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# Reclassifying Broadband Internet Access: Who Cares What Congress Wants Anyway?

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## NOTE

### RECLASSIFYING BROADBAND INTERNET ACCESS: WHO CARES WHAT CONGRESS WANTS ANYWAY?

*Jeremy D. Lemon*<sup>†</sup>

#### I. INTRODUCTION

The Internet is the single greatest communication invention of our time.<sup>1</sup> It allows instantaneous communication through a broad array of networks all over the world, providing an immense amount of information at the users' fingertips. After the first commercial web browser became available to the consumer market in 1993, the Internet, in a few short years, revolutionized modern day communication.<sup>2</sup> It drastically changed mankind's methods of communication so much that it makes one shudder to imagine a world without the Internet. Our dependence on the Internet is ever-increasing as the commercial, educational, and social benefits received from the Internet are recognized.<sup>3</sup> Companies rely on Internet websites to sell their products, and many teachers now post homework assignments online for their students.<sup>4</sup> In fact, students regularly consult Internet websites to access information necessary for school projects, papers, and assignments, as well as for entertainment purposes. Socially, many websites such as Facebook, Myspace, and Twitter allow users to post a personal profile to establish and maintain consistent contact with other users all across the world. Instant messaging capabilities allow users to instantaneously communicate by typing messages to another user.<sup>5</sup> Also, instant communication software—such as Skype—allows users to video chat through the Internet, and websites such as YouTube allow users to post

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1. Jason Oxman, *The FCC and the Unregulation of the Internet 4* (FCC, Working Paper No. 31, 1999), available at [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp31.pdf](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf).

2. *Id.*

3. *Id.*

4. See BLACKBOARD, <http://www.blackboard.com> (last visited Sept. 25, 2011).

5. See AOL, <http://www.aim.com> (last visited Sept. 25, 2011).

videos to provide entertainment and education.<sup>6</sup> In short, the Internet has made available a vast new world of endless information through instantaneous communication.

The success and innovation of the Internet are often attributed to the “market forces, investment, and competition that have driven its growth.”<sup>7</sup> These three components are made possible by the openness that has defined the Internet throughout its development.<sup>8</sup> Congress and the Federal Communications Commission (FCC) preserved the Internet’s openness through their policy of generally not regulating Internet access.<sup>9</sup> Even the FCC’s chairman recognized that this was “the best decision [the] government ever made with respect to the Internet.”<sup>10</sup> This policy of Internet openness has led to great innovation and relatively inexpensive access to the Internet.<sup>11</sup>

Despite the benefits and success of non-regulatory policies, the FCC recently proposed a new regulatory scheme for the Internet after having its jurisdiction challenged in court.<sup>12</sup> In April 2010, in *Comcast Corp. v. FCC*, the D.C. Court of Appeals confused the FCC as to the FCC’s jurisdictional reach delegated by Congress.<sup>13</sup> In the aftermath of this case, the FCC proposed subjecting broadband Internet access to mandatory and broad regulation by reclassifying Internet access from an information service to a telecommunications service.<sup>14</sup>

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6. See SKYPE, <http://www.skype.com> (last visited Sept. 25, 2011); YOUTUBE, <http://www.youtube.com> (last visited Sept. 25, 2011).

7. Oxman, *supra* note 1, at 5.

8. *Id.*

9. See Telecommunications Act of 1996 § 509, 47 U.S.C. § 230 (2006); *In re* Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14,986 (2005) [hereinafter *Policy Statement*].

10. *Comments of AT&T, Inc. to FCC*, ATT.COM 1 (Jan. 14, 2010), [http://www.att.com/Common/about\\_us/public\\_policy/AT&TNet\\_Neutrality\\_Comments1\\_14\\_09.pdf](http://www.att.com/Common/about_us/public_policy/AT&TNet_Neutrality_Comments1_14_09.pdf).

11. Oxman, *supra* note 1, at 5.

12. *In re* Framework for Broadband Internet Service, 75 Fed. Reg. 36071-01 para. 1-2 (June 24, 2010) [hereinafter *Notice of Inquiry*].

13. *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (holding that the FCC “failed to tie its assertion of ancillary authority over Comcast’s Internet service to any ‘statutorily mandated responsibility’”).

14. See discussion *infra* Part II.

In the Communications Act of 1934 (“Communications Act”)<sup>15</sup> and the Telecommunications Act of 1996 (“Telecommunications Act”),<sup>16</sup> Congress delegated to the FCC the regulatory framework to impose regulations on different types of communications.<sup>17</sup> This regulatory framework is quite extensive and far-reaching and to this point has only been minimally applied to the Internet. This Note proposes that subjecting broadband Internet access<sup>18</sup> to further regulations under Title II of the Communications Act of 1934 violates the FCC’s jurisdictional reach prescribed by Congress.<sup>19</sup> Section II reviews the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and provides a thorough discussion of the regulatory framework mandated by Congress, as well as the historical underpinnings of the framework. Section III addresses *Comcast Corp. v. FCC*, the controlling case that created uncertainty regarding the FCC’s jurisdiction over the Internet. Section III also explains the measures proposed by the FCC to resolve the jurisdictional issue and the Administrative Procedure Act’s process for holding agency actions adverse to Congress’s delegated authority. Section IV argues that subjecting broadband Internet access providers or any component of a provider’s service to regulation under Title II of the Communications Act violates the text and congressional intent of the Act as amended.

## II. BACKGROUND

### A. Current Classification Framework of Communications

Through the Communications Act of 1934, Congress established the FCC “for the purpose of regulating interstate and foreign commerce in communication by wire and radio” to make “Nation-wide, and world-wide

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15. Communications Act of 1934, 47 U.S.C. § 151 (2006).

16. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

17. See generally 47 U.S.C. §§ 151-614.

18. Broadband Internet access refers “to the bundle of services that facilities-based providers sell to end users in the retail market. This bundle allows end users to connect to the Internet, and often includes other services such as e-mail and online storage.” *Notice of Inquiry*, *supra* note 12, at 1 n.1.

19. This Note does not address every facet of the Internet and all its capabilities. Instead, this Note addresses whether the FCC may regulate broadband Internet access. The term “Internet service providers” (ISPs) may be used interchangeably with “broadband Internet access providers.”

wire and radio communication service”<sup>20</sup> available to everyone in the United States. When the Communications Act took force, the only communications that the FCC was empowered to regulate were telecommunications and radio broadcasts.<sup>21</sup>

As technology progressed, updates to this area of the law became necessary.<sup>22</sup> Congress supplemented the Communications Act by implementing the Telecommunications Act, which was enacted “for the express purposes of promoting competition, reducing regulation, and encouraging the rapid deployment of new telecommunications technologies.”<sup>23</sup> In the Telecommunications Act, Congress expressed its policy concerning the Internet as a desire “to promote the continued development of the Internet”<sup>24</sup> and “to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”<sup>25</sup> In 2005, the FCC declared its own policy regarding the Internet as the desire to offer “guidance and insight into [the FCC’s] approach to the Internet and broadband that is consistent with these Congressional [sic] directives.”<sup>26</sup> In this official Policy Statement, the FCC adopted certain principles “[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet . . . .”<sup>27</sup>

In the Telecommunications Act, Congress provided for two separate categories of regulation: “telecommunications carriers and information service providers.”<sup>28</sup> This distinction is crucial because “telecommunications carriers” are subject to broad regulation as common carriers under Title II of the Act,<sup>29</sup> but “information service providers” are

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20. 47 U.S.C. § 151.

21. See MAX D. PAGLIN, A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 3-5 (1989).

22. SHARON K. BLACK, TELECOMMUNICATIONS LAW IN THE INTERNET AGE 1-9 (2002).

23. *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14,853, 14,856 n.8 (2005) (citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.)) [hereinafter *Report and Order*].

24. Telecommunications Act of 1996 § 509, 47 U.S.C. § 230(b)(1).

25. 47 U.S.C. § 230(b)(2).

26. *Policy Statement*, *supra* note 9, at 14,987 para. 3.

27. *Id.*

28. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 975 (2005).

29. 47 U.S.C. § 153(44).

not common carriers and are regulated with only a light touch under Title I.<sup>30</sup>

### 1. Telecommunications Carriers

A telecommunications carrier is “any provider of telecommunications services,”<sup>31</sup> which is defined as “the offering of telecommunications for a fee directly to the public.”<sup>32</sup> Telecommunications itself is 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.”<sup>33</sup> Under the Telecommunications Act, telecommunications carriers are classified as common carriers,<sup>34</sup> which are subject to broad regulation under Title II of the Telecommunications Act.<sup>35</sup> Telecommunications historically encompassed telephone, telegraph, and cable services.<sup>36</sup> Under Title II, common carriers must charge just and reasonable rates, have nondiscriminatory policies, defer to hearings concerning alleged lawlessness, and file certain contracts with the FCC.<sup>37</sup> Such regulations are mandatory, but the FCC must forbear from regulating if “the public interest requires it.”<sup>38</sup>

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30. *Brand X*, 545 U.S. at 976.

31. 47 U.S.C. § 153(44).

32. 47 U.S.C. § 153(46).

33. 47 U.S.C. § 153(43). For this definition, think of a telephone. The telephone transports a message to a specific point of the caller’s choosing, while the content and form of the message do not change. For example, the caller speaks into the telephone, and the receiver is able to hear the speaker’s communication because the form and content of the communication are the same as when sent by the speaker.

34. 47 U.S.C. § 153(10). This section defines a “common carrier” or “carrier” as any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

*Id.*

35. *Brand X*, 545 U.S. at 976; *see also* Telecommunications Act of 1996 § 3, 47 U.S.C. § 153(44) (2006); Communications Act of 1934 § 201, 47 U.S.C. § 201 (2006).

36. *See* PAGLIN, *supra* note 21, at 27-30, 30 n.40.

37. *See* 47 U.S.C. §§ 201-276.

38. *Brand X*, 545 U.S. at 976.

## 2. Information Services

Information services are not subject to common carrier regulation under Title II as common carriers; instead, information services are subject to the FCC's ancillary jurisdiction found in Title I.<sup>39</sup> Section 4(i) in Title I of the Communications Act provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."<sup>40</sup> Traditionally, this ancillary jurisdiction vests the FCC with power to lightly regulate information services to the extent that the FCC acts pursuant to an authority-granting provision under Title I, and that the regulation is "reasonably ancillary to the [FCC's] effective performance of its statutorily mandated responsibilities."<sup>41</sup> This provision was the issue at the center of *Comcast Corp. v. FCC*,<sup>42</sup> discussed in detail in Part IIIA, *infra*.

The FCC does wield some regulatory authority over information services, which is defined by Congress in the Telecommunications Act.<sup>43</sup> According to the Telecommunications Act, an information service is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"<sup>44</sup> This definition focuses primarily on the capacity or ability to process information, as opposed to the actual means of merely transporting the information.<sup>45</sup> An information service processes information and may use a telecommunication's means to actually deliver the information to the user. An information service is still properly defined as an information service, even if it has an integrated telecommunications component.<sup>46</sup>

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39. *Id.*

40. 47 U.S.C. § 154(i).

41. See *Comcast Corp. v. FCC*, 600 F.3d 642, 644-46 (D.C. Cir. 2010).

42. *Id.* at 642.

43. *Brand X*, 545 U.S. at 975-76.

44. Telecommunications Act of 1996 § 3, 47 U.S.C. § 153(20) (2006).

45. *Id.* The *means* of transporting information, on the other hand, is the primary focus of the definition of telecommunications: "telecommunications" means 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).

46. *In re Fed.-State Joint Bd. on Universal Serv.*, 13 FCC Rcd. 11,501, 11,539 para. 80 (1998) (report to Congress) [hereinafter *Universal Service Report*].

*B. The Historical Origins of the Classification Framework*

This dichotomy<sup>47</sup> between telecommunications carriers and information services originated in the 1960s and continued to develop through the mid-1980s in the *Computer Inquiry Proceedings*.<sup>48</sup> These proceedings constitute three different sets of FCC regulations and declarations: *Computer I*, *II*, and *III*.<sup>49</sup>

In 1970, the FCC issued *Computer I* to address company's processing and storing public data.<sup>50</sup> In 1970, data processing meant the "use of a computer for the processing of information as distinguished from circuit or message-switching."<sup>51</sup> To promote innovation and competition in the data processing market, the FCC decided not to claim broad regulatory authority over data processing services, thereby treating them differently than other regulated communications services.<sup>52</sup> Instead of imposing broad regulation over data processing, the FCC determined that it would make the necessary classification on a case-by-case basis for those services that combined communications and data processing functions.<sup>53</sup> While implementing this regulation, however, the FCC realized that a case-by-case determination would simply not suffice in light of new technological advances.<sup>54</sup>

In response to the problems arising under *Computer I*, the FCC issued *Computer II* in 1980.<sup>55</sup> In *Computer II*, the FCC distinguished between "basic services" and "enhanced services."<sup>56</sup> It defined basic service as the offering of "a pure transmission capability over a communications path that

47. *Id.* at 11,520 para. 39. This classification system is properly referred to as a dichotomy because of Congress's desire that the categories be mutually exclusive as discussed in Part IV *infra*.

48. *Brand X*, 545 U.S. at 976; *accord Report and Order*, *supra* note 23, at 14,866 para. 21.

49. *In re* Regulatory and Policy Problems Presented by the Interdependence of Computer and Comm'n Servs. and Facilities, 28 F.C.C. 2d 291 (1970) [hereinafter *Computer I*]; *In re* Amendment of Section 64.702 of the Comm'n's Rule and Regulations, 77 F.C.C. 2d 384 (1980) [hereinafter *Computer II*]; *In re* Amendment of Sections 64.702 of the Comm'n's Rules and Regulations (Third Computer Inquiry), 104 F.C.C. 2d 958 (1986) [hereinafter *Computer III*].

50. *Report and Order*, *supra* note 23, at 14,867 para. 22.

51. *Id.* at 14,867 n.55 (quoting *Computer I*, *supra* note 49, at 295 para. 15).

52. *Id.* at 14,867 para. 22.

53. *Id.*

54. *Id.* at 14,867 para. 23.

55. *Computer II*, *supra* note 49.

56. *Report and Order*, *supra* note 23, at 14,867 para. 23 (citing *Computer II*, *supra* note 49, at 435 para. 132).

is virtually transparent in terms of its interactions with customer supplied information.”<sup>57</sup> On the other hand, it characterized enhanced service as “any offering over the telecommunications network which is more than a basic transmission service.”<sup>58</sup> In this ruling, the FCC subjected basic services to regulation as a common carrier under Title II of the Communications Act.<sup>59</sup> *Computer II* did not treat enhanced services as common carriers; thus, enhanced services were not subject to broad regulation under Title II, but were only subject to the light regulatory touch of the FCC’s ancillary jurisdiction under Title I.<sup>60</sup> The FCC believed this approach to be appropriate because heavy common carrier regulation under Title II would impede further innovation and betray the congressional policy of the Communications Act.<sup>61</sup> The FCC declared that even though enhanced service has a telecommunications component, the primary purpose of such service is data processing, which has never been regulated under Title II.<sup>62</sup> Furthermore, the FCC believed that not subjecting enhanced service to common carrier regulation under Title II was consistent with Congress’s statutory objectives of promoting nation-wide communications service.<sup>63</sup> In this proceeding, however, the FCC did require enhanced services that owned their own transmission facilities to lease their local transmission lines to other enhanced services on a common carrier basis at the same prices, terms, and conditions.<sup>64</sup> This requirement has never applied to enhanced services that did not own their own transmission lines, and the requirement did not have an effect on the services offered to the public.<sup>65</sup> In *Computer III*, the FCC continued to distinguish basic services from enhanced services under the same basic framework.<sup>66</sup>

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57. *Computer II*, *supra* note 49, at 420 para. 96.

58. *Id.* at 420 para. 97.

59. *Id.* at 419 para. 92.

60. *Id.* at 435 para. 132.

61. *Id.* at 434 para. 129.

62. *Id.* at 435 para. 132.

63. *Id.*

64. *Id.* at 474 para. 231.

65. Letter from Robert M. McDowell, Comm’r, FCC, to Henry A. Waxman, Representative, United States House of Representatives 1 (May 5, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-297934A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297934A1.pdf).

66. *Report and Order*, *supra* note 23, at 14,869 para. 26.

When Congress enacted the Telecommunications Act of 1996, it maintained and integrated the same basic dichotomy.<sup>67</sup> Thus, basic services—like telecommunications services—are regulated as common carriers, whereas enhanced services—like information services—are regulated under the FCC’s ancillary jurisdiction in Title I.<sup>68</sup>

### C. Classification of Internet Access as an Information Service

Before Internet access services can be properly classified, it is important to understand how the Internet is accessed. There are two ways to access the Internet: the traditional dial-up method and broadband Internet service.<sup>69</sup> The dial-up method, which is very slow, uses local telephone companies’ facilities to make “calls with computer modems through the telephone wires.”<sup>70</sup> Broadband Internet service, commonly referred to as high-speed Internet, is the most common mode of Internet access today.<sup>71</sup> Broadband Internet service comes in a variety of ways: cable modem service that uses cable lines owned by the cable companies to transmit data between the Internet and users, digital subscriber line (DSL) that uses telephone lines owned by local telephone companies,<sup>72</sup> broadband over power lines,<sup>73</sup> and wireless broadband.<sup>74</sup>

There are two components of broadband Internet access: a telecommunications component and an information service component.<sup>75</sup> To determine how the Internet should be classified for regulatory purposes, the FCC examined the Telecommunications Act and considered Congress’s intent surrounding the Act, the legislative history of the Act, and the text of the Act itself.<sup>76</sup> With this background in mind, in 1998, the FCC declared in its *Universal Service Report*<sup>77</sup> that Internet access services were properly

67. *Id.* at 14,871 para. 29.

68. *Id.*

69. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 974-75 (2005).

70. *Id.*

71. *See id.* at 967.

72. *Id.*

73. Letter from Robert M. McDowell to Henry A. Waxman, *supra* note 65, at 3.

74. *Id.*

75. *Brand X*, 545 U.S. at 978-80.

76. *Id.* at 978-79; *see also Universal Service Report*, *supra* note 46, at 11,539-40 para. 80.

77. The *Universal Service Report* was a report to Congress by the FCC: “On November 26, 1997, in a recent Appropriations Act, Congress directed the Commission to report to

classified as information services, and should therefore be governed under Title I of the Act.<sup>78</sup> By evaluating the legislative history of the Act, the FCC concluded that Congress intended to keep the *Computer II* framework and to keep the Internet generally unregulated, but not under Title II.<sup>79</sup> Moreover, the FCC determined that it was Congress's intent to make the

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Congress on the Commission's implementation of certain provisions of the Telecommunications Act of 1996 regarding the universal service system." *Universal Service Report*, *supra* note 46, at 11,502-03 para. 1. This report states that

the Appropriations Act requires the Commission to submit a report to Congress . . . providing: a detailed description of the extent to which the Commission's interpretations . . . are consistent with the plain language of the Communications Act of 1934 . . . as amended by the Telecommunications Act of 1996, and shall include a review of—(1) the definitions of "information service" . . . "telecommunications service" . . . and the impact of the Commission's interpretation of those definitions on the current and future provision of universal service to consumers in all areas of the Nation . . .

*Id.* at 11,502 n.1.

78. *Id.* at 11,527 para. 52.

79. *Id.* at 11,524 para. 45 (quoting Letter from Senator McCain at 1) ("Senator McCain urges that Congress [never] intended to subject information services providers to the current regulatory scheme applicable to common carriers . . ."). Proponents of broadband Internet access reclassification

claim that, until 2005, Internet access services had always been regulated as Title II telecommunications services as a result of the Commission's *Computer Inquiry* rules. That view illogically conflates two distinct issues: the threshold classification of a retail communications service as either an "information service" or a "telecommunications service," and the regulatory consequences that the legacy *Computer Inquiry* rules attached to services classified as "information services." Those rules, which applied only to wireline common carriers (and not cable modem service providers or wireless broadband providers), did not affect the classification of *retail* Internet access service as an information service. Instead, those rules required carriers offering Internet access services to *also separately offer* the transmission component of their Internet access services as a *wholesale* telecommunications service pursuant to tariff. . . . And while the *Computer Inquiry* rules may have served the Commission's policy goals in the narrowband, circuit-switched "one-wire world" for which they were initially created 40 years ago, they would be a serious impediment to broadband investment and innovation in today's multi-platform broadband IP environment, which is why the Commission has categorically rejected applying those rules to cable, wireline and wireless broadband providers.

Letter to Julius Genachowski, Chairman, FCC, 3-4 n.11 (Feb. 22, 2010), [http://netcompetition.org/Julius\\_Genachowski-Letter.pdf](http://netcompetition.org/Julius_Genachowski-Letter.pdf).

classifications mutually exclusive.<sup>80</sup> Therefore, a communication that is part information service but uses a telecommunications component should be regulated as a whole in one category, not split and regulated under both categories.<sup>81</sup>

Considering the text of the Act itself, the FCC concluded that the Internet does employ a telecommunications component, simply because it is necessary for an Internet access service to transport data between computers to provide access to the Internet.<sup>82</sup> The Internet, however, is classified as an information service because it “offers end users information service capabilities inextricably intertwined with data transport.”<sup>83</sup> In other words, although the Internet uses telecommunications to transport the information, Internet access is considered an information service because consumers use the telecommunications component solely to access information on the Internet. In 2005, the FCC employed this very analysis to argue that cable modem services were properly classified as information services pursuant to its 2002 *Cable Modem Declaratory Ruling*.<sup>84</sup> In *Brand X Internet Services*, the Supreme Court affirmed the FCC’s classification of cable modem service as an information service.<sup>85</sup> In response, the FCC then formally classified the remaining broadband services as information services.<sup>86</sup>

In sum, no part of broadband Internet access has ever been regulated as a telecommunications service even though Internet access has a

80. *Universal Service Report*, *supra* note 46, at 11,520 para. 39.

81. *Id.*

82. *Id.*

83. *Id.* at 11,539-40 para. 80. In this *Universal Service Report*, the FCC stated that [t]he provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers’ own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport.

*Id.*

84. *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002) [hereinafter *Cable Modem Declaratory Ruling*].

85. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (giving great deference to the FCC’s interpretation of the Communications Act of 1934 as amended in 1996).

86. Letter from Robert M. McDowell to Henry A. Waxman, *supra* note 65, at 3 (stating that “the Commission without dissent issued a series of orders classifying all broadband services as information services: wireline (2005), powerline (2006) and wireless (2007)”).

telecommunications component. Rather, the FCC has interpreted the Communications Act and the Telecommunications Act to mean that broadband Internet access should be regulated as an information service, subject only to the FCC's ancillary jurisdiction under Title I.<sup>87</sup>

### III. THE FCC'S PROBLEM—REGULATING INTERNET ACCESS

#### A. Comcast Corp. v. FCC

Until *Comcast Corp. v. FCC* in 2010, the FCC exercised its ancillary authority to regulate Internet Service Providers (ISPs) under Title I of the Communications Act.<sup>88</sup> This case challenged the FCC's understanding of its ancillary jurisdiction. To understand why the FCC is considering reclassifying broadband Internet access as a telecommunications service, *Comcast Corp.* must be fully analyzed.

##### 1. Background to Comcast Corp. v. FCC

The dispute that gave rise to the lawsuit started in 2007, when Comcast's customers were confronted with the problem of using BitTorrent.<sup>89</sup> BitTorrent is a peer-to-peer Internet application that allows for faster Internet data sharing.<sup>90</sup> To understand how peer-to-peer file sharing operates, it is imperative to have a basic understanding of the mechanics of the Internet. The following describes the inter-workings of the Internet:

The Internet uses “packet switched” communications in which information exchanged between two computers is broken into multiple packets of data, which are transmitted individually—but not necessarily by the same route—to their destination. At the destination, the data packets are reassembled into their original order. There is no need for an exclusive path between the two endpoints.

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87. *Brand X*, 545 U.S. at 989.

88. *Notice of Inquiry*, *supra* note 12, at para. 1.

89. Brief for Respondents at 8, *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (No. 08-1291), 2009 WL 3557928. BitTorrent allows users to share files such as music, movies, and photographs over the Internet.

90. *Id.* at 8-9. (“Peer-to-peer networking supports the Internet-based distribution of video programming . . . Peer-to-peer technology can also support other applications, including the provision of voice service. Skype, for example, uses peer-to-peer applications in its Internet-based voice communications business.”).

The creation and transmission of data packets are governed by standardized rules, called protocols, the most common of which is the Transmission Control Protocol or TCP, which continuously monitors the user's connection to ensure that packets are delivered without error and in the correct sequence. Under TCP, if the computer at either end of the communications link detects a problem in the connection, it sends a reset or RST packet, which signals that the current connection should be terminated and a new one established.<sup>91</sup>

Peer-to-peer file sharing, such as BitTorrent, differs greatly from traditional methods of sharing data.<sup>92</sup> Under the traditional method, "a complete copy of a content file (such as a song or a feature-length movie) is stored on servers and distributed from there to end users that request it."<sup>93</sup> With peer-to-peer file sharing, the files are disassembled into small pieces, sent to be stored on different end users' computers, and can be accessed by multiple computers.<sup>94</sup> For example, when a person downloads a movie through BitTorrent, different parts of the movie are received at the same time from other BitTorrent users that have the same movie.<sup>95</sup> Thus, an Internet user that downloads a movie from the Internet using BitTorrent actually downloads pieces of the requested movie from many other Internet users' computers. The consequence of BitTorrent and peer-to-peer file-sharing is that end users' computers become servers for these files that are requested through the file-sharing application.<sup>96</sup> This type of file-sharing ameliorates the need to have substantial amounts of holding space for large amounts of data being requested at once, and it helps to alleviate "the upload chokepoint that would occur if one user attempted to send a large file to another user."<sup>97</sup>

In 2007, it was alleged that Comcast was interfering with its customers' BitTorrent applications.<sup>98</sup> Later, Comcast admitted to interfering with

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91. *Id.* at 9-10 (citation omitted); see also *In re Formal Complaint of Free Press & Pub. Knowledge*, 23 F.C.C.R. 13,028, para. 3 (2008) [hereinafter *Complaint*].

92. *Comments of AT&T, Inc. to FCC*, *supra* note 10, at 73-74.

93. *Id.*

94. Brief for Respondents, *supra* note 89, at 10; *Comments of AT&T, Inc. to FCC*, *supra* note 10, at 74.

95. Brief for Respondents, *supra* note 89, at 10.

96. *Comments of AT&T, Inc. to FCC*, *supra* note 10, at 74.

97. Brief for Respondents, *supra* note 89, at 10.

98. *Id.* at 11.

BitTorrent file-sharing because of the congestion it caused on Comcast's network.<sup>99</sup> This interference was effectuated by using "deep packet inspection,"<sup>100</sup> which targets individual packets of information to determine whether the packet is using BitTorrent technology.<sup>101</sup> If Comcast determined that a packet was using BitTorrent, it sent an RST packet<sup>102</sup> that effectively terminated the connection, thus making the end user find another source for the requested information.<sup>103</sup> Comcast first claimed to take this action only to help ameliorate network congestion during high Internet-usage periods, but later admitted to interfering at all times of the day.<sup>104</sup>

After several complaints, the FCC intervened to enjoin Comcast's interference with peer-to-peer file-sharing over the Internet.<sup>105</sup> The FCC

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99. Reply Brief for Petitioner Comcast Corp. at 3 n.1, *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (No. 08-1291), 2009 WL 3557932. In its brief, Comcast argued that "these practices were designed in good faith to manage high volumes of traffic to ensure that all customers could use and enjoy their High-Speed Internet services." *Id.* "In particular, the contested practices affected less than 10% of peer-to-peer uploads (without affecting any downloads), and any delay lasted less than one minute in 80% of cases. Comcast also comprehensively disclosed the practices to customers by January 2008." *Id.* (citation omitted).

100. Brief for Respondents, *supra* note 89, at 11.

101. *Id.* at 11-12.

102. When information is exchanged between computers, Transmission Control Protocol (TCP) continually monitors the exchange to ensure that the information is exchanged in the correct sequence and without error. If the computer detects an error at either end of the exchange, it sends an RST packet (reset packet) to terminate the exchange. *Id.* at 9-10.

103. *Id.* In its brief, the FCC stated that

[i]n some cases, particularly involving material that is not popular (and thus not located on many users' computers), the information may not be available elsewhere, in which case the requesting user—who could be a customer of Comcast or another service provider—is effectively disabled from downloading the information. In other cases, the material may be available on another computer using a service provider that does not block uploads. The latter outcome can both delay the customer's receipt of the data and shift traffic from Comcast's network to the non-blocking service provider's network.

*Id.* at 11-12.

104. *Id.* at 13.

105. *Id.* at 15-17; *see also Complaint, supra* note 91.

claimed jurisdiction<sup>106</sup> over Comcast pursuant to the congressional intent stated in the opening paragraph of the Communications Act,<sup>107</sup> the ancillary jurisdiction provision within the statute,<sup>108</sup> and Congress's Internet policy statement.<sup>109</sup> After the FCC contacted and proceeded against Comcast regarding its network practices involving BitTorrent, Comcast ceased its interfering behavior.<sup>110</sup> To ensure that Comcast did indeed stop interfering, the FCC ordered<sup>111</sup> Comcast to submit a report to the FCC describing Comcast's old network practices and a description of the new planned procedures.<sup>112</sup> Soon after receiving the order, Comcast challenged it in federal court.<sup>113</sup>

## 2. The Appeals Court's Determination

Pursuant to the Communications Act, courts have developed a two-part test to determine whether the FCC has jurisdiction to regulate information services.<sup>114</sup> The FCC may regulate "only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."<sup>115</sup> Under the first prong of the test, Comcast conceded that its Internet service was well within Title I's requirement<sup>116</sup> of "interstate and foreign commerce in communication by

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106. This jurisdiction was found in the FCC's ancillary authority granted by Congress under Title I of the Communications Act. Because Internet access is an information service, it is not subject to common carrier regulation found in Title II of the Act.

107. Communications Act of 1934 § 1, 47 U.S.C. § 151 (2006); *see also Complaint, supra* note 91, at para. 16.

108. 47 U.S.C. § 154(i); *see also Complaint, supra* note 91, at para. 15.

109. 47 U.S.C. § 230(b). "The Commission found in particular that Comcast's practices present both a 'risk to the open nature of the Internet'—in violation of federal Internet policies that favor maximum customer choice of Internet content and applications—and a 'danger of network management practices being used to further anticompetitive ends.'" Brief for Respondents, *supra* note 89, at 14; *see also Complaint, supra* note 91, at para. 13.

110. *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010).

111. *Complaint, supra* note 91, at para. 54.

112. *Id.*; Brief for Respondents, *supra* note 89, at 17-18.

113. *Comcast Corp.*, 600 F.3d at 645.

114. *Id.* at 646.

115. *Id.*

116. *Id.*

wire.”<sup>117</sup> The main issue, then, was whether the FCC’s regulations fell within the authority granted to it by Congress.<sup>118</sup>

The FCC argued that its regulations were ancillary to the authority delegated to it by Congress under sections 230(b), 151, and 4(i) of the Communications Act.<sup>119</sup> First, the FCC argued that Comcast’s discriminatory practice of interfering with BitTorrent file-sharing frustrated Congress’s Internet policy stated in section 230(b) of the Act.<sup>120</sup> That portion states that “[i]t is the policy of the United States to promote the continued development of the Internet and other interactive computer services.”<sup>121</sup> Second, the FCC argued that Comcast’s practices violated the very reason for creating the FCC—to regulate interstate communication by wire or radio, to make it available to everyone in the United States *without discrimination*.<sup>122</sup> Third, the FCC further argued that under section 4(i) of the Act, Congress delegated it the authority to make the necessary regulation involved in this case.<sup>123</sup>

The D.C. Circuit Court of Appeals rejected each of these arguments, concluding that the regulatory provisions were rooted only in congressional policy, not in an individual grant of authority.<sup>124</sup> After analyzing four previous cases, the court stated “that policy statements alone cannot provide the basis for the Commission’s exercise of ancillary authority—derives from the ‘axiomatic’ principle that ‘administrative agencies may [act] only pursuant to authority delegated to them by Congress.’”<sup>125</sup> Although policy statements provide insight into the mind of Congress, policy statements cannot be said to be delegations of authority.<sup>126</sup> Furthermore, the Court found that the FCC’s interpretation of its ancillary authority in Section 4(i) would leave the FCC “virtually free . . . from its

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117. Communications Act of 1934 § 1, 47 U.S.C. § 151 (2006).

118. *Comcast Corp.*, 600 F.3d at 647.

119. *Id.* 651-55.

120. *Id.* at 651-52 (arguing that such discriminatory practices did not promote the development of the Internet and interactive computer services).

121. 47 U.S.C. § 230(b)(1).

122. *Comcast Corp.*, 600 F.3d at 651-52; *see also* 47 U.S.C. § 151.

123. *Comcast Corp.*, 600 F.3d at 655. “The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i).

124. *Comcast Corp.*, 600 F.3d at 654.

125. *Id.* at 654 (quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005)).

126. *Id.*

congressional tether” and “unbounded.”<sup>127</sup> Therefore, unless a policy statement is coupled with an individual grant of power, the FCC does not have jurisdiction to regulate an information service.<sup>128</sup>

The FCC also argued that sections 706 and 256 are grants of authority from which the FCC could regulate.<sup>129</sup> Even though sections 706<sup>130</sup> and 256<sup>131</sup> may offer grants of authority, the court rejected the FCC’s argument because the FCC had previously determined that those sections do “not constitute an independent grant . . . of authority to employ other regulating methods.”<sup>132</sup> Therefore, the court determined that the FCC would be bound

127. *Id.* at 655.

128. *Id.*

129. *Id.* at 658-60.

130. Section 706 states the following:

The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

Communications Act of 1934 § 706, 47 U.S.C. § 1302(a) (2006).

131. Section 256 states in pertinent part:

In carrying out the purposes of this section, the Commission—  
[s]hall establish procedures for Commission oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications service for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications service. . . .

. . . .

Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law.

47 U.S.C. § 256(b)(1), (c).

132. *Comcast Corp.*, 600 F.3d at 658-59. On December 23, 2010, the FCC instituted new rules to regulate specific conduct of Internet access providers through section 706 of the Telecommunications Act of 1996. *In re Preserving the Open Internet Broadband Indus. Practices*, 25 FCC Rcd. 17905, para. 117 (2010). The Commission reasoned that section 706 gives express authority to “encourage the deployment of advanced telecommunications capability by any of the means listed in the provision,” which includes broadband Internet access. *Id.* at para. 119. Although it is unclear whether this section is actually an independent grant of authority that the FCC may use to regulate ISPs, the D.C. Circuit opined that it is “arguable.” See *Comcast*, 600 F.3d at 658. The merit of the FCC’s argument pursuant to section 706, however, is beyond the scope of this Note.

by its previous ruling that those sections were not grants of regulatory authority.<sup>133</sup>

The court held that although Congress delegated the FCC great authority to regulate communications by wire, Congress did not delegate unbounded power.<sup>134</sup> Because the FCC failed to tether any of the policy statements in the Act to individual grants of authority, the court held that the FCC did not have the jurisdiction to impose such regulation on Comcast.<sup>135</sup>

*B. The FCC's Plan to Reclassify Broadband Internet Access as a Telecommunications Service*

The court's decision confused the FCC regarding its jurisdictional reach to regulate information services pursuant to its ancillary authority.<sup>136</sup> Prior to this decision, the FCC believed that it had sufficient authority to regulate information services so long as the regulation fell within Congress's policy goals.<sup>137</sup> Pursuant to its ancillary authority found in section 4(i), the FCC believed it could institute the necessary regulations.<sup>138</sup> Comcast caused the FCC to question its understanding of its ancillary authority.<sup>139</sup> Following that case, the FCC immediately sent out a *Notice of Inquiry*<sup>140</sup> asking for public comment regarding the FCC's jurisdiction and what policy changes it could effectuate to have more regulatory authority over similar future practices.<sup>141</sup> The FCC's general counsel, Austin Schlick, believes that the Comcast decision will only foster more litigation and uncertainty regarding the FCC's ancillary authority.<sup>142</sup> In its first step towards implementing regulation, the FCC invited public comment on the issue of reclassifying broadband Internet access from an information service to a telecommunications service.<sup>143</sup>

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133. *Comcast*, 600 F.3d at 658.

134. *Id.* at 661.

135. *Id.*

136. *Notice of Inquiry*, *supra* note 12, at para. 1.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *New Proposal to Reclassify Broadband Services as Telecommunications Services Issued by US Federal Communications Commission*, MAYERBROWN.COM (May 7, 2010), <http://www.mayerbrown.com/publications/article.asp?id=8957&nid=6>.

142. *Id.*

143. *Notice of Inquiry*, *supra* note 12.

In this *Notice of Inquiry*, the FCC sought comment on three specific issues:

First, we ask whether the current information service classification of broadband Internet service can still support effective performance of the Commission's core responsibilities. Second, we ask for comment on the legal and practical consequences of classifying the Internet connectivity component of broadband Internet service as a "telecommunications service" to which the full weight of Title II requirements would apply, and whether such a classification would accurately reflect the current market facts. Finally, we identify and invite comment on a third way, under which the Commission would classify the Internet connectivity portion of broadband Internet service as a telecommunications service but would simultaneously forbear, using the section 10 authority Congress delegated to us, from all but a small handful of provisions.<sup>144</sup>

To be sure, the FCC expressly stated that it would not consider the issues of regulating Internet applications or the content of the Internet.<sup>145</sup> Furthermore, it is also not concerned with Internet facilities or services such as the "Internet backbone, content delivery networks (CDNs), over-the-top video services, or voice-over-Internet-Protocol (VoIP) telephony services."<sup>146</sup> Instead, the FCC sought comment on regulation over broadband Internet service providers, and whether it could single out and regulate the connectivity component of wireline broadband Internet providers.<sup>147</sup> Congress did not, however, delegate the authority to the FCC to reclassify broadband Internet access as a telecommunications service or to treat it as more than one offering.<sup>148</sup> Such a reclassification would frustrate Congress's intent for the regulation of the Internet.

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144. *Id.* at para. 28.

145. *Id.* at para. 10.

146. *Id.*

147. *Id.*

148. See discussion *infra* Part IV.

C. *The FCC Only Has the Authority Delegated to It by Congress*

Article I of the United States Constitution vests “[a]ll legislative Powers herein granted . . . in a Congress of the United States.”<sup>149</sup> Congress may delegate its legislative authority to an agency, provided that Congress provides intelligible standards to regulate the delegation of power.<sup>150</sup> Even though the principal purpose of intelligible standards is to ensure that delegations of power comport with the strictures of the Constitution, those standards also provide boundaries so that an agency is less likely to overstep its bounds or to arbitrarily exercise its authority.<sup>151</sup>

It is a cardinal rule of administrative law that an administrative agency only has the specific authority delegated to it by Congress<sup>152</sup> and may not act beyond its delegated powers.<sup>153</sup> “[A]n agency’s power is no greater than that delegated to it by Congress.”<sup>154</sup> If an administrative agency acts beyond its delegated authority, the courts are bound to hold the actions “*ultra vires*<sup>155</sup> . . . or a violation of the Administrative Procedure Act.”<sup>156</sup> The Administrative Procedure Act (APA) states that “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”<sup>157</sup> Since Congress delegates authority to agencies through legislation, the enabling statute establishes the parameters of an agency’s authority to act.<sup>158</sup> In this case, the APA warrants an examination into the FCC’s plan to reclassify broadband Internet access to determine whether such a reclassification comports with the strictures of the Communications Act as amended by the Telecommunications Act.

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149. U.S. CONST. art. I, § 1.

150. *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 473 (2001).

151. *Am. Trucking Ass’ns, Inc. v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999).

152. *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 497 (D.C. Cir. 2010) (Brown, J., concurring).

153. *Id.*

154. *Lyng v. Payne*, 476 U.S. 926, 937 (1986).

155. *Black’s Law Dictionary* defines “*ultra vires*” as “[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or by law.” BLACK’S LAW DICTIONARY 1525 (9th ed. 2009).

156. *Catholic Health Initiatives*, 617 F.3d at 497 (Brown, J., concurring).

157. 5 U.S.C. § 706(2)(C) (2006).

158. *Catholic Health Initiatives*, 617 F.3d at 497 (Brown, J., concurring).

IV. CONGRESS DID NOT DELEGATE BROAD INTERNET REGULATORY  
AUTHORITY TO THE FCC

Sixty-two years after creating the FCC and delegating it the authority to regulate interstate communication by wire,<sup>159</sup> Congress passed the Telecommunications Act of 1996 with the intention of de-regulating and promoting competition for telecommunication and information services.<sup>160</sup> Although Internet service providers are not expressly mentioned as either a telecommunication service or an information service, the text of the Telecommunications Act and the legislative history reflect Congress's desire to leave Internet access services open to the market, not subjecting it or any component thereof to Title II regulation as a common carrier.<sup>161</sup>

A. *Congress Codified the FCC's Computer II Regulatory Dichotomy into Statutory Law*

1. Basic and Enhanced Services as Telecommunication and Information Services

As discussed in Part II *supra*, in the 1980 Computer II proceeding, the FCC developed a classification scheme between basic service and enhanced service.<sup>162</sup> Basic service was the transportation of information through wires without a change in the form or content of the information.<sup>163</sup> On the other hand, enhanced service

combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the

159. Communications Act of 1934 § 1, 47 U.S.C. § 151 (2006).

160. S. REP. NO. 104-230, at 1 (1996) (Conf. Rep.).

161. In the 15 years since Congress passed this Act, the FCC has stated time and again that its interpretation of the 1996 Act leads it to the conclusion that broadband Internet access providers are information services. It does appear, however, that the FCC believes that Congress left it with unprecedented authority to decide how to classify Internet access. This Note proposes that Congress intended Internet access to be an information service and that the entire service delivered to the public should be regulated as an information service, not split into two parts.

162. See *Computer II*, *supra* note 49, at 387 para. 5.

163. *Id.* at 420 para. 96.

subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.<sup>164</sup>

The Telecommunications Act mirrors this paradigm, codifying Congress's intention that the classifications be the same. The Act provides that telecommunications is the transmission of information that does not manipulate its form or content but delivers the information in its original form.<sup>165</sup> This definition not only mirrors the FCC's definition of basic service in *Computer II*, but also is the same characterization: a transmission without a change in the form or content of the information.<sup>166</sup> On the other side of the dichotomy, an information service, while utilizing a telecommunications component to transport the information, does manipulate the information transmitted.<sup>167</sup> The two definitions—information and enhanced services—both include services having the capability to process information and then transmit it in a different form or with different content.<sup>168</sup> Therefore, when Congress enacted the Telecommunications Act, it used different terms to define virtually the exact same dichotomy previously developed by the FCC.

The Act's legislative history provides evidence that Congress specifically intended to build upon the old *Computer II* framework, making the old basic and enhanced services into their modern-day counterpart: telecommunication and information services, respectively. Before enacting the 1996 Act, a House of Representatives report stated that it relied on a 1983 Modification of Final Judgment (MFJ) for its definition of

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164. *Id.* at 387 para. 5.

165. Telecommunications Act of 1996 § 3, 47 U.S.C. § 153(43) (2006) ("The term 'telecommunications' means the transmission between or among points specified by the user, or information of the user's choosing, without change in the form or content of the information as sent and received.").

166. *Id.*

167. 47 U.S.C. § 153(20). An "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.

*Id.*

168. Compare 47 U.S.C. § 153(20), with 47 C.F.R. § 64.702(a) (2010) (demonstrating that both definitions require capability of processing information and interacting with the subscriber).

telecommunication and information services.<sup>169</sup> In a settlement agreement (known as the MFJ) between the Department of Justice and AT&T and its affiliates, the District Court for the District of Columbia listed terms and definitions that it used throughout the opinion in approving the settlement.<sup>170</sup> In this MFJ, the court defined the terms “telecommunications” and “information service,” giving the terms the definition that Congress later codified in the Telecommunications Act, word for word.<sup>171</sup> In its opinion, the court expressly stated that *Computer II*'s enhanced service is the equivalent to information services used by the court in the settlement agreement.<sup>172</sup> Likewise, in a Senate committee report in 1995, the Senate expressly stated that an information service is “similar to the FCC’s definition of ‘enhanced services.’”<sup>173</sup>

When Congress enacted the Telecommunications Act, many information services had been operating without Title II regulation under the *Computer II* framework, which had existed for sixteen years.<sup>174</sup> Congress was well-aware of this dichotomy and could have expressly altered the previous framework, but there is no mention of any such intent anywhere in the congressional record. Congress’s awareness of the dichotomy is exhibited by the House report that expressly stated that the definitions in the House bill were based on the definitions provided in the MFJ.<sup>175</sup> Furthermore, the Senate committee report conclusively conveyed its knowledge that the term “information service” set forth in its bill, which eventually became law, was “similar to the FCC definition of ‘enhanced services.’”<sup>176</sup> Surely Congress would understand the ramifications of its decision to use those definitions and not expressly state its intent to regulate information services. By stating its awareness of the previous classification system and not expressly providing for any change, it is evident that Congress intended to incorporate the FCC’s existing regulatory framework

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169. H.R. REP. NO. 104-204, at 125 (1995).

170. *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

171. *Id.*

172. *Id.* at 178 n.198.

173. S. REP. NO. 104-23, at 18 (1995).

174. *Universal Service Report*, *supra* note 46, at 11,524 para. 45.

175. H.R. REP. NO. 104-204, at 125.

176. S. REP. NO. 104-23, at 18.

established in 1980.<sup>177</sup> Before the Act was passed, the FCC could have instituted proceedings to change its classification scheme upon a showing that was not arbitrary or capricious,<sup>178</sup> but once Congress codified into law the FCC's dichotomy, it became set in stone until Congress changes course via new legislation.<sup>179</sup>

This conclusion should not come as a shock by any means. Just after passage of the 1996 Act, the FCC sought public comment on whether Congress had codified the previous dichotomy between enhanced service and basic service.<sup>180</sup> "Virtually all parties that commented on this issue agree that the statutory term 'information services' encompasses all activities that fall within the Commission's definition of 'enhanced services.'"<sup>181</sup> From the inception of this Act, it is commonly believed by most that Congress indeed incorporated the FCC's classification system into statutory law.<sup>182</sup>

Under the *Computer II* framework, basic services were regulated in accordance with Title II of the Communications Act, and enhanced services were exempt because the FCC believed regulating enhanced services would stifle innovation.<sup>183</sup> Only basic services were subject to regulation.<sup>184</sup> By using the MFJ definitions that built upon the *Computer II* terms, Congress

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177. *Universal Service Report*, *supra* note 46, at 11,519 para. 37 (citing Letter from Senator McCain at 1). Senator McCain urged that

in defining 'telecommunications,' 'telecommunications service' and 'information service,' Congress 'distinguished between information services and telecommunication services to reflect the distinction set forth on the Modification of Final Judgment and the Commission's *Second Computer Inquiry* proceeding between those services that offer pure transmission capacity and others that somehow enhance the transmission capacity.' An information service, he continues, 'is the offering of particular capabilities via telecommunications, but is itself not telecommunications or a telecommunications service.'

*Id.*

178. *See* 5 U.S.C. § 706(2)(A) (2006).

179. *See* 5 U.S.C. § 706(2)(C).

180. *In re* Implementation of the Non-accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended, 11 FCC Rcd. 21,905, 21,954 para. 99 (1997).

181. *Id.* at 21,954 para. 100. The FCC further declared, however, that all enhanced services are information services, but not all information services are enhanced services. Information services should be interpreted more broadly. *Id.* at 21,956 para. 103.

182. *Id.* at 21,954 para. 100.

183. *Universal Service Report*, *supra* note 46, at 11,513 para. 26.

184. *See id.* at 11,521-14 paras. 22-28.

must have intended for information services—the modern-day counterpart to enhanced services—to be exempt from Title II regulation also.

## 2. Information and Telecommunication Services as Mutually Exclusive

Not only did Congress intend to treat information services as the previous enhanced service classification, but it intended that information and telecommunications services be mutually exclusive. First, the FCC expressly stated in *Computer II* that it would not regulate enhanced services under Title II of the Communications Act of 1934, but that it would regulate basic services.<sup>185</sup> Thus, enhanced services were mutually exclusive to basic services.<sup>186</sup> A particular service was regulated only as one or the other. Second, in *Computer II*, the FCC determined that even though enhanced services might use both a communications service and a data processing component, it would be considered an enhanced service nonetheless.<sup>187</sup>

In the Act, Congress codified this idea in the definition of an information service—a capability that is offered via telecommunications.<sup>188</sup> Even though an information service has a telecommunications component, it is still considered an information service.<sup>189</sup> From the definition provided in the Act, it is clear that the *transmission* of information chosen by the user without a change in the form or content of the information is a telecommunications service.<sup>190</sup> It becomes an information service, however, when the service offers the capability to store, transform, and process information simply by using a telecommunications component.<sup>191</sup> Thus, a particular service is either one that does not change the chosen content or form of the information (telecommunications service), or it is a service that has capabilities to store, transform, and process information using a telecommunications component (an information service).<sup>192</sup> The Supreme Court affirmed this mutually exclusive classification as being consistent with the Communications Act as amended by the Telecommunications

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185. *Computer II*, *supra* note 49, at 435 para. 132.

186. 47 C.F.R. § 64.702(a) (2010).

187. *Universal Service Report*, *supra* note 46, at 11,513 para. 27.

188. Telecommunications Act of 1996 § 3, 47 U.S.C. § 153(20) (2006).

189. *Universal Service Report*, *supra* note 46, at 11,520 para. 39.

190. 47 U.S.C. § 153(43), (46).

191. *Universal Service Report*, *supra* note 46, at 11,521 para. 41.

192. Compare 47 U.S.C. § 153(43), (46) with 47 U.S.C. § 153(20).

Act.<sup>193</sup> Therefore, the text and history of the classification framework support the proposition that the two classifications are mutually exclusive.

This is consistent with the legislative history of the Telecommunications Act. The intent of both the House and the Senate bills indicates that Congress intended telecommunication and information services to be mutually exclusive. The House of Representatives's bill stated that a "telecommunications service . . . does not include an information service."<sup>194</sup> In a committee report, the Senate declared that the definition of telecommunications "excludes those services . . . that are defined as information services."<sup>195</sup> In the same report, the Senate reasoned that "[i]nformation service providers do not 'provide' telecommunications services; they are users of telecommunications services. The definition of telecommunications service specifically excludes the offering of information services (as opposed to the transmission of such services for a fee) precisely to avoid imposing common carrier obligations on information service providers."<sup>196</sup> Thus, both chambers of Congress specifically intended that each service was mutually exclusive from the other. A service may be regulated as either service according to its nature, but may not be regulated as both.

Congress, knowing the FCC's history of not regulating enhanced services, intentionally codified the same regulatory framework in the Telecommunications Act. Both chambers of Congress manifested their desire to have mutually exclusive categories of services, even though an information service may have a telecommunications component.

### 3. Congress's Intent

This interpretation is consistent with Congress's express intent in enacting the Telecommunications Act—to promote competition and deregulation for new telecommunications technologies.<sup>197</sup> The Senate bill stated that its purpose was "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies

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193. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 973-77 (2005).

194. H.R. 1555, 104th Cong. § 501(50) (1995).

195. S. REP. No. 104-23, at 18 (1995).

196. *Id.* at 28.

197. *Report and Order*, *supra* note 23, at 14,856 n.8 (citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)).

and services to all Americans by opening all telecommunications markets to competition . . . .”<sup>198</sup> Likewise, the House stated that its goal was also to promote competition and “reduce regulation.”<sup>199</sup> These policy statements are important for two reasons. First, these were the same reasons employed by the FCC in 1980 in *Computer II* when it decided not to regulate enhanced services.<sup>200</sup> The FCC thought that Title II regulation would harm innovation and competition.<sup>201</sup> Congress, in 1995, had the same policy considerations as the FCC had in 1980 evidencing that Congress intended to maintain the FCC’s deregulatory policies and even wrote them into statutory law in the 1996 Act. Second, if Congress indeed did intend to change course and submit information services or enhanced services to common carrier regulation, Congress’s policy to promote de-regulation and competition would not have lined up with its intent. Up until this time, information services had been basically free of regulation and had seen great improvements and innovation due to competition.<sup>202</sup> Congress must have intended to continue the FCC’s path of de-regulation to meet its goals.

*B. Congress Intended for Internet Access Services to be Information Services*

In the Telecommunications Act, Congress did not explicitly state that Internet access services were information services. It is apparent, however,

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198. S. REP. NO. 104-23, at 1.

199. H.R. 1555, 104th Cong. (1995).

200. *Computer II*, *supra* note 49, at 426-27 para. 109.

201. *Id.* In this regulation, the FCC stated:

To fully appreciate the significance of this, it is helpful to understand the dynamics of the marketplace in light of our current regulatory scheme. There are literally thousands of unregulated computer service vendors offering competing services connected to the interstate telecommunications network. The services they provide are many and varied. The only limitation on the types of services offered are those arising from the constraints of their own entrepreneurial capabilities and, in a very real sense, the implicit requirement that they structure their services so as to avoid crossing a regulatory boundary that would subject them to regulation. . . . By removing this barrier the entire market for enhanced services should be even more competitive than it has been in the presence of that barrier. . . . The record in this proceeding makes clear that even when the Commission’s stated policies are in favor of open entry, the very presence of Title II requirements inhibits a truly competitive, consumer responsive market.

*Id.*

202. See 47 U.S.C. § 230(a)(4), (b)(2) (2006).

that Congress contemplated the Internet when it enacted the Act.<sup>203</sup> Senator McCain urged that “[i]t certainly was not Congress’s intent in enacting the supposedly pro-competitive, deregulatory 1996 Act to *extend* the burdens of current Title II regulation to Internet services, which historically have been excluded from regulation.”<sup>204</sup> This sentiment was echoed by “Senators Ashcroft, Ford, John F. Kerry, Abraham and Wyden emphasiz[ing] that nothing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet . . . services . . . .”<sup>205</sup>

#### 1. The Text of the Telecommunications Act

Broadband Internet access fits squarely within the definition of an information service. As Justice Thomas argued:

A user cannot reach a third party’s Web site without DNS, which (among other things) matches the Web site address the end user types into his browser . . . with the IP address of the Web page’s host server. [F]or an internet user, “DNS is a must. . . . [N]early all of the Internet’s network services use DNS. That includes the World Wide Web, electronic mail, remote terminal access, and file transfer”[. . . Similarly, the Internet service provided by cable companies facilitates access to third-party Web pages by offering consumers the ability to store, or “cache,” popular content on local computer servers. . . . In other words, subscribers can reach third-party Web sites via “the World Wide Web, and browse their contents, only because their service provider offers the ‘capability for . . . acquiring, [storing] . . . retrieving [and] utilizing . . . information.’” “The service that Internet access providers offer to members of the public is Internet access,” not a transparent ability (from the end user’s perspective) to transmit information.<sup>206</sup>

This has not changed since it was stated by Justice Thomas in 2005 and reaffirmed by the FCC in 2007.<sup>207</sup> Broadband providers today provide even

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203. 47 U.S.C. § 230(a)–(b).

204. *Universal Service Report*, *supra* note 46, at 11,519 para. 37 (alteration in original) (internal quotation marks omitted) (citing Letter from Senator McCain at 2).

205. *Id.* at 11,520 para. 38 (internal quotation marks omitted).

206. Letter to Julius Genachowski, Chairman, FCC, *supra* note 79, at 7-8 (citation omitted) (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 999-1000 (Thomas, J.)).

207. *Id.*

more functionalities than before. These added functionalities include “security screening, spam protection, anti-virus and anti-botnet technologies, pop-up blockers, parental controls, online email and photo storage, instant messaging, and the ability to create a customized browser . . . .”<sup>208</sup> From the user’s perspective, broadband Internet access providers offer much more than a pure transmission, but instead offer a completely integrated offering of access to the Internet along with other features. Accordingly, broadband Internet access providers are properly classified as information services, fitting within the definition prescribed by Congress.

Although the text of the Act does not explicitly state that ISPs are information services, the language certainly implies it. Section 230 of the Telecommunications Act, also known as the Communications Decency Act of 1996,<sup>209</sup> evidences Congress’s intent to consider ISPs as information services.<sup>210</sup> This section immunized providers and users of interactive computer services from restricting access in good faith to “material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”<sup>211</sup> Furthermore, it immunized ISPs from liability stemming from access services provided to content providers of obscene material.<sup>212</sup>

Within the definitions provided in this section, “Interactive computer service” is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”<sup>213</sup> First, it is notable that the definition limits the criteria to information services, systems, or access software providers, with no mention of telecommunications services.<sup>214</sup> Second, it

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208. *Id.* “In many cases, these network security-related features are fully integrated with the Internet access service offering; a consumer cannot utilize the service without also receiving the functionality provided by these security mechanisms.” *Id.* at 9.

209. Telecommunications Act of 1996 § 501, Pub. L. No. 104-104, 110 Stat. 56, 133 (1996).

210. *See* Telecommunications Act of 1996 § 509, 47 U.S.C. § 230 (2006).

211. 47 U.S.C. § 230(c)(2)(A).

212. 47 U.S.C. § 230(c)(2)(B).

213. 47 U.S.C. § 230(f)(2).

214. *Id.*

recognizes that information services provide “access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . .”<sup>215</sup> This definition describes precisely what ISPs do—provide access to servers and the Internet. If ISPs were to be treated as telecommunications services, then this section would have no bearing on what it purports to regulate. At the very least, it seems incredible that Congress would intend for ISPs to be considered information services for purposes of section 230, but for every other purpose, allow the FCC to decide how to define ISPs. This would only foster confusion and litigation. Furthermore, if Congress intended to have ISPs be defined as telecommunications services, Congress surely would have included telecommunications services within the definition of interactive computer services, or Congress may have included interactive computer services within the definition of telecommunication services or common carriers.

Courts have found section 230 to encompass ISPs as information services. In *America Online, Inc. v. Greatdeals.net*, America Online, Inc. (AOL), formerly one of the largest ISPs in the United States, brought suit against Martindale Empowerment to enjoin it from sending unsolicited, bulk email advertisements to AOL’s customers.<sup>216</sup> Under the definition of interactive computer service in section 230 of the Telecommunications Act, the court found that AOL, as an Internet provider, was properly classified as an information service and should not be regulated under the anti-discriminatory provisions relating to common carriers.<sup>217</sup> Although the court deferred to the FCC’s interpretation of the statute, the court found that it was a reasonable interpretation with much support in the text of the statute.<sup>218</sup> The court stated that “[i]f Congress had intended to include interactive computer services or information service providers like AOL in the definition of common carrier, it would have so indicated.”<sup>219</sup> Therefore, AOL was considered an information service not subject to regulation under Title II of the Act.<sup>220</sup>

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215. *Id.*

216. *Am. Online, Inc. v. Greatdeals.net*, 49 F. Supp. 2d 851, 854 (E.D. Va. 1999).

217. *Id.* at 855-57.

218. *Id.* at 856.

219. *Id.*

220. *Id.* at 855-57.

## 2. Congress's Stated Policy in the Act

In the congressional findings and policy provided in the Act, Congress clearly manifested its intent to shelter the Internet and Internet providers from regulation. First, Congress made a number of findings that it transcribed in the Act:

The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources . . . .

. . . .

The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.<sup>221</sup>

Congress specifically recognized that up until this point, the Internet and Internet providers were subject to only minimal government regulation.<sup>222</sup> Not only were they subject to minimal regulation, but it “flourished”<sup>223</sup> and developed rapidly under the FCC’s classification system.<sup>224</sup>

Second, Congress stated:

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) 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 . . . .<sup>225</sup>

In reading the findings and policy statements together, it is abundantly clear that Congress did not institute any kind of change, but intended to keep the status quo. Congress intended to preserve the “vibrant and competitive free market that *presently exists* for the Internet.”<sup>226</sup> Congress was aware of the regulatory landscape at the time of the Act and expressly stated its intention to keep that same framework.<sup>227</sup> Furthermore, the phrase

221. 47 U.S.C. § 230(a)(1), (4) (2006).

222. 47 U.S.C. § 230(a)(4).

223. *Id.*

224. *See* 47 U.S.C. § 230(a)(1), (4).

225. 47 U.S.C. § 230(b)(1), (2) (emphasis added).

226. 47 U.S.C. § 230(b)(2) (emphasis added).

227. *See* 47 U.S.C. § 230(a)(4), (b)(2).

“unfettered by Federal and State regulation”<sup>228</sup> expressly shows Congress’s de-regulatory Internet policy. Congress recognized the innovation and progress the Internet has made and intended to keep the status quo, which was minimal federal and state regulation. In enacting this policy in the Act, in essence, Congress set in stone its desire to keep the Internet and interactive computer services open, free from oppressive regulation.

Some argue that the findings and policy portions of section 230 are merely describing the status of the Internet.<sup>229</sup> Namely, that Congress found that only the Internet—not ISPs—was free from federal or state regulation.<sup>230</sup> This finding, however, not only states that the Internet has flourished due to minimal governmental regulation, but also that interactive computer services have flourished as well.<sup>231</sup> Again, interactive computer services are defined as information services that provide access to server computers or the Internet—ISPs.<sup>232</sup> Even courts have interpreted that definition as including ISPs.<sup>233</sup> In the policy section of 230, interactive computer services are included along with the Internet—evidencing Congress’s intent that the present non-regulatory landscape should remain the same. Therefore, section 230 applies to the Internet as well as ISPs.

Even if the congressional intent in the Act is unclear, Congress’s silence evidences its approval of the FCC’s policies of not classifying any part of broadband Internet access as a telecommunications service. “When an agency adheres consistently to a particular view of statutory meaning, and Congress is aware of the agency’s interpretation and takes no action to correct it, Congress’s inaction is persuasive evidence that the interpretation is the one intended by Congress.”<sup>234</sup> In the FCC’s 1998 report to Congress, the FCC made expressly clear that it would not regulate Internet access providers as common carriers under Title II.<sup>235</sup> The FCC continued this

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228. *Id.*

229. See Marvin Ammori, *Letter from Marvin Ammori, General Counsel, Free Press, to Marlene H. Dortch, Federal Communications Commission*, 957 PLI/PAT 591, 623-27 (2009).

230. *Id.*

231. 47 U.S.C. § 230(a)(4).

232. 47 U.S.C. § 230(f)(2).

233. See *Doe v. GTE Corp.*, 347 F.3d 655, 658-60 (7th Cir. 2003); *Am. Online, Inc. v. Greatdeals.net*, 49 F. Supp. 2d 851, 854-57 (E.D. Va. 1999).

234. Letter from Seth P. Waxman, Counsel for the United States Telecomm. Ass’n, to Julius Genachowski, Chairman, FCC 9 (April 28, 2010) (citing *CBS, Inc. v. FCC*, 453 U.S. 367, 382-85 (1981)), available at [http://www.law.northwestern.edu/agep/conferences/documents/AGEP\\_Data\\_Privacy\\_Byrd2.pdf](http://www.law.northwestern.edu/agep/conferences/documents/AGEP_Data_Privacy_Byrd2.pdf).

235. See *Universal Service Report*, *supra* note 46, at 11,540 para. 80.

course in 2002, 2005, 2006, and 2007 as it formally classified all types of broadband Internet services as information services.<sup>236</sup> Furthermore, the FCC always classified the entire broadband Internet service as an information service, never singling out a telecommunications service that may have some part in the offering of the information service.<sup>237</sup> Since these determinations, “Congress has never signaled disapproval of the Commission’s current statutory interpretation or taken any action to overturn it—a strong indicator that the Commission’s approach thus far has been the one intended by Congress.”<sup>238</sup>

Congress’s and the FCC’s non-regulatory policies have proved to be successful. In an argument against Internet neutrality, AT&T Corporation explained that the

market [is] competitive . . . wireless broadband Internet access has become a vibrant part of the marketplace and a true competitive threat, serving as an alternative for a host of wireline broadband applications. And beyond the mere number of competitors, many other factors demonstrate the competitiveness of the marketplace. There are more applications and content providers than ever before, some of which have customer bases many times the size of any broadband provider’s customer base; broadband penetration figures continue to climb; broadband speeds are rising; and broadband prices are dropping.<sup>239</sup>

The general consensus is that minimal Internet regulation promotes the most competition and innovation.<sup>240</sup> That is why Congress specifically provided to maintain the same regulatory framework. As the FCC has maintained for over 10 years since the Telecommunications Act was enacted, broadband Internet access is properly classified as a whole as an information service exempt from any regulation under Title II.<sup>241</sup> The FCC

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236. See *supra* note 86.

237. Letter from Seth P. Waxman, Counsel for the U. S. Telecom Ass’n., *supra* note 234, at 7-8.

238. *Id.* at 9.

239. *Comments of AT&T, Inc. to FCC*, *supra* note 10, at 226.

240. See Telecommunications Act of 1996 § 509, 47 U.S.C. § 230 (2006); *Comments of AT&T, Inc. to FCC*, *supra* note 10, at 226.

241. *Universal Service Report*, *supra* note 46, at 11,540 para. 80; *Nat’l Cable & Telecomms. Ass’n. v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005).

believed this interpretation was “entirely consistent, both internally and with the letter and spirit of the Act.”<sup>242</sup> Not only is it consistent “with the letter and spirit of the Act,” but it is mandatory as set forth by Congress in the Telecommunications Act.

*C. Congress Did Not Intend for Facilities-Based ISPs to “Unbundle” Their Service*

The FCC’s *Notice of Inquiry* contemplates thrusting *Computer II*’s “unbundling” requirements on the Internet connectivity component of facilities-based ISPs, but still treats Internet access as an information service.<sup>243</sup> Under this scheme, the FCC would regulate only the underlying telecommunications component that actually transports the information the ISPs offer to their customers and would treat the Internet connectivity component as a common carrier offering under Title II.<sup>244</sup> Thus, only ISPs that own their own facilities (facilities-based providers) would be subject to regulation.<sup>245</sup> Among other requirements, ISPs would be required to lease their lines on a common carrier basis to competitors on the same terms and conditions as their own offering.<sup>246</sup>

Under the *Computer Inquiry* proceedings, the FCC treated facilities-based providers differently from non-facilities-based providers.<sup>247</sup> Pursuant to the FCC’s regulations, enhanced service providers that owned their own lines were required to lease those lines to competitors.<sup>248</sup> This practice mitigated the risk of one provider having a monopoly over all the wires used to provide the enhanced service.<sup>249</sup> Therefore, the FCC was able to promote competition in a world that depended on telephone wires to transport information.<sup>250</sup>

Even though Congress intended to incorporate the FCC’s dichotomy between enhanced and basic services into the Telecommunications Act as discussed above, it does not follow that every FCC policy dealing with those

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242. *Universal Service Report*, *supra* note 46, at 11,552 para. 105.

243. *Notice of Inquiry*, *supra* note 12, at para. 28.

244. *Id.*

245. *Id.* at paras. 1, 28.

246. 47 U.S.C. § 251(b)(4) (2006).

247. *Computer II*, *supra* note 49, at para. 231.

248. *See id.*

249. *See* Letter to Julius Genachowski, Chairman, FCC, *supra* note 79, at 3-4 n.11.

250. *See id.*

services was incorporated.<sup>251</sup> There is no grant of authority within the Act signaling Congress's intent to single out any one offering and subject that offering to Title II regulation as a common carrier. Justice Thomas argued,

In the *Computer II* rules, the Commission subjected facilities-based providers to common-carrier duties not because of the nature of the “offering” made by those carriers, but rather because of the concern that local telephone companies would abuse the monopoly power . . . . The differential treatment of facilities-based carriers was therefore a function not of the definitions of “enhanced-service” and “basic service,” but instead of a choice by the Commission to regulate more stringently, in its discretion, certain entities that provided enhanced service. The Act's definitions, however, parallel the definitions of enhanced and basic service, not the facilities-based grounds on which that policy choice was based, and the Commission remains free to impose special regulatory duties on facilities-based ISPs under its *Title I ancillary jurisdiction*.<sup>252</sup>

Since the FCC promulgated these rules in the 1980s, the landscape has changed. The threat of an enhanced service provider maintaining an unfair monopoly has subsided. The FCC designed these outdated, unbundling regulations for a world that was connected through one wire, not “today's multi-platform broadband IP environment.”<sup>253</sup> The “unbundling” rules prevented a single company with a monopoly from refusing other companies access to its wires. According to the FCC, the underlying “basic service is the building block upon which enhanced services are offered.”<sup>254</sup> Therefore, this unbundling allowed other enhanced service providers to offer their services using the same transmission lines. Unbundling would no

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251. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 995-96 (2005).

252. *Id.* at 996 (emphasis added) (citations omitted).

253. Letter to Julius Genachowski, Chairman, FCC, *supra* note 79, at 3-4 n.11.

[W]hile the *Computer Inquiry* rules may have served the Commission's policy goals in the narrowband, circuit-switched ‘one-wire world’ for which they were initially created 40 years ago, they would be a serious impediment to broadband investment and innovation in today's multi-platform broadband IP environment, which is why the Commission has categorically rejected applying those rules to cable, wireline and wireless broadband providers.

*Id.*

254. *Computer II*, *supra* note 49, at para. 231.

longer serve the same purpose because we no longer live in a one-wire world. In fact, a person does not even need a wire to connect to the Internet, and there are multiple broadband platforms in regular use. Thus, the original purpose for the unbundling requirement is no longer necessary, and this discretionary rule promulgated by the FCC during the *Computer Inquiry* proceedings should not be imputed as Congress's intent without further evidence.

Congress could not have intended to apply the unbundling requirements on broadband ISPs because that would defy Congress's own policy statements in section 230 for the same reasons stated in Part IV(B)(2) *supra*.<sup>255</sup> Congress favored de-regulation and intended to keep the Internet and ISPs free from state and federal regulation.<sup>256</sup> Furthermore, Congress intended to keep the market free and competitive.<sup>257</sup> ISPs, such as Verizon and AT&T (among others), fear that

this antiquated regulatory structure would require all providers to divert time and resources from deploying broadband networks so that they can design and implement the myriad systems and processes necessary to comply with a bevy of newly imposed Title II obligations and requirements. At best, this would lead to major market uncertainties that will hamper each company's ability to raise and deploy capital efficiently. At worst, it would seriously undermine the value of broadband investments already made and disincant [sic] new ones. In either case, the Title II classification proposal would dampen broadband investment and job-producing economic growth at the worst possible time.<sup>258</sup>

As Justice Thomas stated, the FCC is free to impose Title I regulations on the telecommunications component pursuant to its ancillary jurisdiction, but the authority to impose Title II common carrier regulations on the telecommunications component is unfounded.

Before 2010, the FCC properly interpreted the Act in accordance with Congress's intent. The FCC's official recognition of broadband Internet

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255. 47 U.S.C. § 230(b) (2006).

256. 47 U.S.C. § 230(b)(2).

257. *Id.*

258. Letter to Julius Genachowski, Chairman, FCC, *supra* note 79, at 6.

access as one offering under the Act is a classification that even the Supreme Court affirmed as reasonable under Congress's directives.<sup>259</sup>

## V. CONCLUSION

In 1980, the FCC formally began a practice of de-regulation in terms of new technologies that were classified as enhanced services. This classification scheme was further recognized in the Modification of Final Judgment by the District Court of the District of Columbia. Congress, having complete knowledge of the existing de-regulatory framework imposed by the FCC and the court, codified this structure in the Telecommunications Act of 1996. In doing so, Congress intended that Internet access services be afforded shelter from regulation and be considered an information service as one offering—not subject to mandatory Title II regulation. Congress did not take any action whatsoever to indicate it had changed the *Computer II* classification framework. Instead, Congress wrote the FCC's dichotomy into statutory law. Any effort by the FCC to reclassify broadband Internet access services as a telecommunications service would be adverse to the power Congress specifically delegated to it, and therefore, a violation of the Administrative Procedure Act. Although Congress implemented the FCC's dichotomy, there is no statutory authority or provision to suggest that Congress intended the FCC to regulate the Internet connectivity component of broadband Internet access as a telecommunications service. The FCC does not have the authority to reclassify broadband Internet access or any component thereof as a telecommunications service.

In a recent gathering, the FCC's Commissioner Michael Copps declared that “[o]ur [FCC’s] job now is to correct course by reclassifying broadband as the telecommunications service that it is—you know, actually call an apple an apple!”<sup>260</sup> But to act within its congressionally delegated power, the FCC must wait for Congress to call it an apple.

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259. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 979, 977 (2005).

260. Michael J. Copps, *Statement of FCC Commissioner at “The Future of the Internet” Public Hearing*, FCC 3 (2010), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db1117/DOC-302855A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1117/DOC-302855A1.pdf).

