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U.S. Supreme Court Champions Cable Guy

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While it may be blasphemous to admit, I don't spend a great deal of time reading U.S. Supreme Court opinions. However, when one of interest comes along, I jump at the opportunity.

Within the past 10 days, I've found the court's decision in *National Cable & Telecommunications Association et al. v. Brand X Internet Services, et al.* (no. 04-277, argued March 29 — decided June 27) an intriguing read. From its unusual and not totally on-point (some might go so far as to say "inaccurate") analogies (including the unusual and unlikely combination of cars, puppies and leashes and pizza delivery, all in an effort to describe how products and service "offerings" can be separated into individual components), through Justice Antonin Scalia's feisty and eloquent dissent, for anyone really into the nuts and bolts of telecommunications regulation, it's the kind of court decision that appropriately qualifies as beach-worthy reading.

The decision affirms the Federal Communications Commission's earlier interpretation of Title II of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 USC Section 151 et seq., which subjects all providers of "telecommunications services" to mandatory common carrier regulation.

Specifically, the FCC's interpretation, reinforced by this decision, allows cable companies to exclude competitive internet service providers (ISPs), for example, Earthlink, from offering services over cable companies' networks. That is, a provider of cable modem service is not obligated to open its network facilities to every — or for that matter any — ISP other than the one it provides.

This decision represents a significant win for the cable television industry, and a potential win for the large local service providers who hope to provide cable service and receive the same level of protection from competition that the cable providers have just been allowed (see last month's column on this topic).

The essence of the case involves the distinctions, initially created in earlier FCC and court proceedings, defining which communications products and service offerings qualify as "information services," and which are "telecommunications services." To the uninitiated, this seemingly subtle distinction is yet another manifestation of the evolutions in the broad arenas of both technology and law. The problem is that these evolving processes are not evolving in any sort of parallel way.

Back in the dark ages of telecommunications (approximately 25 years ago), there were two competing technologies — base, sometimes called "narrowband" and broadband communications. Narrowband supports primarily voice applications. Broadband provides a much larger pipe through which data, or information, can be transmitted at much higher speeds than narrowband can support. As the Internet and cable television morphed from luxury items to "must haves," the demand for largely unregulated (that's the key-word here) broadband services has increased dramatically.

The 1996 Telecommunications Act, which amended the original Communications Act of 1934, addressed the issue of broadband deployment. Since that time, approximately 90 percent of American households have access to cable television, and by association, cable modem (broadband) service. DSL (digital subscriber line), which is the primary competing broadband technology to cable modem service (there are others, but cable modem and DSL are the biggies), can be provided over a standard telephone line provided that other conditions (including, among other factors, distance from the phone company's central office to the end-user location). To bring this issue into

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clearer focus, DSL, which is provided over a standard telephone (baseband) line is a "telecommunications service" and thus subject to regulatory constraints, while cable modem service constitutes an "information service" and is thus free from such burdensome obligations.

The issue, and thus the importance of this case, is the fact that DSL and cable modem service, although similar in "outcome," (broadband Internet access) are treated differently in the regulatory arena, thus creating what many, including FCC Chairman Kevin Martin believe is untenable "regulatory disparity."

The chairman, who has expressed an interest in deregulating "telecommunications services" in an effort to create a level playing field between the two dominant technologies, may find this a tough sell. At the moment, the FCC has only four commissioners — two Republicans and two Democrats, and convincing those in favor of regulation to simply let go may be an untenable task until a new (and presumably Republican) commissioner is appointed.

The Supreme Court's decision to uphold the FCC's actions in this case relies heavily on the standard provided in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, (467 US 837) which requires that in the absence of an ambiguous statute, deference is to be given to the appropriate agency's reasonable construction, even if that view is different from what the court believes to be the best

interpretation. Or, in English, absent some egregious interpretation, an agency with the necessary expertise should be allowed to interpret a statute before a court does.

While Brand X Internet Services and its co-parties to the case argued, among other things, that the statute in question was clearly ambiguous, the court disagreed. As such, while at least in my neighborhood, DSL costs the same as does cable modem service, the burdens placed on the providers (and ultimately consumers) of broadband through cable will be considerably less than those placed upon DSL providers. However, while the DSL providers are obligated to provide access to competing ISPs, the cable companies, at least for now, are not.

This decision is important for several reasons. First, it gives the FCC the "go-ahead" to make further efforts to deregulate broadband services (read: DSL) which have been on hold since this issue first made its way to the Ninth Circuit. This clearly is good news not only for the cable companies, but for the incumbent local exchange carriers who provide DSL, and who are anticipating that this decision will enable the ILECs to offer DSL absent the regulatory shackles that have kept it from equal footing with cable modem service.

Secondly, it gives the FCC some assurances that its interpretation of the Telecom Act of 1996 will be given deference over those of a court. Third, the decision provides some assurances to the cable industry that its broadband service offerings will remain largely free from the obligations imposed on "telecommunications services" as defined, and finally, although not discussed here, it provides an indication that the FCC will review its rules on the Universal Service Fund, which, for the time being, is supported strictly by users of the regulated "telecommunications services," although the revenues it generates are used to pay for broadband deployment.

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