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DSL Classified as “Information Service”

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Earlier this year, we reported to you that the Supreme Court released its decision in the *Brand X* case, wherein it upheld a March 2002 Declaratory Ruling by the FCC classifying cable modem services as an “information service” under the Communications Act, rather than as a “telecommunications service.” Many observers predicted that this ruling would result in another ruling by the FCC applying similar deregulatory treatment to DSL services offered by telephone companies. In August, the FCC dropped the other shoe and issued such an Order.

The Order adopted by the Commission determined that wireline broadband Internet access services (DSL) are defined as “information services” that are functionally integrated with a telecommunications component. In the past, the Commission required facilities-based telephone companies to offer that wireline broadband transmission component separately from their Internet service, as a stand-alone service on a common-carrier basis, and thus classified that component as a telecommunications service. This meant that wireline broadband providers, unlike their cable television brethren, had to make their broadband offerings available to everyone, including competitors. Wireline companies balked at making the necessary investment in these facilities if others could simply piggyback on their networks. In its August Order, the Commission eliminated this transmission component sharing requirement, created over the past three decades under very different technological and market conditions, finding it caused vendors to delay development and deployment of innovations to consumers.

To ensure a smooth transition, the Order required that facilities-based broadband Internet access service providers continue to provide existing wireline broadband Internet access transmission offerings, on a grandfathered basis, to unaffiliated ISPs for one year. The Order also requires facilities-based providers to contribute to existing universal service mechanisms based on their current levels of reported revenues for the DSL transmission for a 270-day period after the effective date of the Order or until the Commission adopts new contribution rules, whichever occurs earlier. If the Commission is unable to complete new contribution rules within the 270-day period, the Commission will take whatever action is necessary to preserve existing funding levels, including extending the 270-day period or expanding the contribution base.

The Order also allows wireline providers the options to offer the transmission component of the wireline broadband Internet access service to affiliated or unaffiliated ISPs on a common-carrier basis, on a non-common carrier basis, or by some combination of both.

Some rural incumbent local exchange carriers have indicated that they may choose to offer broadband Internet access transmission on a common carrier basis.

While we have seen the broad outlines in the Public Notice of the FCC's action, the Commission still has not released the text of the Order, over five weeks later. As the old saying goes, "the devil is in the details," and industry and consumers eagerly await the details in the text, which will likely trigger as many questions as it answers. The Order will not actually become effective until it is released and published in the Federal Register.

Many observers, including FCC Commissioners Adelstein and Copps, have expressed concern that this action will harm competition and openness in the broadband services consumer market. Perhaps in order to salve such concerns, the Commission also adopted a "policy statement" that outlines four principles "to encourage broadband deployment and preserve and promote the open and interconnected nature of public Internet": (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers. Although the Commission did not adopt rules in this regard, it stated that it will incorporate these principles into its ongoing policymaking activities. We shall see.