ILECs to offer services below cost even as previously profitable services no longer provide a means for cross-subsidization. The court showed its apparent disdain for forcing the ILECs to support competition by stating that “an ILEC can't be used as a pinata.”⁴⁰ An inference that the FCC has overly burdened the ILECs fails to recognize new profit making opportunities provided by the '96 Act and widely approved by the FCC, e.g., ILEC long distance service, and the fact that for many services the court affirmed the FCC's finding of no impairment making it possible for the ILECs to avoid any unbundling responsibilities and “confiscatory” pricing obligations. While the Court reversed the FCC's finding of impairment for medium broadband capacity DS1, DS3 and unactivated “dark” fiber, based on the wrongful delegation to state regulators, the court affirmed the FCC's findings of no impairment for very high capacity transport and switching facilities and also affirmed the FCC's refinement of what constitutes dedicated transmission facilities to exclude links between CLEC and ILEC premises. Likewise the court affirmed the FCC's refusal to mandate wireless carrier access to unbundled dedicated transport in light of the fact that these carriers have ample access at higher wholesale rates and can afford to pay these rates and remain profitable. The court also affirmed the FCC's refusal to mandate ILEC unbundling of new fiber optic or hybrid copper/fiber optic facilities as well as CLEC-ILEC sharing of copper local loops. For these services the court appears to infer sufficient competition

³⁹ *Id.* 290 F. 3d at 573.

⁴⁰ *Id.*

exists, even if a cable television/ILEC duopoly results, or that unbundling requirements would create too great disincentives for ILECs to invest in broadband infrastructure.

The court also considered the FCC's decision to limit unbundled access to enhanced extended links ("EELs") at TELRIC rates to CLECs providing a substantial volume of local exchange services. CLECs not meeting the local service test and all interexchange carriers ("IXCs") must pay higher special access wholesale rates for functionally equivalent service. The court did not appear willing to endorse an exclusion based on the FCC's reading of Section 251(d)(2)(B) that the Commission could deem certain telecommunications services "non-qualifying services" and exclude them from the unbundling requirement. However the court speculated that the Commission should not find impairment in light of the fact that CLECs, like wireless carriers, can survive in the marketplace even with the financial burden of paying ILECs higher, non-TRILIC rates. The court apparently has no information about the declining viability of CLEC competition, nor does it seem concerned that the local exchange and broadband marketplace may support only two facilities-based operators in any locality.

UNE Remand

The FCC also has adopted rules that significantly limit the scope and nature of what facilities and services ILECs must make available to competitors.⁴¹ The Commission previously decided CLECs must take service from ILECs on an "all or nothing" basis contained in a contract instead of having the flexibility to "pick and choose" from any service arrangement

⁴¹ Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290, 2005 WL 289015 (rel. Feb. 4, 2005).

that an ILEC had offered.⁴² Even as the FCC restricted the provisioning flexibility available to CLECs, the Commission also decided to limit further the scope of which network elements a CLEC can negotiate. The Commission already has decided to eliminate ILEC unbundling obligations for most broadband facilities and optical-capacity transport and loop facilities.

The Commission decided that it could order a phase out of mandatory ILEC unbundling of circuit switching, particularly higher-capacity (DS-3 and dark fiber) transmission facilities. Faced with several judicial rebukes of its assessment of CLEC impairment absent access to UNEs, the Commission now appears intent on eliminating unbundling where it perceives the costs as outweighing marketplace benefits, particularly in light of the fact that CLECs have acquired some market share and generated competition by using UNE access which some courts have found too generous and all inclusive.

The Commission modified its *Triennial Review Order* to specify that it will evaluate whether a CLEC would incur impaired ability to compete in the absence of access to a particular ILEC network element based on the capabilities of a “reasonably efficient” CLEC competitor. Additionally the Commission set aside the *Triennial Review Order*’s “qualifying service” interpretation of Section 251(d)(2) that had required CLECs, having supported an FCC finding of impairment, to use the network element to provide at least one type of service that falls within the ’96 Act definition of local exchange, or exchange access service. For purposes of determining where a CLEC still faces impairment, but for access to ILEC-provided UNEs, the FCC refined its previously narrowed geographic and market assessment to allow it to make

⁴² Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Second Report and Order, 19 FCC Rcd. 13,494 (2004).

inferences on the scope of competition in other areas based on an assessment made for one specific geographical market. The Commission also rejected a policy that would limit a CLEC to ILEC tariffed services if the CLEC could effectively compete even without access to UNEs.

Dedicated Interoffice Transport

The FCC determined that CLECs remain impaired if they lack access to DS1 transport, except for routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based carriers that have facilities collocated at the wire center, or has provisioned at least 38,000 business access lines. Additionally CLECs remain impaired without access to high capacity DS3 or installed but unequipped “dark” fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based competitors, or at least 24,000 business lines. According to the FCC competing carriers do not face impairment regarding access to entrance facilities connecting an incumbent LEC’s network with a CLEC’s network in any instance.

The Commission adopted a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity dedicated transport where they do face impairment, and an 18-month plan for transitioning out of compulsory dark fiber transport network unbundling. These transition plans apply only to the embedded customer base, and do not permit CLECs to add new dedicated transport UNEs in the absence of impairment. During the transition periods, CLECs will retain access to unbundled dedicated transport at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of the Commission’s Order.

Forbearance of ILEC Broadband Service Regulation

The FCC also has favorably responded to petitions by the Bell ILECs to abandon enforcement of the 14 point competitive check list and the unbundling requirements⁴³ imposed by Section 271 and 251 of the Telecommunications Act of 1996.⁴⁴ In its *Triennial Review*,⁴⁵ the FCC substantially deregulated the ILECs' provision of fiber-to-the-home ("FTTH") loops, fiber-to-the-curb ("FTTC") loops and the packet switching and routing functions needed to provide service via these loops. The Commission determined that CLECs would not face any impairment in the marketplace vis a vis new fiber networks used by ILECs to provide broadband services.

Specifically, the Commission determined, on a national basis, that ILECs do not have to unbundle certain broadband elements, including FTTH loops in Agreenfield@ new construction locations, and where the ILEC installs new FTTH loops in overbuild situations, along with the equipment needed to provide packet switching and routing. The Commission based its

⁴³ Petition For Forbearance of The Verizon Telephone Companies Pursuant to 47 U.S.C. ' 160(C), WC Docket No. 01-338, Memorandum Opinion and Order, 19 FCC Rcd. 21,496 (2004)[hereinafter cited as Broadband Forbearance Order].

⁴⁴ 47 U.S.C. ' 271 (2004); 47 U.S.C. ' 251.

⁴⁵ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98- 147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003), *partially vacated and sub nom.*, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) (USTA II); Order on Reconsideration, 19 FCC Rcd. 15,856 (rel. Aug. 9, 2004), Further Reconsideration, 19 FCC Rcd. 20,293 (rel. Oct. 18, 2004) (Triennial Review FTTC Reconsideration Order). In response to the D.C. Circuit's vacatur of certain Triennial Review Order unbundling rules, the FCC issued an Interim Order and NPRM, setting forth a six-month interim unbundling framework with respect to those network elements, and seeking comment on permanent unbundling rules that would respond to the USTA II decision. Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, 19 FCC Rcd. 16,783 (rel. Aug. 20, 2004).

determinations with regard to these elements on the impairment standard and the requirement of section 706 of the =96 Act to provide incentives for all carriers, including the ILECs, to invest in broadband facilities. The Commission concluded that although it was relying on its impairment standard in determining whether these elements should be subject to unbundling, it had discretion under its section 251(d)(2) “at a minimum” authority to consider other factors. Accordingly, the Commission considered the statutory goals outlined in section 706 in concluding that those broadband elements would not be subject to unbundling nationwide. The Commission later extended unbundling and interconnection relief to include FTTH loops serving predominantly residential multiple dwelling units (MDUs). In the subsequent *Triennial Review FTTC Reconsideration Order*, the Commission found that the FTTH analysis applied to FTTC loops, as well, and granted the same unbundling relief.⁴⁶

The FCC also specified the relationship between Sections 251 and 271 of the =96 Act. The Commission noted that of the 14 requirements that an ILEC must satisfy to secure inter-LATA long distance authority under Section 271, only one item referenced the unbundling requirements contained in Section 251. The Commission concluded that checklist items four through six and ten constitute a distinct statutory basis for the requirement that Bell Operating Companies provide competitors with access to certain network elements that does not necessarily hinge on whether those elements are included among those subject to the unbundling requirements contained in Section 251. Accordingly, the Commission stated that even if it concluded that requesting telecommunications carriers are not “impaired” without access to one of those elements under Section 251, Section 271 would still require the BOCs to provide such

⁴⁶ Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order on Reconsideration, 19 FCC Rcd. 20,293 (2004).

access. However, under that circumstance, the pricing standard would not be determined under Section 252(d)(1) requiring TELRIC pricing, but would be governed by the general “just and reasonable” standard established under Sections 201 and 202 of the Communications Act.

As required by Section 10 of the 1996 Act, the FCC held that it should forbear from applying the Section 271 access obligations to those broadband elements that the Commission had exempted in the *Triennial Review* proceeding from the unbundling requirements contained in Section 251(c)(3). Additionally the FCC determined that that the checklist portion of Section 271 has been “fully implemented” in all states, and that the three-pronged forbearance test has been met with respect to these broadband elements. To justify forbearance under Section 10, the FCC must conclude that the regulations to be eliminated are no longer needed to ensure just and reasonable charges and practices, are not necessary for the protection of consumers and the proposed regulatory forbearance would serve the public interest. With regard more extensive deregulatory requests made by SBC and Qwest the Commission declined to address those issues in the Order it released.⁴⁷

The FCC subsequently concluded that its deregulation of FTTH loop will apply to those fiber loops where fiber is extended within 500 feet of a customer’s premises, including multiple

⁴⁷ “[W]e conclude that section 271(c)(1)(B) has been fully implemented for all of the BOCs in all of the states in which they are providing service. Moreover, we find that section 10(a)'s three-pronged test for forbearance has been met with respect to section 271(c)(1)(B)'s independent access obligation for FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching for all of the affected BOCs to the extent such broadband elements were relieved of unbundling on a national basis under section 251(c). Accordingly, we grant Verizon's and BellSouth's petitions for forbearance, and we grant in part the SBC and Qwest petitions.” Broadband Forbearance Order at &37.

dwelling units (“MDUs”) that are predominantly residential.⁴⁸ The Commission further clarified that the definition of FTTH loops includes fiber loops deployed to the minimum point of entry (“MPOE”)⁴⁹ of MDUs, regardless of the ownership of the inside wiring. Additionally the Commission also determined that FTTC loops shall be subject to the same unbundling framework that the Commission established for FTTH loops and clarified that ILECs do not have to add Time Division Multiplexing capabilities into new packetized digital transmission facilities.⁵⁰

Additional Forbearance Petitions

⁴⁸ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98- 147, Order on Reconsideration, 19 FCC Rcd. 15,856 (2004).

⁴⁹ The Minimum point of entry (MPOE) as used herein shall be either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings. The reasonable and nondiscriminatory standard operating practices of the provider of wireline telecommunications services shall determine which shall apply. The provider of wireline telecommunications services is not precluded from establishing reasonable classifications of multiunit premises for purposes of determining which shall apply. Multiunit premises include, but are not limited to, residential, commercial, shopping center and campus situations. 47 C.F.R. ' 68.105(b).

⁵⁰ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Reconsideration, 19 FCC Rcd. 20,293 (2004).

Several of the Bell Operating Companies also have filed with the FCC petitions for forbearance from applying Title II and the *Computer Inquiry*⁵¹ rules to any broadband services.

⁵² In other petitions a Bell Operating Company has sought forbearance for a specific service. For example, SBC has filed a petition seeking forbearance of Title II Common Carrier regulation for Internet Protocol Platform Services the company seeks to offer.⁵³ Qwest Corporation filed a petition for forbearance of for Digital Subscriber Link so that regulatory parity exists with cable modem services.⁵⁴ Qwest requested forbearance from dominant carrier tariff regulation, rate averaging requirements, and resale at an avoided-cost discount, for Qwest's mass-market xDSL services.

The '96 imposes a one year deadline for the Commission to act, extendable for an additional 90 days.⁵⁵ If granted these petitions would further eliminate conventional common carrier requirements on the Bell Operating Companies and established limited regulatory oversight, under Section I of the Communications Act, for the kinds of services likely to dominate the telecommunications and information processing marketplace in the near future.

⁵¹ *See infra*, n.80.

⁵² *See, e.g.*, Public Notice, Comments Invited on Petition for Forbearance Filed by BellSouth Telecommunications, Inc. Regarding Incumbent LEC Provision of Broadband, WC Docket No. 04-405, DA 04-3507, 19 FCC Rcd. 21,989 (rel. Nov. 3, 2004)

⁵³ Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, WC Docket No. 04-29, 19 FCC Rcd. 2640 (2004); pleading schedule extended, 2004 WL 2813709 (rel. Dec. 07, 2004).

⁵⁴ Bellsouth Corporation=s Petition for Forbearance under 47 U.S.C. ' 160(c) from Enforcement of Section 252 with Respect to Non-251 Agreements, WC Docket No. 04-313 CC Docket No. 01-338, DA 05-391, Order, 2005 WL 350479 (rel. Feb. 11, 2005)(finding that the public interest supports a 90 day extension of time for the FCC to respond to the petition); *See also*, Comments Invited on Petition for Forbearance Filed by Qwest Corporation Regarding Qwests DSL Service, DA04-3602, Public Notice, 2004 WL 2609618 (rel. Nov 16, 2004).

⁵⁵ 47 U.S.C. ' 160 (a)-(c).

DSL Service Reclassified as an Information Service

Quickly following up on the Supreme Court's endorsement of its classifying cable modem access to the Internet an information service, the FCC reclassified telephone company provided Digital Subscriber Line ("DSL") to achieve regulatory parity. The FCC now deems DSL an information service and in turn the Commission eliminated common carrier facilities sharing requirements and the additional obligations imposed by the *Third Computer Inquiry*.⁵⁶ The FCC characterized this change as enabling wireline broadband Internet access providers to respond quickly to consumer demand with efficient, innovative services and spur more vigorous head-to-head competition with broadband services provided over other platforms. However the Commission's reclassification will result in the likely eliminating of DSL resale competition after a Commission-imposed one year transition period.

The Commission rationalized its reclassification on both marketplace and technological changes that have generated multiple, competing platforms for Internet access from cable, wireless, satellite, and power line networks. Consistent with this generous assessment of the current state of facilities-based, broadband competition in the U.S. the FCC considers its

⁵⁶ "Years after the conclusion of the Computer II proceeding, the Commission determined that the cost of decreased efficiency and innovation imposed by the structural safeguards of Computer II outweighed their benefits. The Commission therefore replaced structural separation with a regime of nonstructural safeguards in its Computer III decisions. This framework maintained the existing basic and enhanced service categories and adopted comparably efficient interconnection (CEI) and ONA [Open Network Architecture] requirements as a replacement for the Computer II structural separation requirements for AT&T and the BOCs." DSL Reclassification Order at 9, ¶26. "ONA plans apply to enhanced services generally and impose more specific and comprehensive unbundling requirements on the BOCs, not unlike section 251's unbundling obligations. Through ONA, BOCs must separate key components of their basic services into "basic service elements," and make those components, or building blocks, available to unaffiliated enhanced service providers to build new services regardless of whether the BOC's affiliated enhanced services operations use these unbundled components." *Id.* at ¶28.

elimination of most DSL and cable modem regulation as helping to foster market-based, rather than regulation-driven, investment and deployment decisions.

The FCC finessed its reclassification of DSL service by determining that the once stand alone telecommunications service component it previously had identified now should be considered as “functionally integrated” with a predominant information service component. The Commission previously had required facilities-based providers to offer that wireline broadband transmission component separately from their Internet service as a stand-alone service on a common-carrier basis, and thus classified that component as a telecommunications service. Going forward, the Commission will eliminate this transmission component sharing requirement, on grounds that the requirement caused facilities-based vendors to delay development and deployment of innovations to consumers.

To ensure a smooth transition, the Order required facilities-based wireline broadband Internet access service providers to continue providing existing wireline broadband Internet access transmission offerings, on a grandfathered basis, to unaffiliated ISPs for one year. The Order also required facilities-based providers to contribute to existing universal service mechanisms based on their current levels of reported revenues for the DSL transmission for a 270-day period after the effective date of the Order, or until the Commission adopts new contribution rules, whichever occurs earlier.

The Order also allowed wireline providers the flexibility to offer the transmission component of the wireline broadband Internet access service to affiliated or unaffiliated ISPs on a common-carrier basis, a non-common carrier basis, or some combination of both. Some rural ILECs had stated a desire to have the option of offering broadband Internet access transmission on a common carrier basis. In a parallel Notice of Proposed Rulemaking, the Commission

sought comment on whether it should develop a framework for consumer protection in the broadband age – a framework that ensures that consumer protection needs are met by *all* providers of broadband Internet access service, regardless of the underlying technology.

Limits to the FCC's Deregulatory Mission

Appellate courts generally have endorsed the FCC's deregulatory mission, or reversed the Commission for failing to limit the scope of its procompetitive regulatory initiatives. In light of this environment, the FCC has doubled and redoubled its regulatory restraint, despite statistical evidence that the much anticipated and now confirmed competitive marketplace for local and broadband services has not yet occurred. Despite controversial and aggressive tactics to promote CLEC market entry, which the FCC soon will abandon, the Commission reports that as of December, 2004 CLECs have managed to acquire only a 18.5% share of the switched local exchange telephone marketplace.⁵⁷ The FCC also reported that as of December 2004, cable television companies provided 56.4% of broadband high speed services with telephone companies providing 36.5%.⁵⁸ With rare exception one cable television company and one telephone company offer broadband services in any locality meaning that 92.9% of the primary next generation networks are provided by two largely unregulated operators in any single

⁵⁷ Federal Communications Commission, Federal Communications Commission Releases Data on Local Telephone Competition, (released July 8, 2005); available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0705.pdf. The Commission also reported that only 26% of the local service lines provided by CLECs use self-provisioned equipment instead of resold ILEC lines.

⁵⁸ Federal Communications Commission, *High Speed Services for Internet Access: Status as of December 31, 2004*, (rel. July 7, 2005); available at: http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0705.pdf.

locality.⁵⁹ At some future date wireless satellite and terrestrial operators, as well as power companies may offer a viable competitive alternative, but currently such options, if they exist at all, offer slower speed services at significantly higher rates.

In light of unassailable evidence that limited, instead of robust facilities-based competition currently exists in local exchange and next generation network services, the question remains whether the local telecommunications services marketplace as well as the marketplace for broadband access to the Internet currently operates so competitively as to obviate the need for FCC regulation. Even if we have confidence that such competition now exists, or soon will, can we also conclude that the FCC should continue on its deregulatory glide path?

Roadblocks to Deregulation

Despite a clear predisposition not to regulate information services, including Internet-mediated telephony, the FCC increasingly finds itself unable to achieve this goal. While continuing to avoid classifying Voice over the Internet Protocol (“VoIP”) offerings as telecommunications services, the FCC has decided to impose requirements that information service providers heretofore have never borne. The Commission issued an Order requiring VoIP operators to provide emergency 911 access (“E911”) to subscribers of services that can access the conventional public switched telephone network (“PSTN”).⁶⁰ The Commission requires providers of interconnected VoIP service to provide E911 services to all customers as a standard

⁵⁹ Despite arguing the confiscatory nature of TELRIC pricing and having to provide unbundled network elements, no ILEC sought to tap into such easy profits by offering local exchange services outside the markets where they provide local exchange services.

⁶⁰ IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116, 2005 WL 1323217, 36 Communications Reg. (P&F) 1 (rel. Jun 3, 2005).

feature of the service, rather than as an optional enhancement. Additionally the Commission required VoIP operators providing access to the PSTN to provide E911 from wherever the customer accesses service, whether at home or elsewhere.

The Commission responded to reports that VoIP subscribers could not readily access emergency services and emergency service providers could not readily determine the identity and location of VoIP callers. Because VoIP uses Internet Protocol addresses, instead of telephone numbers, E911 service providers cannot identify VoIP callers without the creation of an up to date data base that translates IP addresses into telephone numbers, or otherwise provides location information. In application the FCC now requires VoIP operators to provide a feature that the Commission will not leave subject to marketplace demand, despite the Commission's information service classification:

The Commission previously has determined that customers today lack any expectation that 911 will function for non-voice services like data services. The record clearly indicates, however, that consumers expect that VoIP services that are interconnected with the PSTN will function in some ways like a 'regular telephone' service. At least regarding the ability to provide access to emergency services by dialing 911, we find these expectations to be reasonable. If a VoIP service subscriber is able to receive calls from other VoIP service users and from telephones connected to the PSTN, and is able to place calls to other VoIP service users and to telephones connected to the PSTN, a customer reasonably could expect to be able to dial 911 using that service to access appropriate emergency services. Thus, we believe that a service that enables a customer to do everything (or nearly everything) the customer could do using an analog telephone, and more, can at least reasonably be expected and required to route 911 calls to the appropriate destination.⁶¹

Mindful of its commitment not to regulate the Internet, the FCC justified the imposition of E-911 access on grounds that public safety concerns transcend the information service/telecommunications regulatory dichotomy:

⁶¹ *Id.* at ¶23 (citations omitted).

Although the Commission is committed to allowing these services to evolve without undue regulation in accord with our nation's policies for Internet services, we are, at the same time, aware of our obligation to promote "safety of life and property" and to "encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure" for public safety.⁶²

The Commission determined that it had "ancillary jurisdiction" to impose E911 access primarily on the broad public interest mandate established in Title I of the Communications Act:

We conclude that we have authority under Title I of the Act to impose E911 requirements on interconnected VoIP providers, and commenters largely agree. In addition, we conclude that we have authority to adopt these rules under our plenary numbering authority pursuant to section 251(e) of the Act. We find that regardless of the regulatory classification, the Commission has ancillary jurisdiction to promote public safety by adopting E911 rules for interconnected VoIP services. This Order, however, in no way prejudices how the Commission might ultimately classify these services. To the extent that the Commission later finds these services to be telecommunications services, the Commission would have additional authority under Title II to adopt these rules.⁶³

In finding Title I jurisdiction, the FCC articulated a nexus between mandating E911 access and effective performance of the Commission's various responsibilities, e.g., promoting public safety.⁶⁴ But in mandating regulatory compliance, the FCC has implicitly acknowledged a market failure, viz., the likelihood that not all VoIP operators would provide E-911 service unless compelled to do so by government.

⁶² *Id.* at ¶4, *citing* See 47 U.S.C. § 151 (2004) and Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106- 81, 113 Stat. 1286, § 2(b) (1999) (911 Act).

⁶³ *Id.* at ¶26 (citations omitted).

⁶⁴ *See Id.* at ¶29. "Our actions today are consistent with, and a necessary extension of, our prior exercises of authority to ensure public safety. Since 1996, the Commission has acted to impose 911/E911 rules on providers of new technologies. Since that time, the Commission has affirmed and expanded on those efforts by exercising jurisdiction over other services to impose 911/E911 requirements, relying primarily on its Title I authority. That exercise of authority has been ratified, not rebuked, by Congress." *Id.* at ¶30 (citations omitted).

Within 120 days of the effective date of the Commission's Order, an interconnected VoIP provider must transmit all 911 calls, as well as a call back number and the caller's "Registered Location" for each call to the Public Safety Agency, designated statewide default answering point, or appropriate local emergency authority that serves the caller's Registered Location and that has been designated as the E-911 coordinator for handling telecommunications carriers' E911 calls under section 64.3001 of the Commission's rules. VoIP operators must route emergency calls to E-911 coordinators using the existing dedicated Wireline E911 Networks and must provide the call numbering information needed to support immediate data base interrogation to determine the location of the emergency caller.

CALEA Enforcement

Responding to a petition from the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Agency, the FCC determined that providers of VoIP services, which provide access to and from the PSTN must comply with court-ordered wiretaps.⁶⁵ The Commission found that as VoIP services provide a competitive alternative to dial up telephone services, already subject to wiretap rules, providers of these new services also should comply with the Communications Assistance for Law Enforcement Act ("CALEA"). CALEA contains a provision that authorizes the Commission to deem an entity a telecommunications carrier if the Commission finds that such service is a replacement for a

⁶⁵ Communications Assistance for Law Enforcement Act and Broadband Access and Services, ET Docket 04-295 , RM-10,865, First Report and Order and Further Notice of Proposed Rulemaking, FCC 05-153 (rel. Sept. 23, 2005); available at: <http://www.fcc.gov/FCC-05-153A1.pdf>. "In this Order, we conclude that the Communications Assistance for Law Enforcement Act (CALEA) applies to facilities-based broadband Internet access providers and providers of interconnected voice over Internet Protocol (VoIP) service." *Id.* at ¶1.

substantial portion of the local telephone exchange.⁶⁶ This means that the FCC can apply regulations on VoIP providers despite a determination by the Commission that such operators do not offer telecommunications services as defined by the Communications Act of 1934, as amended.

Section 102(8)(B)(ii) of CALEA defines a telecommunications carrier as “a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title.”⁶⁷ Using this definition the FCC concluded that facilities-based Internet access providers and VoIP operators providing services accessing the PSTN are subject to CALEA wiretap requirements, even if they do not constitute telecommunications carriers under the Communications Act.

The FCC has conscientiously attempted to insulate the Internet and Internet-carried services from traditional, “legacy” regulation. To ensure that its interpretation of CALEA does not provide a basis for applying other common carrier telecommunications regulations, the Commission specified that the definition of “telecommunications carrier” in CALEA covers a

⁶⁶ “The term ‘telecommunications carrier’--(A) means a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire; and (B) includes--(i) a person or entity engaged in providing commercial mobile service (as defined in section 332(d) of this title); or (ii) a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this subchapter; but (C) does not include-- (i) persons or entities insofar as they are engaged in providing information services; and (ii) any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General.” 47 U.S.C. §1001 (8)(A)-(C).

⁶⁷ 47 U.S.C. §1001(8)(B)(ii)(2005).

broader range of ventures than a similar term used in the Communications Act. The FCC noted that CALEA requirements requiring the Commission to apply a Substantial Replacement Provision (SRP) test, can apply to providers of services that would not fit within the telecommunications services provider classification under the Communications Act. The Commission established a three component SRP test: 1) a finding that the entity engages in providing wire or electronic communication switching or transmission service; 2) a determination that the service provided constitutes a replacement for a substantial portion of what constitutes local telephone exchange service; and 3) that after satisfying the first two components it would serve the public interest to deem the entity's offering as a CALEA-defined telecommunications service. Additionally the FCC determined that it could interpret CALEA and Congressional intent to narrow the scope of CALEA-defined information services so that services meeting the SRP test would constitute a telecommunications service, even though the FCC might otherwise consider them information services.⁶⁸

To provide interconnected VoIP providers a reasonable amount of time to satisfy all applicable CALEA requirements, the Commission established a deadline of 18 months from the effective date of its Order. The Commission also adopted a Further Notice of Proposed Rulemaking that will seek more information about whether certain classes or categories of facilities-based broadband Internet access providers, e.g., small and rural providers and providers

⁶⁸ “An ‘irreconcilable tension’ would occur if the Commission rendered Congress’s deliberate extension of CALEA’s requirements to providers satisfying the SRP insignificant by simply applying its Communications Act interpretation of ‘information services’ to CALEA. Consequently, to resolve that tension in a manner that the Commission determines best reflects Congressional intent under CALEA as well as the text of the statute, a service classified as an ‘information service’ under the Communications Act may not, in all respects, be classified as an ‘information service’ under CALEA.” *Id.* at ¶18.

of broadband networks for educational and research institutions, should qualify for an exemption of the CALEA wiretapping requirements.

The Need for a New Approach

It has become increasingly clear that the FCC must have more options than an either/or designation using only three categories: cable, telecommunications and information services. Using these limited options the FCC has needed to engage in strained interpretation of both its deregulatory and regulatory options. Already the Commission has had to craft a fine distinction between telecommunications as an integral part of an information service and telecommunications as a stand alone end user service. In both types of telecommunications the transmission of analog signals or digital bits operates the same and the differentiation occurs on the basis of whether the end user service includes software or other applications. So currently telecommunications and telecommunications service have different meanings and trigger different regulatory burdens.

Having to accommodate the requirements contained in CALEA has forced the FCC to acknowledge that an information service designation it might make will not necessarily foreclose the imposition of regulations and requirements otherwise applicable only to telecommunications services. Regardless of whether the FCC deems certain types of VoIP telephone calls as information services, in the future the Commission will require E-911 functionality and compliance with wiretap orders. So one government agency's information service classification is another government agency's telecommunications service classification.

The European Alternative

The European Commission and individual European National Regulatory Authorities have recognized that convergence requires a technology neutral approach when seeking to

calibrate when and how to use ex ante, sector specific regulation in lieu of general antitrust enforcement. In 2003 the European Union endorsed a New Electronic Communications Package that applies a unified and harmonized approach to all electronic communications.⁶⁹

With an eye toward phasing out ex ante regulation the new package limits such regulation to a specified set of services dominated by one or more operators:

The Europeans recognized that the bulk of all telecommunications regulation deals, in one way or another, with responses to market power. In particular, they associate the possession of Significant Market Power (SMP) with obligations that could include transparency, non-discrimination, accounting separation, access to and use of specific network facilities (including Unbundled Network Elements [UNEs], wholesale obligations, collocation, and interconnection), price controls and cost accounting, making necessary leased lines available, and carrier selection and pre-selection.⁷⁰

Rather than tie current regulation to “legacy” levels, based on a fixed, and perhaps dated service definitions, or on an unmeasured sense of current or perspective competition, the

⁶⁹ The Framework Directive defines an electronic communications service as “a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks.” Directive 2002/21 of the European Parliament and of the Council of March 7, 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), [2002] O.J. L108/33, Art.2c; available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_108/l_10820020424en00330050.pdf[hereinafter cited as Electronic Communications Framework Directive]. See also Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities [2002] O.J. L108/7; available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_108/l_10820020424en00070020.pdf; Directive 2002/20/EC on the authorisation of electronic communications networks and services [2002] O.J. L108/21; available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_108/l_10820020424en00210032.pdf; Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services [2002] O.J. L108/51; available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_108/l_10820020424en00510077.pdf.

⁷⁰ J. Scott Marcus, *The Potential Relevance to the United States of the European Union’s Newly Adopted Regulatory Framework for Telecommunications*, 2 J. TELECOMM. & HIGH TECH. L. 111, 122-23 (Fall, 2003)[citations omitted][hereinafter cited as Marcus].

European Union applies regulation only for services where existing market power prevents deregulation.⁷¹ The New European Framework provides greater granularity in the examination of services by specifying a series of relevant electronic communications markets. The initial list of services identified as warranting a separate SMP assessment included: connection to and use of the public telephone network at fixed locations, retail and wholesale leased private lines, call origination and termination for both the fixed public telephone network and mobile telephone networks, leased line interconnection including unbundled local loops and international roaming via public mobile telephone networks.⁷²

The European Commission also provided NRAs a set of guidelines, based on sound competition law and economics,⁷³ for assessing whether one or more operators possess significant market power:

If SMP exists, the NRA will impose appropriate obligations from the set noted in the

⁷¹ “There is much to be said for the new EU framework. It attempts to address convergence by using fluid market definitions instead of enshrining technology-based definitions within the law. It thus offers the potential of regulating at a velocity that approaches that of the changes in underlying technology and marketplace.” Marcus at 128.

⁷² See Electronic Communications Framework Directive, Annex I, List of markets to be included in the initial Commission recommendation on relevant product and service markets referred to in Article 15. See also, Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, 2003/311EC, [2003] O.J. L 144/45; available at: http://europa.eu.int/information_society/policy/ecom/doc/todays_framework/interconnection_interoperability/i_11420030508en00450049.pdf.

⁷³ “An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.” *Id.* at Art. 14, pt. 2.

previous paragraph, taking into account the specifics of the particular marketplace in question. These obligations are imposed *ex ante*, based on the presence of SMP - it is not necessary to demonstrate that market power has been abused. Conversely, if the NRA fails to find SMP, then any such obligations that may already be in place must be rolled back.⁷⁴

The European Union also authorizes NRAs to impose obligations of non-discrimination, in relation to interconnection and/or network access. Such obligations must ensure equivalency in terms of what an operator with SMP provides for its own services and what it must offer competitors. One NRA, the United Kingdom's Office of Communications, proposed that the incumbent carrier ensure non-discriminatory access through structural means: a split between British Telecom's network services and other retail services.⁷⁵ Ofcom characterized its structural safeguard proposal as requiring that "BT's own downstream operations use the same products, processes, and prices as those used by their retail rivals, equivalence of input in the economic jargon" and consistent with the EU access Directive.⁷⁶ However Ofcom's initiative proposed something more drastic: "operational separation within BT that would ensure that those responsible for overseeing BT's bottleneck assets had real incentives to wish to serve other operators in practice and on the ground with the same zeal, efficiency and enthusiasm as they served the remainder of BT's downstream activities."⁷⁷ In response British Telecom offered

⁷⁴ Marcus at 123.

⁷⁵ United Kingdom, Office of Communications, Strategic Review Telecommunications Phase 2 consultation document, Telecommunications Statement (undated); available at: http://www.ofcom.org.uk/consult/condocs/telecoms_p2/statement/.

⁷⁶ *Id.* See also United Kingdom, Office of Communications, Telecommunications: A new regulatory approach, powerpoint presentation, (June 23, 2005); available at: http://www.ofcom.org.uk/consult/condocs/telecoms_p2/statement/slides.pdf.

⁷⁷ *Id.*

voluntarily to create a new Access Services Division that would operate as a separate division and would provide unbundled local loops to wholesale customers, a new Equality of Access Board that would have responsibility for ensuring that the company fulfilled its equal access commitments and a commitment by the company to ensure “equivalence of input, ” starting in 2006 and completing by 2010, for competitors who seek resale access to the company’s wholesale lines, unbundled local loops and broadband leased lines.

Unlike the FCC, which has dismissed structural safeguards as an unreasonable impediment on an incumbent carrier’s ability to achieve operating and scale efficiencies, Ofcom in the United Kingdom and recently the Australian government ⁷⁸ have embraced them. ⁷⁹ At the onset of next generation networks, optimized for the delivery of broadband information services, some nations with a sophisticated sense of what kind of telecommunications regulation remains essential, have embraced aggressive remedies to persistent access and interconnection challenges.

⁷⁸ “Australian legislators during the next few weeks will weigh a telecom- restructuring proposal hammered out by the national administration to split national incumbent Telstra into separate wholesale and retail operating units, to divest the government's controlling share of the company and to earmark funds from the sale into investments many believe Telstra would ignore.” Telecom Policy Report, *Telstra Mirrors BT For Retail/Wholesale Split* (Aug. 22, 2005);available at: http://www.findarticles.com/p/articles/mi_m0PJR/is_2005_August_22/ai_n14923443.

⁷⁹ “Absent structural separation, the incentives on firms to discriminate against downstream (or upstream) competitors are significant. NRAs and competition authorities are already faced with a large range of discriminatory behaviour by vertically integrated telecommunications firms including: • outright denial of access to the network; • discriminatory or excessive pricing; • failure to link prices properly to costs; • margin squeezes; • quality differentials or sabotage; • failure to ensure timely disclosure of vital information; [and] • failure to allow equivalent customer experiences.” Martin Cave and Peter Crowther, *Pre-Emptive Competition Policy Meets Regulatory Anti-Trust*, 26 E.C.L.R., No. 9, 481, 485 (2005).

Muddling Through or Achieving a Broadband Mission?

If the FCC has to continue using the cable, information and telecommunications service definitions contained in the '96 Act, the Commission probably will not fare as well with reviewing courts as it did with the Supreme Court in the *Brand X* case. FCC decision making can hardly past muster with reviewing courts with a track record that first regulates, then deregulates a new service, e.g., DSL, or one that deregulates and then partially re-regulates a different new service, e.g., VoIP insofar as compliance with wiretap orders imposed on telecommunications service providers.

Congress can relieve the FCC of having to experience regulatory schizophrenia.

Congress could embrace the European Union model, or it could order structural separation⁸⁰

⁸⁰ Initially the FCC enthusiastically embraced structural separation as an effective way to ensure non-discriminatory treatment between an ILEC on one hand and ILEC affiliates and competitors operating in markets that offer enhancements to basic telecommunications transmission capacity. In the *Second Computer Inquiry*, the FCC required AT&T to provide enhanced services, which have close similarity to information services, only through separate subsidiaries. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), CC Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980), *on reconsideration*, Memorandum Opinion and Order, 84 F.C.C. 2d 50 (1980) and Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C. 2d 512 (1981), *aff'd sub nom.* Computer and Commun. Indus. Ass'n v FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). *see also* Robert M. Frieden, Robert M., The Computer Inquiries: Mapping the Communications/Information Processing Terrain, 33 FED. COMM. L. J., No. 1. pp. 55-115 (1981); Robert M. Frieden, The Third Computer Inquiry: A Deregulatory Dilemma, 38 FED. COMM. L. J., No. 3. pp. 383-410 (1987).

Without any actual measurement of whether structural separation caused ILECs to operate inefficiently or to lose operational synergies the Commission subsequently eliminated structural safeguards. Amendment of Sections 64.702 of the Comm'n's Rules and Regs. (Third Computer Inquiry), Report and Order, 104 FCC 2d 958 (1986), *on Recons.*, 2 FCC Rcd. 3035 (1987), Amendment to Third Computer Inquiry, Report and Order, 2 FCC Rcd. 3072 (1987), Amendment Computer III, Memorandum Opinion and Order on Further Recons., 3 FCC Rcd. 1135 (1988), Amendment Computer III, Memorandum Opinion and Order, 3 FCC Rcd. 1150 (1988), Amendment Computer III, Memorandum Opinion and Second Recons., 4 FCC Rcd. 5927 (1989), *rev'd* California v. FCC, 905 F.2d 1217 (9th Cir. 1990), Computer III Remand Proceedings, Report and Order, 5 FCC Rcd. 7719 (1990), Computer III Remand Proceedings,

between basic bitstream transport and all other enhanced and value adding services as Ofcom sought and British Telecom volunteered to do. In both scenarios the legislature and regulatory agency having responsibility to execute legislative mandate, implicitly recognizes that the information, communications and entertainment marketplace blends telecommunications and information services. However such blending, whether through vertical or horizontal integration, can be decoupled for purposes of determining whether a venture possesses market power and can distort or frustrate competition. Examining convergent services based on layers of functionality, a process endorsed by this author and others,⁸¹ can provide both flexibility and restraint in the decision whether ex ante regulation remains necessary. For example, a facilities-based VoIP service provider would not automatically be condemned to Title II, common carrier regulation based on its provision of basic digital bit transmission lines, unless it actually had current market power in that low layer of a complex, multi-layered array of services that blend software applications with bit transport. Opponents of the layered approach to regulation seem to infer that once deemed a dominant carrier in analog telecommunications transmission, incumbent

BOC Safeguards, Report and Order, 6 FCC Rcd. 7571 (1991), *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993), BOC Safeguards Order vacated in part and remanded, *California v. FCC*, 39 F.3d 919 (9th Cir. 1994), Implementation of Telecommunications Act of 1996, Notice of Proposed Rulemaking, 11 FCC Rcd. 12,513 (1996), Computer III Further Remand Proceedings, Further Notice of Proposed Rulemaking, 13 FCC Rcd. 6040, Computer III Further Remand Proceedings, Report and Order, 14 FCC Rcd. 4289 (1999), Computer III Further Remand Proceedings, 1998 Biennial Regulatory Review, 14 FCC Rcd. 21,628 (1999) [hereinafter Computer III].

See also Michael H. Ryan, *Structural Separation: A Prerequisite for Effective Telecoms Competition*, E.C.L.R. 2003, 24(6), 241-250; David Gabel, *Why is There So Little Competition in the Provision of Local Telecommunications Services?: An Examination of Alternative Approaches to End-User Access*, 2002 L. REV. MICH. ST. U. DET. C.L. 651 (Fall 2002); T. Randolph Beard, George S. Ford and Lawrence J. Spiwak, *Why ADCO? Why Now? An Economic Exploration Into the Future of Industry Structure for the "Last Mile" in Local Telecommunications Markets*, 54 FED. COMM. L.J. 421 (May 2002).

⁸¹ *See supra*, n., 8.

carriers will bear that regulatory legacy in perpetuity. Far from it. If and when true sustainable facilities-based competition occurs in digital bit transmission, then a current assessment of significant market power would free previously dominant carriers of conventional, common carrier regulation. Similarly entrants in new markets such as VoIP, which lease telecommunications, but which generate revenues largely from the applications they apply to leased lines, would qualify for regulatory exemption based on a similar current market dominance test. This exemption from regulation would readily apply to incumbent carriers and new comers.

Relying on current market specific assessments of dominance frees the FCC from having to engage in constant ad hoc determinations of which semantic silo a new service exclusively fits. Because convergent, next generation network services typically will blend voice, data and video functions, the FCC can hardly justify a “supreme” classification to the exclusion of the other two which obviously appear. Referring back to the *Brand X* majority analogy, a pet store quite plausibly can house unregulated vending of leashes and pet accessories, even as the sale of pets and the distribution of medications under the same roof could trigger a different regulatory complexion. Similarly extending Judge Scalia’s analogy a pizzeria might also sell alcoholic beverages, but clearly alcohol-specific regulations applicable to the pizzeria might limit the geographical scope of sales and type of qualifying customer.

In hindsight we may have occasion to recall that the *Brand X* case’s use of warring analogies forced Congress and the FCC to get serious about revamping the nature and type of ongoing regulation in light of convergence and the migration to next generation digital networks. Alternatively the Court’s decision we may recall that the Supreme Court’s decision cleared the way for a market consolidation by two incumbent ventures now largely free of any public

interest regulatory burdens. If the latter scenario plays out both Congress and the FCC will likely face a tougher burden in shoring up universal service funding,⁸² remedying inferior broadband market penetration performance and helping an industry reclaim its global competitive advantage.

⁸² See Rob Frieden, *Killing With Kindness: Fatal Flaws in the \$5.7 Billion Universal Service Funding Mission and What Should be Done to Narrow the Digital Divide*, unpublished manuscript, available at: <http://www.personal.psu.edu/faculty/r/m/rmf5/>.