1-1-2007

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Recommended Citation
Tramanh Phi, Comment, Duopolies, Restrictions, and Content Regulation: How Much Access Are We Really Getting from Broadband Internet Access, 47 Santa Clara L. Rev. 347 (2007).
Available at: http://digitalcommons.law.scu.edu/lawreview/vol47/iss2/3

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DUOPOLIES, RESTRICTIONS, AND CONTENT REGULATION: HOW MUCH ACCESS ARE WE REALLY GETTING FROM BROADBAND INTERNET ACCESS?

Tramanh Phi*

I. INTRODUCTION

Carole Sumler wants her Brand X Internet service, but fears that the Federal Communications Commission (FCC) will take it away.1 Sumler is a loyal customer of Brand X Internet, a small Southern California digital subscriber line (DSL)2 service provider.3 In June of 2005, the United States Supreme Court rejected Brand X's bid to gain access to cable networks' broadband lines.4 In NCTA v. Brand X Internet Services, Brand X unsuccessfully argued that cable companies, like phone companies, should be required to share their lines with third-party broadband providers, such as smaller Internet service provider (ISP) companies like Brand X.5 The Court, however, sided with the FCC, and upheld the

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2. DSL, or digital subscriber lines, provide access to the Internet through traditional copper telephone lines. Heather T. Hendrickson, Comment, Cable Open Access: The FCC Should Establish a National Policy of Staying Out of the Way of Broadband Competition, 8 GEO. MASON L. REV. 749, 753 (2000) (describing DSL services); see also discussion infra Part II.A.3.


5. See id.
cable companies' long-standing practice of excluding most third-party broadband providers from their networks.  

Less than three months after the Brand X Internet Services decision, the FCC released a Report and Order and Notice of Proposed Rulemaking (DSL Order) that reclassified wireline broadband, such as DSL, as an information service provider. Prior to the FCC’s DSL Order, telephone companies were required to offer access to DSL lines to other ISPs at regulated rates. By recategorizing DSL as an information service provider, the FCC effectively relieved the phone companies who own the DSL lines of their obligation to lease their lines to smaller private companies. In the wake of the DSL Order, phone companies were no longer required to lease their DSL lines to third-party competitors such as Brand X. This is when Sumler became most concerned—what would happen to her beloved Brand X if the big phone companies no longer had an obligation to lease their DSL lines to the smaller companies? 

One concern that arose during the Brand X litigation and persists after the FCC’s DSL Order is that if small providers such as Brand X cannot lease broadband lines from cable or phone companies, the costly task of procuring their own lines will push them out of business. The FCC’s claims that its order will promote investment in broadband networks will not convince consumers that life without the small providers is the better choice. Sumler does not look forward to the prospect of switching to a larger broadband ISP, which she believes will not deliver the support and personal attention

6. See id.
9. DSL Order, 20 F.C.C.R. at para. 169; see discussion infra Part II.C.
10. See Bertolucci, supra note 1. Prior to the DSL Order, telephone companies were required to lease access to these services to smaller third-party competitors, pursuant to federal regulations, because they had a monopoly over the transmission facilities for services such as DSL. See Nirali Patel, Comment, FCC Broadband Policy: More Power for the Bell Monopolies, 55 ADMIN. L. REV. 393, 406 (2003). These regulated phone companies were known as “common carriers.” See discussion infra Part II.B.
11. See Bertolucci, supra note 1.
12. See discussion infra Part IV.A.
she receives from Brand X, a service provider that has a mere 350 subscribers.  

This comment will explore the FCC’s recent DSL Order and argue that the DSL Order is inconsistent with the FCC’s own goals and the goals of the Telecommunications Act of 1996 (1996 Act). Part II will discuss the background of broadband Internet access, including the nature of broadband, the evolution of its regulation through case law and legislation, and the ultimate reclassification of DSL by the FCC. Part III will address the problems and inconsistencies posed by the FCC’s DSL Order, while Part IV will analyze the legitimacy of the DSL Order in light of the FCC’s own goals and the goals of the 1996 Act. Finally, Part V proposes instituting forced open access on both cable modem and wireline broadband in order to promote competition and to satisfy the goals of the FCC and Congress.

II. BACKGROUND

A. The Definition of Broadband

1. Broadband as an “Advanced Telecommunication”

“Broadband” has not been defined by either Congress or the FCC in terms of a specific technology. While consumers usually equate broadband with the capability of fast access to information and services over the Internet, such as high-quality voice, data, graphics, and video telecommunications, the FCC refers to broadband service as “advanced telecommunications.”

14. See Bertolucci, supra note 1.
15. See discussion infra Part II.A.
16. See discussion infra Part II.B.
17. See discussion infra Part II.C.
18. See discussion infra Part III.
19. See discussion infra Part IV.
20. See discussion infra Part V.
21. See Patel, supra note 10, at 399.
22. See Hendrickson, supra note 2, at 752.
In the 1996 Act, the phrase "advanced telecommunications" is used to describe services and facilities with an upstream (customer-to-provider) and downstream (provider-to-customer) transmission speed of more than 200 kilobits per second (kbps). The FCC chose this speed as a benchmark because it is fast enough to provide the most popular applications, including web-browsing, at the same speed at which one can flip the pages of a book. The 200 kbps refers to the speed, or bandwidth capabilities within "the last mile," a road analogy the FCC uses to describe the infrastructure of the network.

There are two principle means by which a consumer can receive broadband access: DSL and cable lines. DSL transmits data between the Internet and the end user's computer via the same copper wires owned by local telephone companies, while cable modem services use the same coaxial cable used to transmit television signals owned by cable companies.

2. Division of Network Infrastructure

The FCC divides the telecommunications network infrastructure into four general categories: the backbone, the middle mile, the last mile, and the last 100 feet. The backbone consists of the long haul communications transport facilities that provide long-distance, high-capacity, high-speed transmission paths for transporting massive quantities of data. As the core of the infrastructure, most long haul transport facilities consist of fiber-optic lines buried under the ground or under the sea. Providers of the backbone include long distance companies such as AT&T, Sprint, and Qwest.

24. Id.
25. Id.
26. See id.
27. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1124 (9th Cir. 2003).
28. Id.; see also discussion infra Part II.A.3.
30. Id.
31. Id.
Middle mile facilities, which provide fast, large-capacity connections between long haul facilities and the last mile, are usually constructed with fiber-optic lines, although fixed wireless and satellite links also exist. Many middle mile facilities were originally built by telephone and cable companies for ordinary telecommunications or cable television services. Middle mile facilities, such as local telephone companies, often lease capacity on their networks to non-facilities-based Internet service providers and to high-speed providers. The FCC refers to these local phone companies as Local Exchange Carriers (LECs).

The last mile is of significant importance because it is often the missing link in communities that do not have access to advanced telecommunications capabilities. The last mile connection to the end user can take the form of cable modem service, digital subscriber line service, or another LEC-provided service, terrestrial wireless service, or satellite service.

The final segment of the network infrastructure, the last 100 feet, is the most visible to consumers. The last 100 feet includes the in-house wiring found in a consumer's residence, the wiring in an apartment or office building, the wiring in a local area network, or the wireless links in a local wireless network.

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33. 706 Report II, 15 F.C.C.R. at para. 18. The FCC noted in its 706 Report that AT&T recently upgraded vast amounts of broadband backbone by extending miles of new fiber-optic cable, and Sprint has implemented fiber-optic technology that will increase the transport capacity of its existing network. See 706 Report I, 14 F.C.C.R. at para. 38.


35. A facilities-based ISP operates its own facilities for the switching and/or transmission of telecommunications between exchanges, whereas a non-facilities-based ISP does not own the transmission facilities used to connect the end user to the Internet. See NCTA v. Brand X Internet Servs., 545 U.S. 967, 978 (2005).


37. See 47 U.S.C. § 153(26) (2001) ("The term 'local exchange carrier' means any person that is engaged in the provision of telephone exchange service or exchange access."). LECs are divided into two categories: "incumbent" (ILECs), which are usually the original, monopoly LECs, and "competitive" (CLECs), their newer competitors. See discussion infra Part II.B.2.b.


39. Id. In the FCC's 706 Report, the FCC raised the possibility that the slow deployment of facilities serving the last mile may be causing the lack of Internet access to rural communities. See 706 Report I, 14 F.C.C.R. 2398, para. 66 (Jan. 28, 1999).
network.\textsuperscript{40}

The point of contention lies within the last mile, and more specifically, the ability of competitive service providers to use last mile facilities that are capable of supporting broadband services. Of these competitive services, two major competitors lead the broadband race: DSL and cable.\textsuperscript{41}

3. DSL vs. Cable

"Digital subscriber lines" is a generic name for a host of digital services\textsuperscript{42} provided over traditional copper telephone lines.\textsuperscript{43} DSL has been offered by local telephone carriers since 1996, and as of 2005, represented 37.2\% of the residential broadband market.\textsuperscript{44} To supply broadband via DSL, carriers upgrade the copper wire already in place for telephone services so that the same wire can support high-speed data traffic.\textsuperscript{45}

Cable modem service, with a 60.3\% market share, is the current leader of the broadband race.\textsuperscript{46} "Cable modem technologies rely on the basic network structure used to provide residents with cable television service, but with upgrades to support broadband services"; the upgrades enable cable services to have higher data transmission speeds than DSL services.\textsuperscript{47}

B. History of Regulation

1. Early Categorization of Services

Although both cable modem and DSL provide high-speed Internet access, historically, they were governed under

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{40} 706 Report II, 15 F.C.C.R. at para. 18.
\item \textsuperscript{41} Hendrickson, supra note 2, at 753.
\item \textsuperscript{42} The digital services provided over traditional copper telephone lines include Asymmetric Digital Subscriber Line (ADSL), High Bit Rate Digital Subscriber Line (HDSL), and Single Pair Symmetric Services (SDSL). Id.
\item \textsuperscript{43} Typically, residential customers use ADSL, which allows both traditional voice and high-speed data to travel over the same line. Patel, supra note 10, at 401.
\item \textsuperscript{44} DSL Order, 20 F.C.C.R. 14853, at para. 51 (Aug. 5, 2005).
\item \textsuperscript{45} Patel, supra note 10, at 401.
\item \textsuperscript{46} DSL Order, 20 F.C.C.R. at para. 51.
\item \textsuperscript{47} Patel, supra note 10, at 400. To increase bandwidth and improve reliability, most upgrades use a combination of optical fiber and coaxial cable, which has a higher data transmission capacity than the standard copper phone lines used by DSL. See id.
\end{itemize}
\end{footnotesize}
radically different regulatory schemes. Under the Communications Act of 1934 (1934 Act),\textsuperscript{48} telephone companies fell under the "common carrier"\textsuperscript{49} designation and were regulated under Title II of the Act,\textsuperscript{50} while cable operators were regulated separately under Title VI of the Act.\textsuperscript{51} Thus, the regulation of broadband depended upon the categorization of the type of service offered, whether telephone-based or cable-based. Based on these categories, services that provided virtually the same functions could be regulated by different parts of the 1934 Act. This resulted in great confusion in subsequent attempts to regulate and make sense of the burgeoning telecommunications industry.

2. The Computer Inquiries

In the 1960s, the merging of the computer and communications industries integrated data processing and communications.\textsuperscript{52} This created regulatory headaches for the FCC because of the fundamental differences between the two industries.\textsuperscript{53} Through a series of proceedings called The Computer Inquiries, the FCC sought to separate the regulatory approach of each of these industries.

a. Computer I: Data Processing vs. Communication Services

In Computer I,\textsuperscript{54} the FCC found that data processing, such as calculating numbers in a spreadsheet, was recognized as a highly competitive industry, rendering government regulation was unnecessary.\textsuperscript{55} On the other hand,

\begin{itemize}
  \item \textsuperscript{49} Patel, \textit{supra} note 10, at 402 (defining common carriers as carriers "expected to carry any and all traffic over their networks on a nondiscriminatory basis at uniform, publicly announced rates" (quoting Adam D. Thierer, \textit{Solving the Broadband Paradox, ISSUES IN SCI. & TECH.} (2002))).
  \item \textsuperscript{50} See 47 U.S.C. §§ 201-76 (2000).
  \item \textsuperscript{52} See Patel, \textit{supra} note 10, at 403.
  \item \textsuperscript{53} See id.
  \item \textsuperscript{55} Id. "Data processing" is the use of the computer for operations which include storing, retrieving, sorting, merging and calculating data, according to
communications services, including the transmission of information via e-mail, were viewed as a monopoly requiring regulation by the government. The FCC decided to regulate communications services as common carrier offerings under Title II of the Act, but chose to leave data processing services unregulated. Those services combining both communications and data processing functions, known as "hybrid" services, would be classified on a case-by-case basis.

b. Computer II: Basic Services vs. Enhanced Services

Technological developments made the Computer I categorizations nearly obsolete as it became more difficult to distinguish communications from data processing or computing. In response, the FCC created a framework in Computer II that defined and distinguished "basic services" and "enhanced services." These mutually exclusive categories depended on the function of the process performed. The FCC defined the term "basic service" as "the common carrier offering of transmission capacity for the movement of information," with the archetypal example of basic service being telephone service.

The FCC defined "enhanced services" as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information;
provide the subscriber additional, different or restructured information; or involve subscriber interaction with stored information."65 "Thus, enhanced services combined a basic service, such as telephone service, with an enhancement, such as computer processing or storage service," resulting in applications such as Internet access service, voice messaging, and electronic publishing.66 The significance of the basic-enhanced services distinction in Computer II was that the FCC decided to regulate only basic services.67 The FCC determined that enhanced services were not within the scope of its Title II jurisdiction.68

Under this regime, incumbent local exchange carriers (ILECs), such as common carriers, were subject to substantial federal regulation when providing broadband services.69 ILECs are traditional local telephone companies, which included the Regional Bell Operating Companies (RBOCs).70 Since Bell provided what was believed to be the last remaining naturally monopolistic71 telecommunications service,72 the FCC was concerned that these carriers with local telephone distribution networks could use their control over basic services and engage in anticompetitive behavior.

65. 47 C.F.R § 64.702(a) (2002); see also Computer II, 77 F.C.C.2d at para. 97.
67. See Computer II, 77 F.C.C.2d at paras. 5-7 (concluding that regulation of enhanced services is unnecessary because it is not required by statute, is contrary to public interest, and would not lead to regulatory certainty).
68. See id. at para. 132.
69. See id. (stating that the FCC controls the prices, terms, and conditions offered by ILECs).
70. See PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW 1371 (2d ed. 1999) (defining ILEC as the "[t]erm used to refer to the traditional local telephone companies"). ILECs compete with Competitive Local Exchange Carriers (CLECs). Id. at 1366.
71. The telephone industry is a classic example of a natural monopoly. Adam J. Coates, Comment, The First Amendment, the FCC, and Digital Subscriber Line Service: Will Congress Get it Right This Time?, 5 U. PA. J. CONST. L. 734, 735-36 (2003). A natural monopoly is an industry where the efficient number of participants is one and there are extremely high entry costs, making it difficult and expensive for competitors to enter the market. Id. at 736 n.4. The costs of deploying a local telephone network require laying cable to reach every customer in a community, as well as inventing, building, deploying, operating, and maintaining the system necessary to switch calls between customers. Id.
72. Id. at 740. The Bell monopoly began with Alexander Graham Bell's patents in telephone technology and continued due to Bell's refusal to interconnect its networks with those of its competitors. See id. at 735.
disrupting the development of enhanced services markets. From the time the 1934 Act was passed, Bell was the sole proprietor of a vast network of telephone networks virtually throughout the country; Bell owned, manufactured, or invented nearly every piece of equipment used to operate and administer this massive network. If an ILEC could deny competitors access to basic transmission facilities, this would produce a monopoly by forcing competitive local exchange carriers (CLECs), the local telephone companies who competed against the Bell ILECs, to leave the market because they could not afford to compete.

In order to prevent carriers such as ILECs from leveraging control over basic transmission facilities and dominating the enhanced services market, the FCC required facilities-based common carriers to provide the basic transmission services underlying their enhanced services on a nondiscriminatory basis to other enhanced service providers. The FCC referred to this obligation as an "unbundling requirement" on such carriers.

Per federal regulations, these carriers had to "unbundle" their basic services from their enhanced services; the carriers then had to offer their basic service at the same prices, terms, and conditions, to all enhanced service providers, including their own enhanced services operations. In addition, the FCC imposed a structural

73. See Patel, supra note 10, at 405-06.
74. Coates, supra note 71, at 736.
75. See HUBER, supra note 70, at 1366 (defining a CLEC as a carrier that provides local-exchange service in competition with an incumbent local-exchange carrier).
76. Coates, supra note 71, at 736.
77. Amendment of Sections 64.702 of the Commission's Rules and Regulations (Computer III), 104 F.C.C.2d 958, para. 4 (May 15, 1986).
78. Id. at para. 6.
79. Under "unbundling," ILECs who owned both basic and enhanced services are required to separate and establish separate prices for those components of their transmission services, rather than offering only one bundled price for the total service. By unbundling, the underlying basic component can be sold to the competing CLECs. See Computer II, 77 F.C.C.2d 384, para. 231 (Apr. 7, 1980); see also DSL Order, 20 F.C.C.R. 14853, para. 24 (Aug. 5, 2005).
80. Id. Computer II states: Thus those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant
separation requirement whereby large ILECs were required to provide their enhanced services through corporate affiliates, entirely separate from the entity providing basic services.\(^1\) Accordingly, when an ILEC introduced its own DSL-based information service, it was required to make standalone offerings of its underlying DSL transmission capacity as a common carrier service.\(^2\) CLECs competing with the ILEC were then able to purchase DSL transmission service from the ILEC, and combine it with their own Internet applications and service in order to offer their own Internet access product to end users.\(^3\)

c. Computer III: Continuing Open Access

*Computer III*\(^4\) replaced *Computer II*'s structural separation requirement with a set of nonstructural safeguards designed to give all enhanced service providers nondiscriminatory access to network facilities.\(^5\) These obligations, similar to those already required under *Computer II*, required an RBOC's enhanced services operations to set terms to the basic services it used in offering enhanced services, with these basic services being made available to other enhanced service providers and users under the same terms on an unbundled and functionally equal basis.\(^6\)

3. Telecommunications Act of 1996

The 1996 Act was passed in part to address the changing landscape of communications created by the emergence of new technology such as the Internet, and the deployment of such technology to the public.\(^7\) The FCC maintained the

to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized. Other offerors of enhanced services would likewise be able to use such a carrier's facilities under the same terms and conditions.

\(^1\) *Id.*

\(^2\) *See Computer II, 77 F.C.C.2d at para. 208.*

\(^3\) *John T. Nakahata, Broadband Regulation at the Demise of the 1934 Act: The Challenge of Muddling Through, 12 COMMLAW CONSPECTUS 169, 172 (2004).*

\(^4\) *Id.*

\(^5\) *See Computer III, 104 F.C.C.2d 958, para. 3 (May 15, 1986)*

\(^6\) *See id. at paras. 3-4.*

\(^7\) *Id. at para. 4.*

\(^8\) *See generally Telecommunications Act of 1996, 47 U.S.C. §§ 151, 216, 607-09 (1996).*
distinction between regulated basic services and unregulated enhanced services in the 1996 Act. While the 1996 Act preserves the regulatory scheme created under Computer II, those services previously characterized as basic services and enhanced services were renamed "telecommunications services" and "information services" respectively.

Like basic services, telecommunications services are defined as the provision of pure transmission capability. On the other hand, information services involve the provision of enhanced functionality, such as the manipulation or storage of information. Like enhanced services, information services are almost completely free of common carrier regulation; in contrast, telecommunications services are bound by the common carrier regulations which regulate basic services.

The FCC has consistently characterized the DSL provided by an ILEC or CLEC to an ISP as a telecommunications service. Hence, in regulating DSL as a telecommunications service, the 1996 Act affirmatively required the Bell companies to unbundle the components of their DSL service and lease them to their competitors at government regulated, cost-based rates. In contrast, cable modem Internet access services are characterized as an information service. Thus, while DSL has been largely

89. Id.
91. See id. (noting any deviation from pure transmission transforms the service into an information service).
92. See HUBER, supra note 70, at 983-84 (noting that data services over cable are similarly exempt from common carrier regulation under Title II of the 1934 Act).
94. 47 U.S.C. § 251(c)(3) (2000) (defining the high-frequency portion of local loops, over which DSL service is provided, as an unbundled network element that must be provided to requesting carriers on a nondiscriminatory basis).
95. See Wireline Order, 17 F.C.C.R. at para. 19 (stating that providers of wireline broadband Internet access furnish users with the ability to run a variety of applications consistent with the 1996 Act's definition of information service, the offering of a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information
regulated by the government, cable modem services remain free from such regulation.

Congress, the FCC, and the White House have all expressed the need to keep the government's hands off the Internet and allow markets to determine what shape the Internet will take in the future. The 1996 Act states that its policy is "to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." In an effort to keep the Internet "unfettered," cable companies were not subjected to any congressional requirement of open access to competitors or FCC oversight, despite the fact that cable service is similar to the Bell companies' DSL service.

In part, the 1996 Act was enacted to require the Bell companies to allow competitors to access their monopolistic local markets. This "open access" requirement, which required providers to carry the information of competitors, would create competition in the consumer market, thereby offsetting the natural monopoly inherent in the last mile connection. By giving companies the rights to purchase

via telecommunications" (quoting 47 U.S.C. § 153(20) (2000) (original emphasis removed))).

96. See, e.g., 47 U.S.C. § 230(b) (stating that "it is the policy of the United States ... to promote the continued development of the Internet ... [and] to preserve the vibrant and competitive free market ... unfettered by Federal or State regulation").

97. See, e.g., DSL Order, 20 F.C.C.R. 14853, para. 3 (Aug. 5, 2005) ("[T]he appropriate framework for wireline broadband Internet access service, including its transmission component, is one that is eligible for a lighter regulatory touch.").


99. Coates, supra note 71, at 744.

100. 47 U.S.C. § 230(b).

101. See 47 U.S.C. § 153(10) ("[A] person engaged in ... broadcasting [such as a cable company] shall not ... be deemed a common carrier.").

102. Coates, supra note 71, at 741.

services from a telecommunications provider at wholesale rates and to resell those services to consumers in competition with the original provider, the 1996 Act sought to control monopoly power with market power by imposing open access requirements on DSL. Cable, on the other hand, remained unregulated.

4. Case History

Despite a congressional mandate to deploy advanced communications on a timely basis under the 1996 Act, the FCC did not immediately determine the classification for cable modem service. As a result, several federal courts took the opportunity to regulate national communications policy.

a. AT&T Corp. v. City of Portland

The dispute in AT&T Corp. v. City of Portland arose from the merger of AT&T with Telecommunications, Inc. (TCI). TCI was a cable provider that operated in Portland, Oregon under the city’s local franchising authority. Under the 1996 Act, local governments could regulate cable services for the specific purpose of preserving competition. The extent of this authority was contingent upon whether the service in question could be defined as cable; the 1996 Act, in contrast, explicitly prohibits franchising authorities from regulating telecommunications services.

105. AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000).
106. Id. at 873. “On June 24, 1998, AT&T announced its intent to merge with TCI, under which AT&T would become the parent company of TCI and integrate its telecommunications business with TCI’s cable network, thereby building a facilities-based local residential telecommunications network (including the last mile).” Hendrickson, supra note 2, at 756.
107. See AT&T, 216 F.3d at 875.
108. See 47 U.S.C. § 533(d)(2). The statute states:
Nothing in this section shall be construed to prevent any State or franchising authority from prohibiting the ownership or control of a cable system in a jurisdiction by any person . . . in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the delivery of cable service in such jurisdiction.
Id.
109. See 47 U.S.C. 541(b)(3)(B) (“A franchising authority may not impose any requirement under this title that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.”).
Under the assumption that TCI's cable modem service fell under the category of "cable services," the city of Portland attempted to condition the merger of AT&T with TCI on the provision that AT&T provide open access to other competing ISPs over the broadband cables in Portland. In response, AT&T brought an action seeking a declaration that the condition violated the 1996 Act. AT&T ultimately prevailed, and the franchise agreement transfer condition was nullified, because the Ninth Circuit held that cable modem service was not a "cable service" as defined by statute. Instead, the court held that cable modem service was a hybrid formulation—partly an information service and partly a telecommunications service. Since the 1996 Act prohibited local governments from regulating telecommunications services, Portland's condition on the merger proved to be incompatible. Therefore, AT&T was able to move forward and ignore the city's condition on the merger.

In 2002, however, the FCC sought to correct the Ninth Circuit's categorization of cable modem service, noting that in AT&T Corp., the court made its decision "based on a record that was less than comprehensive." In a Declaratory Ruling, the FCC officially concluded that "cable modem service, as it is currently offered, is properly classified as an interstate information service, not as a cable service, and that there is no separate offering of telecommunications service." In effect, the regulation of cable modem Internet service would fall squarely within the FCC's jurisdiction as an information service, a category which had never been

110. AT&T, 216 F.3d at 875. The franchise agreement between Portland and TCI included language allowing the city to "condition any Transfer upon such conditions, related to the technical, legal and financial qualifications of the prospective party to perform according to the terms of the franchise, as it deems appropriate." Id.
111. Id. at 875-76.
112. See id. at 876-77.
113. See id. at 878.
114. See id. at 879-80.
115. See id.
117. Id. at para. 7.
subject to regulation.\textsuperscript{118}

\textit{b. Brand X Internet Services v. FCC}

Seeking a review of the FCC's Declaratory Ruling, the Ninth Circuit, in \textit{Brand X Internet Services v. FCC}\textsuperscript{119} revisited its previous decision in \textit{AT&T Corp. v. City of Portland}.\textsuperscript{120} In \textit{Brand X}, the Ninth Circuit stated that "[w]e must decide whether our prior interpretation of the Telecommunications Act controls review of the [FCC's] decision to classify Internet service provided by cable companies exclusively as an interstate 'information service.'"\textsuperscript{121}

The appellate court vacated the FCC's finding that cable modem service constituted an information service, citing stare decisis as the basis for its opinion.\textsuperscript{122} By contradicting the FCC and restating that cable modem broadband services were neither exclusively an "information service" nor a "telecommunications service," but rather, a combination of the two, the Ninth Circuit subjected cable companies to open-access rules that governed the telephone industry.\textsuperscript{123}

The FCC and the United States Solicitor General challenged the Ninth Circuit's decision as a usurpation of national communications policy, arguing that the court limited the growth of cable broadband services by imposing burdensome regulations.\textsuperscript{124} Along with the government, the National Cable and Telecommunications Association (NCTA), joined by Charter Communications, Cox Communications, and Time Warner Cable Inc., asked the Supreme Court to review the Ninth Circuit's decision to vacate the FCC's conclusion that broadband over cable was an information service.\textsuperscript{125} Agreeing with the FCC's conclusion that

\begin{thebibliography}{99}
\bibitem{118} See id. at para. 59.
\bibitem{119} Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003).
\bibitem{120} AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000).
\bibitem{121} Brand X Internet Servs., 345 F.3d at 1123.
\bibitem{122} Id. at 1131-32.
\bibitem{123} Id. at 1126 n.11. The practical result was that cable broadband providers would continue to be required to open their lines to competing ISPs.
\end{thebibliography}
broadband services should be minimally regulated, the NCTA contended that if cable modem service, and by extension every other broadband service, was subject to common carrier regulation, this would stifle the much needed investment, innovation, and broadband deployment sought by the U.S. economy.126

c. NCTA v. Brand X Internet Services

The United States Supreme Court granted certiorari in NCTA v. Brand X Internet Services,127 and ultimately overturned the Ninth Circuit’s interpretation of the Communications Act.128 The Court held that the Ninth Circuit should have used the framework adopted in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,129 whereby any ambiguities in a statute may be interpreted and resolved by an agency if that statute is within an agency’s jurisdiction and the agency’s interpretation is reasonable.130 Further, Chevron required federal courts to accept the agency’s construction of the statute, even if the agency’s reading differed from a particular court’s preferred statutory interpretation.131 To that end, the Supreme Court upheld the FCC’s categorization of cable broadband services as an information service, noting that just because a cable company offers consumers “an information service in the form of Internet access . . . via telecommunications . . . it does not inexorably follow as a matter of ordinary language that they also offer consumers the high-speed data transmission (telecommunications) that is an input used to provide this service.”132 Ultimately, the Court concluded that the FCC’s construction was a reasonable policy choice.133

126. See Petition for Writ of Certiorari, supra note 125, at 19.
128. See id. at 980.
129. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Chevron’s interpretation of the term “stationary source,” as it was used in the Clean Air Act Amendments of 1977, was rejected and Chevron’s definition had to defer to the Environmental Protection Agency’s construction of the term because that agency’s interpretation was deemed reasonable. Id.
130. NCTA, 545 U.S. at 981-82.
131. Id. at 980.
132. Id. at 989.
133. Id. at 1000. The Court found that the FCC’s interpretation was
Although the Court recognized that the FCC's treatment of cable modem service was inconsistent with its treatment of DSL service, the Court declined to express any view upon this discrepancy. The Court noted that "the Commission's decision appears to be a first step in an effort to reshape the way the Commission regulates information-service providers." 

C. DSL Order: In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities

The Brand X Court's foreshadowing of the FCC's regulation of DSL and information service providers proved to be true. On September 23, 2005, the FCC released a Report and Order and a Notice of Proposed Rulemaking (DSL Order) which established a new regulatory framework for broadband Internet access services offered by wireline facilities-based providers. Basing its decision on NCTA v. Brand X and the goals set forth in the Wireline Order proceeding, the framework of the order seeks to establish a minimal regulatory environment for wireline broadband Internet access services. In effect, the FCC would no longer categorize wireline broadband, such as DSL, as a regulated telecommunications service. Instead, wireline broadband

reasonable because the FCC's interpretation of the 1996 Act would not allow communications providers to evade common carrier regulation simply by bundling a telecommunications service with an information service, despite the respondents' arguments to the contrary. See id. at 996-97. Further, the Court found that the FCC's description of cable modem service as something more than a transparent transmission path from an end user perspective to be reasonable. See id. at 999.

134. See id. at 999-1000.
135. Id. at 1002.
137. See Wireline Order, 17 F.C.C.R. 3019, paras. 3-6 (Feb. 14, 2002). The goals include: (1) to encourage the ubiquitous availability of broadband to all Americans; (2) to include in the Commission's regulatory framework any and all platforms capable of fusing communications power, computing power, high-bandwidth intensive content, and access to the Internet; (3) that broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market; and (4) to strive to develop an analytical framework that is consistent, to the extent possible, across multiple platforms. Id.
138. See DSL Order, 20 F.C.C.R. at paras. 3-6 (deciding that the appropriate framework for wireline broadband Internet access service is one with "a lighter regulatory touch").
would be categorized as an information service, effectively putting DSL in the same unregulated class as cable modem Internet service.\textsuperscript{139}

Characterizing wireline broadband as an information service effectively left DSL outside of Title II common carrier regulations.\textsuperscript{140} The practical effect is that wireline carriers would no longer be required to unbundle the underlying basic transmission from wireline Internet access service and offer it on a common carrier basis.\textsuperscript{141} In other words, wireline carriers would be able to choose when and how to offer broadband transmission capacity.

The FCC states that its primary purposes in establishing this new framework are: (1) to encourage the ubiquitous availability of broadband to all Americans; (2) to develop a consistent regulatory framework across platforms by regulating like services in a similar functional manner; and (3) to allow facilities-based wireline broadband Internet access service providers to respond to changing marketplace demands effectively and efficiently.\textsuperscript{142}

In its accompanying policy statement,\textsuperscript{143} the FCC adopts several principals “to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers.”\textsuperscript{144} These principles state that consumers are entitled to: (1) access the lawful Internet content of their choice; (2) run applications and use services of their choice; (3) connect their choice of legal devices that do not harm the network; and (4) competition among network providers, application and service providers, and content providers.\textsuperscript{145}

\section*{III. THE LEGAL PROBLEM}

Although it seems that imposing fewer regulations on

\begin{itemize}
\item \textsuperscript{139} See id. at para. 12. The FCC explains that wireline broadband Internet access service is not a telecommunications service because Internet access services “inextricably intertwine transmission with information-processing capabilities.” See id. at para. 9.
\item \textsuperscript{140} See id. at para. 86.
\item \textsuperscript{141} See id.
\item \textsuperscript{142} See id. at para. 1.
\item \textsuperscript{143} Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14986 (Aug. 5, 2005) (policy statement) [hereinafter Policy Statement].
\item \textsuperscript{144} Id. at para. 4.
\item \textsuperscript{145} Id.
\end{itemize}
wireline broadband access providers is a laudable decision by the FCC, it is not without negative consequences. The FCC's DSL Order is inconsistent with the goals stated in the DSL Order, the goals of its Policy Statement, and the goals of the Telecommunications Act. In particular, two issues are compromised: competition and network neutrality.146

IV. ANALYSIS

A. The Missing Competition

The fundamental goal of the 1996 Act is to promote competition in local telecommunications markets.147 The 1996 Act mandates the FCC to encourage development of advanced telecommunications capability, or broadband: "The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market."148

Nevertheless, the effects of the FCC's recent order which classifies wireline broadband Internet access as an information service, and the conclusion that Computer II unbundling obligations no longer apply to ILECs in their provision of broadband services, is inconsistent with the 1996 Act.149 In fact, rather than promoting competition, the proposed rule will have the opposite effect of reducing competition in the wireline broadband market, resulting in a cable-ILEC duopoly in the overall broadband market.150

The DSL Order will reduce competition within the DSL

146. Network neutrality is the idea that the Internet should not favor one application over another. See Tim Wu, Network Neutrality, Broadband Discrimination, 2 J. TELECOMM. & HIGH TECH. L. 141, 145 (2003); infra Part IV.B.

147. See 47 U.S.C. § 230(b)(2) (2000) (stating that the United States' policy seeks to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services"); see also Wireline Order, 17 F.C.C.R. at para. 5 (stating the FCC "will strive, as directed by Congress" to promote the competitive environment currently existing for the Internet).


149. Patel, supra note 10, at 422.

150. See id. at 421.
market. If CLECs no longer have access to cost-based rates to the local networks necessary to provide broadband, ILECs will be left as the only providers of DSL service. Although the FCC states that facilities-based wireline carriers are given the choice to offer broadband Internet access services on either a common carrier or a non-common carrier basis, thus giving DSL providers the option of offering access to their lines, it is more likely that incumbents will deny access to nonaffiliated ISPs in order to protect and increase their own revenue streams. ILECs are not likely to voluntarily open their networks when they are no longer required to by law. As a result, ILECs will favor their own ISPs and smaller ISPs will be pushed out of the market.

In addition, the DSL Order will reduce consumer choice among ISPs because the DSL order will not only reduce competition in the DSL market, but it will also reduce competition among all ISPs. Although DSL providers would face broadband competition from cable providers, in some areas, logistics dictate that cable modem service is the only choice. In many instances, DSL will not be an alternative because it cannot reach the subscriber’s location or because DSL cannot offer the bandwidth necessary for a particular application. Furthermore, cable modem service may not even be an alternative because it is not deployed everywhere. Therefore, while a fully competitive DSL market will impose some market constraints on cable modem service providers, the level of competition will nevertheless be minimal, and in some situations, nonexistent.

The FCC contends that lack of competition is not problematic because “many consumers have a competitive choice for broadband Internet access services today.” The FCC further asserts that although not all American

151. Id.
154. Id.
155. Id. at 422.
156. See Aronowitz, supra note 103, at 903.
158. See id.
159. See id.
households have a choice between cable modem and DSL-based Internet access service today, "a wide variety of competitive and potentially competitive providers and offerings are emerging in the marketplace."\textsuperscript{161} The FCC cites satellite, wireless, and broadband over power lines as emerging forces that are able to compete with DSL and cable.\textsuperscript{162} However, as of December 2004, among those consumers who subscribe to broadband or narrowband Internet access service, 60.3% receive cable modem service and 37.2% receive DSL service.\textsuperscript{163} This means that nearly 98% of Internet users subscribe to either cable modem or DSL. As a result, the time it will take for any of these "competitors" to become viable challengers to cable or DSL is significant. Although potential substitute technologies exist, the question of whether they will be practicable enough in the marketplace to provide a disruptive force against the cable-DSL duopoly remains open.\textsuperscript{164}

Both the 1996 Act\textsuperscript{165} and the FCC's own DSL Order and accompanying policy statement\textsuperscript{166} direct the FCC to preserve the competitive market in which the Internet exists. Nevertheless, the effects of the FCC's ruling that classifies wireline broadband internet access as an information service, and the implication that Computer II unbundling obligations will not apply to ILECs in their provision of broadband services, is inconsistent with these goals because competition among wireline providers, as well as competition between ISPs, will be compromised.

\textbf{B. The Lack of Network Neutrality}

As the number of ISPs in the broadband Internet access service market decreases, the risk that ILECs will engage in discrimination against Internet content increases.\textsuperscript{167} The

\begin{itemize}
\item 161. \textit{Id.} at para. 50.
\item 162. \textit{See id.}
\item 163. \textit{Id.} at para. 51.
\item 164. Nakahata, \textit{supra} note 82, at 178.
\item 165. \textit{See} 47 U.S.C. § 230(b)(2) (2000) (stating that the United States' policy seeks to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services").
\item 166. \textit{See Policy Statement, 20 F.C.C.R. 14986, para. 4} (Aug. 5, 2005) (stating that "consumers are entitled to competition among network providers, application and service providers, and content providers.").
\item 167. Patel, \textit{supra} note 10, at 423.
\end{itemize}
concept that the Internet should not favor one application is known as network neutrality. Those who support network neutrality argue that a communications network, such as the Internet, is a platform for competition among application developers. For example, since e-mail, the Web and streaming applications are battling for the attention and interest of end users, it is important that the platform be neutral to ensure the competition remains merit-based.

Nevertheless, evidence of discrimination has been cited from several sources, including consumer complaints about cable operators who ban classes of applications or equipment like servers, virtual private networks, or wi-fi devices. Although the broadband operators cited legitimate goals, such as price discrimination and bandwidth management, the Coalition of Broadband Users and Innovators has determined that broadband access providers have the ability to discriminate and that it is technically feasible for cable operators to deny access to unaffiliated content.

The consequences of banned content or applications, however, are mitigated when a consumer has several Internet access providers from which to choose. For example, cable operator AT&T Broadband defined home networking as "theft of services," and threatened subscribers who participated in home networking with civil and criminal

168. Wu, supra note 146, at 145.
169. Id. at 145-46.
170. Id. at 146.
171. Id. at 143. Servers are computers that store files at the edge of the network and fulfill requests for those files from other users. Christopher S. Yoo, Network Neutrality and the Economics of Congestion, 94 GEO. L.J. 1847, 1861 (2006). A virtual private network (VPN) provides a private encrypted connection over a public network such as the Internet. See Andrew Beckerman-Rodau, Ethical Risks from the Use of Technology, 31 RUTGERS COMPUTER & TECH. L.J. 1, 28 (2004). Wi-fi devices may be used in a wireless local area network. See Wi-Fi Alliance, Knowledge Center, Glossary, http://www.wi-fi.org/glossary.php (last visited Oct. 15, 2006).
172. See Wu, supra note 146, at 143.
173. The Coalition of Broadband Users and Innovators (CBUI) is an ad hoc group, which includes Microsoft, Yahoo, and the Media Access Product. Riley K. Temple & Mary Greczyn, Recent Developments in Broadband Regulation, in 813 22ND ANNUAL INSTITUTE ON TELECOMMUNICATIONS POLICY & REGULATION 175, 203 (2004).
174. Id.
175. Home networking occurs when a user connects multiple computers or devices within a home or office location with a single DSL account and single IP address. See Wu, supra note 146, at 157 n.45.
In contrast, DSL provider Verizon clearly stated in its service contract that home networking is permissible.\textsuperscript{177} DSL provider Sprint went as far as to say that subscribers “may run home networks, web servers, and ... ‘will have complete unrestricted access to all content available on the Internet.’”\textsuperscript{178} Therefore, a consumer who wishes to connect several of his or her home computers together on a network could choose Sprint as their Internet access provider, as opposed to a different provider who expressly prohibits home networking. Competition between broadband providers serves as an incentive to control content or application discrimination, less a provider lose customers because of their overly stringent service contracts.

Nevertheless, in the absence of rigorous market competition to bar broadband providers from blocking applications or refusing to carry certain kinds of content, regulatory intervention may be necessary.\textsuperscript{179} If wireline broadband providers no longer have to lease their lines to private companies, and the only viable choice for consumers is the duopoly of cable or DSL, broadband providers will lack an incentive \textit{not} to bar applications or content. No longer threatened with loss of customers to a competitor with more lenient subscriber agreements, ILECs may ban whatever they please without fear.

Furthermore, if networks are not neutral to applications and content, this will hinder investment incentives for broadband application development.\textsuperscript{180} Network neutrality is an evolutionary process by which developers of new technologies compete in a survival-of-the-fittest process.\textsuperscript{181} Those applications that gain the most interest and afford the most utility to end users will come out on top.\textsuperscript{182} Nevertheless, a lack of competition that leads to the regulation of applications will hinder such development and investment.

Although the FCC seems to place a premium on the

\begin{itemize}
\item \textsuperscript{176} Id. at 157.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Id. at 157-58.
\item \textsuperscript{179} Temple & Greczyn, \textit{supra} note 173, at 200-01.
\item \textsuperscript{180} Id. at 204.
\item \textsuperscript{181} Wu, \textit{supra} note 146, at 145.
\item \textsuperscript{182} See id. at 145-46.
\end{itemize}
importance of network neutrality for end users, by
deregulating wireline broadband, the FCC diverges from its
own goals. In the FCC's accompanying policy statement for
its recent DSL Order, it maintains that in order "to encourage
broadband deployment and preserve and promote the open
and interconnected nature of the public Internet," consumers
should be entitled to "access the lawful Internet content of
their choice . . . run applications and use services of their
choice, . . . [and] connect their choice of legal devices that do
not harm the network." In accordance with these goals, the
DSL Order refers to its Notice of Proposed Rulemaking for
imposing requirements necessary "to create a broadband
regulatory regime that is technology and competitively
neutral."

However, there is no mention in the DSL Order's Notice
of Proposed Rulemaking, of any steps toward consumer
protection in the realm of content or application regulation.
Although issues of slamming, truth-in-billing, and
network outage reporting are mentioned among the
proposed rulemaking, there is nothing related to creating any
"technology and competitively neutral" broadband regime.
The FCC does briefly comment on content-related
requirements in a subsection of the DSL Order entitled
"Other Proposed Alternative Regulations for Wireline
Broadband Internet Access Services." While the FCC notes
that it recognizes that "actively interfering with consumer
access to any lawful Internet information, products, or
services would be inconsistent with the statutory goals of
encouraging broadband deployment . . . [the FCC does] not
find sufficient evidence in the record . . . that such

185. See id. at paras. 146-59.
186. Slamming is "submitting or executing an unauthorized change in a
subscriber's selection of a provider of telephone exchange service or telephone
toll service." Id. at para. 150.
187. Truth-in-billing rules "ensure that consumers receive accurate,
meaningful information on their telecommunications bills." Id. at para. 152.
188. Network outage reporting requires providers "to notify the Commission
of outages thirty or more minutes that affect a substantial number of customers
or involve major airports, major military installations, key government
facilities, nuclear power plants, or 911 facilities." Id. at para. 154.
189. See id. at para. 4.
190. See DSL Order, 20 F.C.C.R. at paras. 96-97.
interference . . . is currently occurring.”191 The FCC maintains that “should [it] see evidence” of such a violation, “[it] will not hesitate to take action to address that conduct.”192

Since the FCC does not view content and application neutrality as a current threat, it has not taken steps toward regulating network neutrality. Instead, it has adopted a “wait-and-see” approach, whereby it will deal with any violations once they become a “current threat.”193 Nevertheless, this strategy deviates from the FCC’s own policy statement in which three out of its four policy goals relate to content or application neutrality for consumers.194 In addition, with the absence of competition, wireline broadband providers will no longer have an incentive to keep their networks neutral in order to entice customers, further compromising the FCC’s own policy goals.

V. PROPOSAL

The central goal of the Telecommunications Act of 1996 is to promote competition in all telecommunications markets by expanding opportunities for new entrants to provide services to their customers.195 In order to achieve this objective, the FCC must “pave the way” to ensure that all providers have access to alternative wholesale last mile facilities.196 To this end, a reversal in the FCC’s policy is necessary.

A. A Reversal to Ensure Competition

The FCC should alter its interpretation of cable and DSL broadband as information services by defining all broadband transmissions as “telecommunications services,” and not merely “telecommunications,” so that the Computer II unbundling obligations will apply. Although unbundling

191. Id. at para. 96.
192. Id.
193. See id.
196. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499, para. 4 (Aug. 1 1996) (first report and order) (stating that local competition “is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets”).
obligations do not cover information services, the FCC should make an exception in cases where the ISP is the ILEC itself because as long as ILECs possess control over basic transmission facilities, they have the potential to dominate the wireline broadband market and hinder competition.\footnote{197}{Patel, \textit{supra} note 10, at 423.}

The \textit{NCTA} Court originally upheld the FCC's categorization of cable broadband service as an information service based on \textit{Chevron}, the case that held that any ambiguities in a statute may be interpreted and resolved by an agency if the agency's interpretation is reasonable.\footnote{198}{\textit{See NCTA v. Brand X Internet Servs.}, 545 U.S. 967, 980 (2005); \textit{see also} \textit{Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837 (1984).} However, no ambiguity exists because the 1996 Act and \textit{The Computer Inquiries} are clear on their face. Both plainly state that DSL provided by an ILEC or CLEC is a telecommunications service.\footnote{199}{\textit{See} \textit{Wireline Order}, \textit{supra} note 93, at paras. 25-26 (presenting the FCC's "prior conclusion" that DSL transmission constitutes a telecommunications service).} Further, even if the 1996 Act and \textit{The Computer Inquiries} are found to be ambiguous, the FCC has nevertheless acted in an arbitrary and capricious manner. Any agency which interprets acts of Congress in a manner which hinders competition and contrary to that agency's own policy goals has failed to engage in reasoned decision making.

The key to attaining each of the FCC's goals lies in maximizing consumer choice and competition, both of which may be achieved by allowing new market entrants to compete. Defining broadband as a telecommunications service would have this practical effect; through the imposition of forced open access requirements on both wireline broadband lines and cable broadband lines, both providers would have to unbundle and share their infrastructure with competitors. Providing requesting carriers with access to last mile facilities on a wholesale basis is the most effective way to foster competition, create incentives for compliance with the market-opening provisions in the 1996 Act,\footnote{200}{\textit{See} 47 U.S.C. § 230(b)(2) (2000) (stating that the United States' policy seeks to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services").} and meet the goals set forth in the FCC's
DSL Order\textsuperscript{201} and its accompanying policy statement.\textsuperscript{202}

First, increasing competition by allowing more entrants into the last mile would allow more Americans to access broadband. Since 1996, Congress has made it a top priority for the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market."\textsuperscript{203} Without choices beyond the impending cable-DSL duopoly, consumers will be forced to pay non-competitive rates for their broadband access.\textsuperscript{204} Subscribers who cannot pay the cable systems' or ILECs' inflated rates will continue to be excluded from advanced services.\textsuperscript{205} However, by requiring minimum open access requirements for both wireline and cable systems, consumers will have more choices with more competitive rates.\textsuperscript{206}

Second, a "consistent regulatory framework across platforms,"\textsuperscript{207} in concert with a primary goal\textsuperscript{208} of the DSL Order, can be achieved if both cable and ILECs are subject to forced open access requirements. Although the FCC maintains that consistency is realized because neither cable nor DSL is required to provide open access, the FCC's interpretation of wireline service as an information service merits no deference because the FCC's line of reasoning is arbitrary and capricious. In application, regulatory parity is not truly attained. Under the DSL Order, broadband

\textsuperscript{201} See DSL Order, 20 F.C.C.R. 14853, para. 1 (Aug. 5, 2005) (stating that the FCC's primary purposes in establishing the DSL Order are: (1) to encourage the ubiquitous availability of broadband to all Americans; (2) to develop a consistent regulatory framework across platforms by regulating like services in a similar functional manner; and (3) to allow facilities-based wireline broadband Internet access service providers to respond to changing marketplace demands effectively and efficiently).

\textsuperscript{202} See Policy Statement, 20 F.C.C.R. 14986, para. 4 (Aug. 5, 2005) (stating that consumers are entitled to: (1) access the lawful Internet content of their choice; (2) run applications and use services of their choice; (3) connect their choice of legal devices that do not harm the network; and (4) competition among network providers, application and service providers, and content providers).


\textsuperscript{204} See Policy Statement, 20 F.C.C.R. at para. 4.

\textsuperscript{205} See id.

\textsuperscript{206} See Augustino, supra note 157, at 666.

\textsuperscript{207} DSL Order, 20 F.C.C.R. 14853, para. 1 (Aug. 5, 2005).

\textsuperscript{208} See supra text accompanying note 203.
providers may nevertheless choose to offer the transmission component of broadband Internet access service as a common carrier service if they so choose.\textsuperscript{209} Therefore, no consistent regulatory framework across all platforms is achieved at all if providers are given this choice. Under the current regime, the systems are free to act as duopolists, maximizing their revenues at the expense of consumers.\textsuperscript{210} "By contrast, a system that subjects both wires to open access requirements would ensure that both ILECs and incumbent cable systems are driven primarily by market pressures."\textsuperscript{211}

Further, increasing competition through forced open access would spur investment in broadband capabilities, consistent with the third goal of the FCC's DSL Order.\textsuperscript{212} If both wireline and cable systems are forced to open their lines to smaller ISPs, there will be more choices available for consumers. Threatened with losing traffic to other broadband networks, each competing broadband service provider will face market pressures to develop new and innovative services.\textsuperscript{213} "In addition, the increased competition along the last mile will most likely lead to greater innovation due to a need to offer better technologies to increase customer satisfaction."\textsuperscript{214}

In contrast, left under the current regime, duopoly competition would not be sufficient to spur investment. In a market dominated by a duopoly, entry by competing service providers will be more difficult and the development of technologies and service offerings will be impeded.\textsuperscript{215} In the absence of competition from multiple competitors, cable and DSL will have no incentive to make new and better systems since there would no longer be a threat of being ousted by an innovative competitor. Instead, operators will become complacent and deviate from innovative decisions.\textsuperscript{216}

The FCC's current wait-and-see attitude will cause irreparable harm because the lack of open access will

\textsuperscript{209} See DSL Order, 20 F.C.C.R. at para. 89.
\textsuperscript{210} See id.
\textsuperscript{211} Augustino, supra note 157, at 665.
\textsuperscript{212} See DSL Order, 20 F.C.C.R. at para. 1.
\textsuperscript{213} See Aronowitz, supra note 103, at 905.
\textsuperscript{214} Myles Roberts, Note, Opening the Last Mile to Competition, 4 VA. SPORTS & ENT. L.J. 309, 339-40 (2005).
\textsuperscript{215} Augustino, supra note 157, at 670.
\textsuperscript{216} Hendrickson, supra note 2, at 774.
eradicate the smaller competitive ISPs. Any later efforts toward re-regulation will fail to create any viable competition because of the enormous advantage cable and DSL will build by that time through their duopoly. Therefore, the FCC should adopt minimum open access requirements immediately. Consumers want their broadband services now, and if they have no choice among providers, many will pay the inflated rates demanded by the cable-DSL duopoly.217 The longer the FCC waits, the more money providers will be able to extract from consumers through non-competitive rates.218

B. A Reversal to Achieve Network Neutrality

Forced open access will also serve as a means of achieving network neutrality, which would accomplish the FCC's policy goal of ensuring consumers the right to run the applications and services of their choice.219 Open access would prevent broadband operators from bundling various broadband services together, such as Internet service with cable service.220 If broadband providers are required to unbundle their services, customers who have a pre-existing cable provider for their television will not be required to use that same provider for Internet access, giving the customer more choices for their services.

By requiring broadband operators to lease their lines to smaller ISPs, consumers will have more options available for ISP choices. When consumers have more choices, broadband providers will face market pressure to keep their networks neutral in order to appeal to current and prospective customers. In the absence of such competition, ISPs will have no incentive to refrain from banning content or applications, which would directly conflict with the FCC's policy objectives of allowing consumers to access the content and run the

217. See Augustino, supra note 157, at 666.
218. See id.
219. See Policy Statement, 20 F.C.C.R. 14986, para. 4 (Aug. 5, 2005) (stating that consumers are entitled to: (1) access the lawful Internet content of their choice; (2) run applications and use services of their choice; (3) connect their choice of legal devices that do not harm the network; and (4) competition among network providers, application and service providers, and content providers).
220. See Wu, supra note 146, at 147.
applications of their choice.\textsuperscript{221}

VI. CONCLUSION

The FCC's classification of wireline broadband does not merit deference because it was determined in an arbitrary and capricious manner. The DSL Order's attempt to accelerate broadband deployment by providing ILECs with regulatory parity will instead reduce competition in both the DSL market and the broadband ISP market, as well as hinder network neutrality. "Competition cannot thrive along the last mile until competitive service providers have equal access to last mile facilities. . . ."\textsuperscript{222} The only way to offer such access on a non-discriminatory basis to all service providers is for the government to immediately impose a forced open access scheme.\textsuperscript{223} In doing so, broadband can be made available on a wholesale basis, thereby satisfying the FCC's objectives through maximization of competition, consumer choice, and neutral access.

\textsuperscript{221} Id.
\textsuperscript{222} Roberts, \textit{supra} note 214, at 340.
\textsuperscript{223} Id.