



Supreme Court Issues Decision Upholding FCC's Classification of Cable Modem Service As "Information Service" in *Brand X* Decision

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The U.S. Supreme Court's opinion in the *Brand X* case is a major win for the cable industry. The decision upheld the FCC's classification of cable modem service as an "information service" under the Communications Act, meaning that Earthlink and other Internet service providers do not have mandatory access rights to cable operator broadband platforms.

Key Points:

- The Supreme Court upheld the FCC's classification of cable modem service as an "information service," meaning that the service is not subject to the obligations of Title II of the Communications Act. Title II imposes numerous obligations, including the requirement to file federal tariffs, the requirement to interconnect with other carriers, and the obligation to pay a percentage of revenues into the Universal Service Fund;
- The Supreme Court reasoned that the FCC was entitled to deference to classify cable modem service as an "information service" under the *Chevron* doctrine, which requires federal courts to defer to an agency's construction of ambiguous statutes if the agency's construction of the statute is reasonable;
- Applying that doctrine, the Supreme Court held that the FCC's conclusion that cable modem service should not be subject to common carrier regulation was a lawful interpretation of the Communications Act.

Practical Effects of the Court's Decision:

- Cable operators will continue to be able to run their broadband networks as closed, integrated systems, to the extent they elect to do so;
- There is still a possibility that pursuant to its ancillary authority under Title I, the FCC could

impose some obligations on cable modem service, such as wiretap obligations under CALEA, as well as consumer protections. Commissioners Copps and Adelstein, in statements regarding the decision, both hinted that they will be looking out for consumer interests as the FCC resolves the classification issues in pending Commission proceedings;

- The decision is good news for the Bell companies, who will now have a strong argument (both at the FCC and on Capitol Hill) that DSL service bundled with ISP functions should be treated the same way as cable modem services. Commissioner Abernathy, in her statement regarding the decision, specifically stated that she hopes the FCC will quickly "establish a similarly forward-looking approach for competitive wireline xDSL services," a decision which is likely to come out of the FCC's pending Wireline Broadband Services proceeding.

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