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**VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: *Protecting and Promoting the Open Internet; Framework for Broadband Services* – GN Docket Nos. 14-28 & 10-127**

Dear Ms. Dortch:

AT&T files this letter to rebut claims that the Commission can readily identify a separate telecommunications service within integrated broadband Internet access service offerings that would allow it to regulate broadband Internet service providers as common carriers, and ban “paid prioritization” and other allegedly discriminatory conduct under Title II.

Parties making such claims frequently suggest that the dissent in *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005), provides a road map for Commission action that would lead to that result. Such contentions rest on a misreading of Justice Scalia’s dissenting opinion in that case. In fact, as discussed further below, the allegedly separate service discussed by Justice Scalia in that dissent was a pure and transparent point-to-point transmission path connecting an end user *to* an ISP. It thus did not include any of the ISP functions that are used to enable an end user to transmit information to or from other users and content providers connected to the Internet. It is those ISP functions that create the potential for a provider to prioritize traffic or to engage in the other activities that concern some parties. Accordingly, even if the Commission could properly adopt the approach suggested by a Supreme Court *dissent* – which it cannot and should not do either generally or in this case – Justice Scalia’s understanding would not allow the Commission to address the policy issues regarding so-called Internet “fast lanes” that parties have raised in this docket.

Beyond that, as we also demonstrate below, and as both the majority and dissent in *Brand X* understood, any attempt to identify as a separate telecommunications service a service that *does* include those ISP functions would necessarily contravene the clear text of the Telecommunications Act of 1996. All services that include such functions meet the statutory definition of an “information service” because those functions provide the “*capability* for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available

information via telecommunications.”<sup>1</sup> Those ISP functions necessarily go beyond pure transmission and provide customers with the “capability” to: “acquir[e]” and “retriev[e]” information from websites; “make availabl[e]” information on social media or by sharing files with other users; and “stor[e]” information in the cloud, among many other things. That result is confirmed, moreover, by the regulatory history leading to the 1996 Act and by the Commission’s consistent interpretation of that statute. Thus, any service the Commission sought to define that was broader than what Justice Scalia identified would necessarily be an information service immune from common-carriage regulation.

1. Parties that support the Commission reclassifying some aspect of broadband Internet access as a telecommunications service have pointed to the dissent in *Brand X* as allegedly providing a means for doing so. They contend that, by adopting the dissenting Justices’ argument that broadband providers “offer” a separate telecommunications service subject to Title II, the Commission can ensure that providers do not offer “fast lanes” or “paid prioritization” by declaring such conduct to be “unreasonable discrimination” in the provision of that allegedly separate service under 47 U.S.C. § 202(a).<sup>2</sup>

AT&T has already identified many reasons why the statutory approach suggested by the *Brand X* dissent is incorrect, unwise, and unnecessary and explained that, under established precedent, § 202(a) in fact would not lead to the ban on activities such as prioritization that these parties seek.<sup>3</sup> For present purposes, the key point is that such an approach, even if lawful, would not even arguably provide the means for addressing the alleged concerns about paid prioritization. That is because the separate telecommunications service that the *Brand X* dissent claims is “offered” to consumers includes *only* transmission between the consumer’s premises and the ISP’s premises, not the computer-processing ISP functions that enable users to transmit information to and from other users and content providers connected to the Internet, which are the essence of Internet access service.

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<sup>1</sup> 47 U.S.C. § 153(24) (emphases added). The statute excludes “any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” *Id.*

<sup>2</sup> See, e.g., Free Press Reply Comments, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 et al., at 8-9 (FCC filed Sept. 15, 2014) (“The Commission’s decision to remove broadband from the telecommunications services classification was wrong when issued, as Justice Scalia easily figured out. It’s even more clearly wrong today. There is no time like the present to reverse it.”); Reply Comments of COMPTEL, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, at 14 n.59 (FCC filed Sept. 15, 2014) (“Indeed, in his dissenting [*Brand X*] opinion in which Justices Ginsburg and Souter joined, Justice Scalia found that the telecommunications component of cable modem service retains such an independent identity from Internet access service that it must be regarded as a separate offering and that the Commission exceeded its statutory authority in ruling otherwise.”); Comments of Popular Resistance, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 et al., at 6 (FCC filed July 15, 2014) (“Adding to the strength of the FCC in reclassifying the Internet under Title II was the dissenting opinion issued by Justice Scalia in *Brand X* which was joined by Justices Souter and Ginsburg.”).

<sup>3</sup> See, e.g., AT&T Reply Comments at 24-42, 60-90, GN Dockets No. 14-28 & 10-127 (Sept. 15, 2014).

The *Brand X* dissent makes very clear that the allegedly separate “offering” of telecommunications Justice Scalia would have identified involved only the “broad-band connection between the customer’s computer and the cable company’s computer processing facilities,” 545 U.S. at 1010 – a connection that they elsewhere referred to in short-hand as a “physical transmission pathway to the Internet” that is “sold . . . separately from the Internet functionality,” *id.* at 1008. Further demonstrating this understanding, the dissent explained that it understood the supposedly separate telecommunications service offering to be analogous to the transmission path provided by a local exchange carrier (“LEC”) when a customer uses dial-up Internet access or obtains digital subscriber line (“DSL”) service from an ISP other than that LEC. *See id.* at 1008-09 & n.3 (discussing these “substitutes”). As the dissent understood, in those cases, the physical connections quite evidently offer no ISP functionalities, but rather are merely the means of connecting *to* an ISP. *See id.* at 1009 (distinguishing between “computing functionality” and “the physical pipe by which that functionality comes to [the user’s] computer”). As the dissenters stated, the transmission they had in mind is “downstream from the [ISP’s] computer-processing facilities,” and “merely serves as a conduit for the *information service that has already been ‘assembled’ by the cable company in its capacity as ISP.*” *Id.* at 1010 (emphasis added).<sup>4</sup> Finally, this understanding of the dissent is confirmed by its analogy of the allegedly separate transmission to a restaurant’s “offering” of pizza delivery. *See id.* at 1007. A pizza is, of course, delivered only after all the work necessary to make the pie is complete, just as the transmission of interest to the dissent occurred only after the ISP “assembles” the information requested by the end user before delivery to his or her computer.<sup>5</sup>

The *Brand X* dissent is consistent with the arguments long made by advocates for identifying a separate “telecommunications service.” Those parties likewise recognized that such a service would not – and, under the statute, could not – include any ISP functions. EarthLink, for instance, argued to the Commission in 2002 that the supposedly distinct

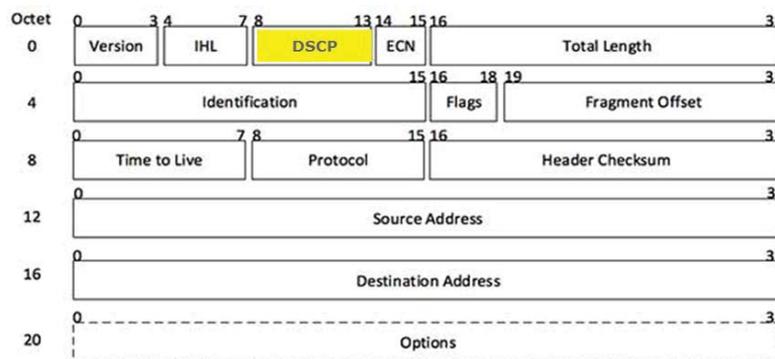
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<sup>4</sup> *Id.* at 1010 (“When cable-company-assembled information enters the cable for delivery to the subscriber, the information service is already complete. The information has been (as the statute requires) generated, acquired, stored, transformed, processed, retrieved, utilized, or made available. All that remains is for the information in its final, unaltered form, to be delivered (via telecommunications) to the subscriber.”).

<sup>5</sup> Notably, the *Brand X* dissenters did *not* contest the Commission’s long-established conclusion that the same service cannot be both a telecommunications service and an information service. Instead, they argued that there was more than one service being offered. *See* 545 U.S. at 1006-07 (“The relevant question is whether the individual components in a package still possess sufficient identity to be described as separate objects of the offer . . .”). For two decades, the Commission has found that there is “strong support in the text and legislative history of the 1996 Act for the view that Congress intended ‘telecommunications service’ and ‘information service’ to apply to separate categories of services.” Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 57 (1998) (“*Universal Service Report to Congress*”). As the Commission further explained, if it took a different approach, it would have broad unintended consequences, as all providers of services offered “via telecommunications” would be subject to claims that there were simultaneously offering telecommunications services. That is why the Commission long ago explained that, if it were to conclude that services could simultaneously fit in both categories, “it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications services category.” *Id.*

“telecommunications service” component of Internet access service was the broadband link “between the end-user’s NID (network interface device, such as a DSL modem), and the DSLAM at the incumbent LEC’s serving wire center.”<sup>6</sup> EarthLink was explicit that this service “does not provide, on its own, access to information sources or any other user of the Internet.”<sup>7</sup> As EarthLink further explained, “in order for ISPs to connect with end-users and offer Internet access, the ISPs must also purchase a data aggregation telecommunications service (typically, ATM or Frame Relay) that takes traffic from the DSLAM to the ISP’s point of interconnection.”<sup>8</sup> Likewise, the DSL transmission service tariffs offered by some local exchange carriers are point-to-point services that terminate at or before the premises of the ISP.<sup>9</sup>

The fact that the supposed telecommunications service for which some have argued, and that the *Brand X* dissent advocated, terminates *before* traffic reaches an ISP, and thus includes no ISP functions, is critical to the issues presented here. It is the routers and other facilities that an ISP uses to route packets to, from, and within the network of networks (including the ISP’s own network) known as the Internet that create the ability to prioritize traffic. In particular, in today’s modern broadband networks, packet prioritization can be implemented at the ingress router through the use of the Differentiated Services Code Point (DSCP) field, as shown in Figure #1:



[Image: IP Header]

Figure #1

Once the DSCP field is added, network packets are then stored in different queues (or packet buffers) depending on their DSCP assignment. Packets are stored in these queues until de-buffered by the scheduler. The scheduler de-buffers packets from queues according to their order of priority leading to prioritization of different traffic types across the network. This is shown in Figure #2.

<sup>6</sup> Comments of EarthLink, Inc., *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Docket No. 02-33, at 11 (filed May 3, 2002) (“EarthLink Comments”).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See NECA Tariff No. 5, § 8.1.1 (eff. Feb. 17, 2007 (includes all tariff changes as of Jan. 1, 2015)) (“Asymmetric Digital Subscriber Line (ADSL) Access Service enables data traffic generated by a customer-provided modem to be transported to a DSL Access Service Connection Point using the Telephone Company’s local exchange service facilities.”); *see also id.* (diagrams showing termination of service before or at ISP premises and thus before any ISP functions).

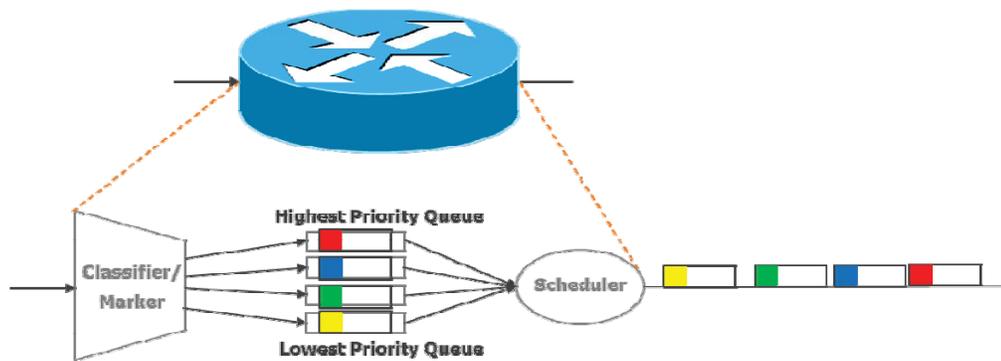


Figure #2

Finally, Figure #3 shows an example of a network configuration where the routed part of the ISP network has four DSCP priorities (Highest priority: Priority #1, Lowest: Priority #4) with Priority #3 assigned to traffic received from Content Provider #1 and Priority #4 assigned to Content Provider #2. In case of network congestion or packet loss, contents from Provider #2 have a higher probability to be dropped or delayed.

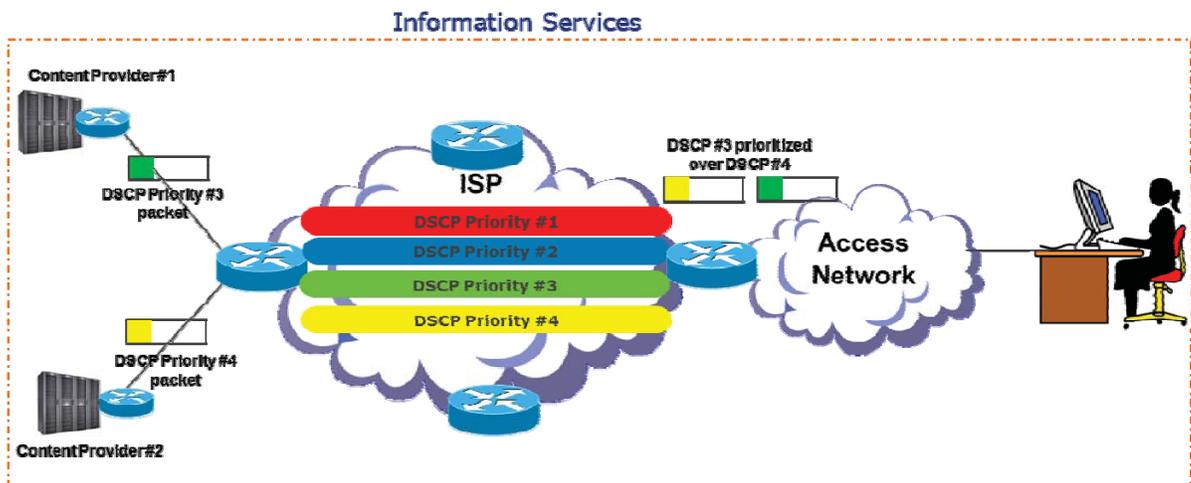


Figure #3

In sum, as these Figures demonstrate, the capabilities that allow prioritization (and would allow the paid prioritization that some parties are concerned about) are, under the dissent’s proposed distinction, part of the ISP function. They involve the use of an ISP’s “computing functionality” to provide “the capability of getting, processing, and manipulating information.” *Id.* at 1010 (citing 47 U.S.C. § 153(20)). They thus are not part of the transmission that Justice Scalia and his colleagues hypothesized should be understood as a separate telecommunications service subject to Title II.

Thus, far from supporting reclassification in order to ban prioritization under Title II, Justice Scalia’s dissent supports the conclusion that the kinds of activities at issue in this proceeding are part of the information service that Internet access providers offer, which cannot be subjected to common carrier regulation. Put differently, any attempt to sever broadband

Internet access into separate telecommunications and information services would not only be incorrect as a matter of fact and law, but also, as the *Brand X* dissent shows, would not empower the Commission to adopt *Open Internet* rules under Title II. That is because the computing capabilities necessary to engage in activities like “paid prioritization” are performed outside the allegedly separate transmission service described by Justice Scalia.

2. Not only did the *Brand X* dissent not identify a separate telecommunications service that encompassed ISP functions, but also it could not have done so consistent with the text of the 1996 Act. The language of the Telecommunications Act of 1996,<sup>10</sup> as well as the pre-existing regulatory background and the Commission’s consistent, subsequent interpretation of the relevant language compel the conclusion that *any* service that offers ISP functionalities is necessarily, as a matter of statutory construction, an information service.

The statutory definition of an “information service” is exceptionally broad. As we noted at the outset, it includes the “offering of a *capability* for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”<sup>11</sup> The definition thus encompasses not only information processing, but also several core components of the “capabilit[ies]” that Internet access service necessarily provides – among other things, “acquiring,” “retrieving,” “storing,” “utilizing,” and “making available” information.

Any service that includes Internet access functionalities plainly satisfies that definition. Those functionalities allow an end user the capability, for example, to retrieve (or acquire or utilize) information from *cnn.com*, to store information with Dropbox, and to make available information on a personal webpage stored on a server at the customer’s premises. Even beyond those facts, as the *Brand X* Court understood, no user could reach the Internet without the computer processing capabilities provided by the Domain Name System (“DNS”). *See* 545 U.S. at 990 (“DNS is essential to providing Internet access”). That is even more true today, when providers such as AT&T offer “DNS Assist” as part of Internet access. That computer processing functionality suggests to Internet access customers the sites they may want to reach when they enter an incomplete or inaccurate web address.<sup>12</sup> Similarly, AT&T’s Internet access service includes “on-net content caching,” which “stores” and “makes available” information to consumers in a way that enhances Internet browsing by maintaining a copy of often sought content in an on-net server, which allows AT&T to provide that information to its customers

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<sup>10</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

<sup>11</sup> 47 U.S.C. § 153(24) (emphasis added).

<sup>12</sup> AT&T High Speed Internet Terms of Service / att.net Terms of Use (“DNS Language Assist. If you enter an incomplete or inaccurate web address, instead of providing only an error message, AT&T will automatically search for similar or related terms and present you with suggested sites you may want to reach. AT&T and our partners do not retain this information, nor do we your retain information for any other purpose. If you prefer to opt out of this service, you may do so by visiting <http://www.att.com/cmpchoice> from your desktop or from your mobile web browser.”), available at <http://www.att.com/shop/internet/att-internet-terms-of-service.html>.

more quickly.<sup>13</sup> And AT&T's service likewise includes the computer functionalities necessary to establish firewalls, which control incoming and outgoing traffic and thus determine the information that is retrieved, utilized, and made available to end users. In sum, ISP functionalities necessarily transform, process, and utilize information in the course of routing packets of data requested by – or pushed to – the end user customer, and provide the customer with the capability to acquire, retrieve, store, and utilize information on the Internet, as well as to make available information of their own.<sup>14</sup> Indeed, if these functionalities did not constitute an information service, dial-up ISPs would have been telecommunications service providers, a nonsensical result that is directly contrary to the Commission's own prior determinations.<sup>15</sup>

Any service that includes ISP functionalities is thus meaningfully distinct from services such as Ethernet, which provides a useful contrast here. Ethernet provides high-speed transmission only. It routes packets from one fixed end point to another, and does not, by itself, allow the capability to retrieve, utilize, or store information from external sources. By contrast, broadband ISPs use computing functionality, including DNS, caching, and other capabilities to provide end users the “capability” of storing, retrieving, utilizing, and making available information from a nearly limitless variety of on-net and external sources. In sum, Ethernet offers pure, transparent transmission and thus is a telecommunications service; broadband ISPs offer computing functionality to allow users the capability to access, store, and manipulate information and thus is an information service.

For all these reasons, the plain meaning of the statutory definition mandates the result that any offering including ISP functionalities – and thus, as discussed above, any offering that includes the ability to prioritize or block content – necessarily is an information service. And under the statute, that is the case regardless whether the service at issue also includes

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<sup>13</sup> Indeed, for this reason, broadband Internet access service cannot be a telecommunications service: when AT&T serves up information from an on-net cache, the information is provided from a “point” of AT&T's choosing, rather than a point specified by the customer. *See* 47 U.S.C. § 153(50) (defining “telecommunications” as the “transmission, between or among points specified by the user . . .”).

<sup>14</sup> Because the ISP functions are core aspects of providing the capability to utilize, store, acquire, and make available information, they do not fall within the limited exception in the definition of “information service” for functions that involve only “management, control, or operation of a *telecommunications system* or the *management of a telecommunications service*.” 47 U.S.C. § 153(24) (emphases added). The ISP functions discussed above are what allow consumers to interact with and obtain information, as well as to make their own information available; they do not merely manage ordinary transmissions. Thus, in the *Non-Accounting Safeguards Order*, the Commission cited as services falling within this exception protocol processing involving “communications between an end-user and the network itself,” “in connection with the introduction of a new basic network technology,” or involving “conversations taking place solely within the carrier's network to facilitate provision of a basic network service.” First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, ¶ 106 (1996), *modified on recon.*, 12 FCC Rcd 2297, *further recon.*, 12 FCC Rcd 8653 (1997) (“*Non-Accounting Safeguards Order*”). ISP functions do not fall into any of these categories. Nor, as demonstrated by the Commission's repeated findings that these functions are enhanced services, do they fit into the pre-1996 Act exception for “adjunct-to-basic” services. *See id.* ¶ 107.

<sup>15</sup> *See Universal Service Report to Congress* ¶¶ 80-81.

transmission, as all information services are provided “via telecommunications.” For that reason, it has long been understood that the offering of ISP computing functionalities, whether provided together with transmission or on its own, is necessarily an information service. As EarthLink stated in the comments quoted above, broadband Internet access is an information service because it involves ““generating, . . . storing, . . . or making available information,”” and that is the case *regardless* whether the service “rides over [transmission] facilities owned by the incumbent LEC.”<sup>16</sup>

These conclusions are buttressed by the regulatory background against which Congress passed the 1996 Act. As the Commission is aware, prior to the passage of that statute, the categories of “enhanced services” under *Computer II*<sup>17</sup> and “information services” under the Modification of Final Judgment<sup>18</sup> were understood to encompass anything beyond basic transmission.

Thus, in the 1980 Final Decision in *Computer II*, the Commission created a “relatively clear-cut” distinction between basic and enhanced services.<sup>19</sup> Basic services included only “a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.”<sup>20</sup> Enhanced services, meanwhile, included everything else: “*any* offering over the telecommunications network which is more than a basic transmission service.”<sup>21</sup> The Commission described the broad class of services that met that definition:

In an enhanced service, for example, computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber’s information. In these services additional, different, or restructured information may be provided the subscriber through various processing applications performed on the transmitted information, or other actions can be taken by either the vendor or the subscriber based on the content of the information transmitted through editing, formatting, etc.<sup>22</sup>

Enhanced services need not involve any change to the content of the subscriber’s information. Rather, they “may simply involve subscriber interaction with stored information,”<sup>23</sup> which of

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<sup>16</sup> EarthLink Comments at 7 (quoting 47 U.S.C. § 153(20)).

<sup>17</sup> Final Decision, *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980) (“*Computer II*”).

<sup>18</sup> *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982) (“MFJ”).

<sup>19</sup> *Computer II* ¶ 97; *see also id.* ¶ 101 (noting that the distinction “draws a clear and, we believe, sustainable line between basic and enhanced services upon which business entities can rely”).

<sup>20</sup> *Id.* ¶ 96; *see also id.* ¶ 95 (describing basic services as “limited to the offering of transmission capacity between two or more points suitable for a user’s transmission needs”).

<sup>21</sup> *Id.* ¶ 97 (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

course describes much of what Internet access enables. Moreover, as the Commission has explained, under *Computer II*, a service was enhanced regardless of the extent of transmission it involved: “The Commission . . . determined that enhanced services, which are offered ‘over common carrier transmission facilities,’ were themselves not to be regulated under Title II of the Act, *no matter how extensive their communications components.*”<sup>24</sup> Thus, any service defined to include ISP functions would meet this standard, whether or not the service also included transmission from, for instance, the ISP to points on the Internet.

The 1982 MFJ likewise distinguished a broad category of “information services” from the separate, narrow category of “telecommunications services.” The MFJ defined “telecommunications services” as “the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities.”<sup>25</sup> Telecommunications, in turn, referred to “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,” as well as all facilities and services “essential to such transmission.”<sup>26</sup> Like the “enhanced services” described in *Computer II*, “information services” under the MFJ included essentially everything else that might be done with information transmitted on a telecommunications network: “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications.”<sup>27</sup>

Consistent with those broad definitions, the precursors of today’s Internet access service had been identified as both an “enhanced service” under *Computer II* and an “information service” under the MFJ prior to the passage of the 1996 Act. For example, in addressing the BOCs’ request for interim waiver of the *Computer II* requirements, the Commission explained that “[e]nhanced services use the existing telephone network to deliver services that provide more than a basic transmission offering, such as voice mail, E-Mail, electronic store-and-forward, fax store-and-forward, data processing, and *gateways to online databases.*”<sup>28</sup>

Even more to the point, the district court lifted the information services restriction in the MFJ to the extent necessary to allow the RBOCs to offer gateways to information services – by providing functions that included data transmission, address translation, and protocol conversion – because the gateway functions themselves were information services.<sup>29</sup> The ISP functionalities

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<sup>24</sup> *Universal Service Report to Congress* ¶ 27 (emphasis added).

<sup>25</sup> 552 F. Supp. at 229.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* Like the 1996 Act, the MFJ excluded from “information services” any such offerings to the extent they were used “for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” *Id.*

<sup>28</sup> Memorandum Opinion and Order, *Bell Operating Companies’ Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 1724, ¶ 1 n.3 (1995) (emphasis added).

<sup>29</sup> See *United States v. Western Elec. Co.*, 673 F. Supp. 525, 587-97 (D.D.C. 1987), *aff’d in part, rev’d in part*, 900 F.2d 283 (D.C. Cir. 1990). The court rejected claims that the decree already allowed the RBOCs to provide gateway services. Rather, given the breadth of the information services definition, which included “acquiring,” “transforming,” “processing,” “utilizing,” and “making available” information via telecommunications, the RBOCs could not provide them without a waiver of the

that enable Internet access service are direct successors to these gateways: both enable access to the multitude of databases – both the ISP’s databases and those of third parties.

In defining “information services” in the statute, Congress adopted, in pertinent part, language nearly identical to the language used in the MFJ.<sup>30</sup> Accordingly, as the Commission recognized soon after the 1996 Act’s passage, Congress’s definition includes “all of the services that the Commission has previously considered to be ‘enhanced services’” as well as additional services not covered by the pre-1996 Act definition of that term.<sup>31</sup> As described above, Internet access – including “gateways to online databases” – fell within the Commission’s pre-1996 Act definition of “enhanced services,” as well as the MFJ’s virtually identical definition of “information services”; thus, Congress’s definition of “information services” necessarily included Internet access as well.<sup>32</sup>

Consistent with Congress’s evident intent, the Commission determined soon after the 1996 Act’s passage that Internet access is an information service under the new statutory scheme. In particular, in the *Universal Service Report to Congress*, the Commission reached this conclusion after reviewing the pre-1996 Act history and also undertaking a “de novo” review of

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information services restriction in the MFJ. *Id.* at 587 n.275. It explained that offering gateway services thus “actually involves the performance of a number of services that by *any fair reading* of the term ‘information services’ would be included in that definition.” *Id.* (emphasis added).

<sup>30</sup> As noted above, the 1996 Act states in relevant part that an information service involves the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(24). The MFJ defined an “information service” in pertinent part as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications.” 552 F. Supp. at 229.

<sup>31</sup> *Non-Accounting Safeguards Order* ¶¶ 102-103 (concluding that, “while all enhanced services are information services, not all information services are enhanced services,” because “information services” are not limited to services provided over common carrier transmission facilities used in interstate communications).

<sup>32</sup> While the House’s definition of information services, which ultimately was included in the 1996 Act, virtually mirrored the MFJ’s definition of that term, *see* H. Rep. No. 104-204, at 46 (1995), the Senate definition was narrower. The Senate defined “information services” as:

the offering of services that – (1) employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber’s transmitted information; (2) provide the subscriber additional, different, or restructured information; or (3) involve subscriber interaction with stored information.

S. Rep. No 104-23, at 79-80 (1995). The Senate’s definition would have limited “information services” to only those services that actually act on a subscriber’s information or that provide the customer additional/stored information – as opposed to an offering that provided a *capability* to reach such services. While ISP functionalities may well have qualified even under this narrower definition, by choosing the broader House version, Congress removed any possible doubt. Indeed, as discussed above, the MFJ court had already concluded that “gateway” services met the nearly identical definition used in those proceedings.

the statutory language.<sup>33</sup> It explained that “Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport.”<sup>34</sup>

And, of course, in 2002, the Commission reasoned, in the decision affirmed in *Brand X*, that cable modem service, an Internet access service, was an information service because it “combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications.”<sup>35</sup> Importantly, there was no dispute between the *Brand X* majority and dissent as to this point. The dissenters agreed that the “computing functionality” (including the acquisition, retrieval, processing, storage and making available of information) provided as part of cable modem service was an information service. *Brand X*, 545 U.S. at 1009-10. As discussed above, they differed only as to whether the “downstream” link between the customer and the ISP’s “computer-processing facilities” constituted a separate offering of telecommunications that could be classified as a telecommunications service. Although their argument remains incorrect, as discussed above, the important point here is that, even on its own terms, it would not provide the means to address prioritization or other alleged forms of discrimination under Title II.

Sincerely,

/s/Christopher M. Heimann

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<sup>33</sup> *Universal Service Report to Congress* ¶ 75 (noting “that the functions and services associated with Internet access were classed as ‘information services’ under the MFJ” and that “the Commission has consistently classed such services as ‘enhanced services’ under *Computer II*”).

<sup>34</sup> *Id.* ¶ 73; see Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 789 (1997) (“We observe that ISPs alter the format of information through computer processing applications such as protocol conversions and interaction with stored data, while the statutory definition of telecommunications only includes transmissions that do not alter the form or content of the information sent.”), *aff’d in part, rev’d and remanded in part sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 121 S. Ct. 423 (2000).

<sup>35</sup> Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 38 (2002).