

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL CABLE & TELECOMMUNICATIONS :

4 ASSOCIATION, ET AL., :

5 Petitioners, :

6 v. : No. 04-277

7 BRAND X INTERNET SERVICES, ET AL.; :

8 and :

9 FEDERAL COMMUNICATIONS COMMISSION :

10 AND UNITED STATES, :

11 Petitioners, :

12 v. : No. 04-281

13 BRAND X INTERNET SERVICES, ET AL. :

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15

16 Washington, D.C.

17 Tuesday, March 29, 2005

18

19 The above-entitled matter came on for oral

20 argument before the Supreme Court of the United States at

21 11:15 a.m.

22 APPEARANCES:

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24 Department of Justice, Washington, D.C.; on behalf of

25 the Petitioner in 04-281.

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3 PAUL T. CAPPuccio, ESQ., New York, New York; on behalf of
4 the Petitioners in 04-277.

5 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of
6 the Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	THOMAS G. HUNGAR, ESQ.	
4	On behalf of the Petitioner in 04-281	4
5	ORAL ARGUMENT OF	
6	PAUL T. CAPPUCCIO, ESQ.	
7	On behalf of the Petitioners 04-277	19
8	ORAL ARGUMENT OF	
9	THOMAS C. GOLDSTEIN, ESQ.	
10	On behalf of the Respondents.	29
11	REBUTTAL ARGUMENT OF	
12	THOMAS G. HUNGAR, ESQ.	
13	On behalf of the Petitioner in 04-281	52
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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2
3
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P R O C E E D I N G S

[11:15 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument
next, number 04-277, National Cable & Telecommunications
Association v. Brand X Internet Services.

Mr. Hungar.

ORAL ARGUMENT OF THOMAS G. HUNGAR
ON BEHALF OF PETITIONER IN 04-281

MR. HUNGAR: Thank you, Mr. Chief Justice, and
may it please the Court:

In the Telecommunications Act of 1996, Congress
declared that it is the policy of the United States to
preserve the vibrant and competitive free market that
presently exists for the Internet unfettered by federal or
state regulation. The FCC implemented that clear policy
directive in the order under review by concluding that
cable modem service should be classified as an information
service and not a telecommunications service under the
Communications Act. That reasonable determination should
be upheld, because it is consistent with the text,
history, and purposes of the Act.

The Act defines "telecommunications" as the
transmission of information without change in form or
substance, and "telecommunications service" as the
offering of telecommunications directly to the public for

1 a fee.

2 Given that focus on the nature of the "offering
3 to the public," the FCC reasonably concluded that the
4 integrated cable modem service offering should be viewed
5 as a whole in determining its classification under the
6 Act.

7 JUSTICE SCALIA: Why? Why is that reasonable?
8 I mean, why is it offered to the public if it's offered
9 alone, but it's not offered to the public if it's offered
10 with a tie-in? I mean, if -- you know, if I say, you
11 know, I'm selling you a windshield alone, I guess I'm
12 offering a windshield. But if I say, you know, you've got
13 to buy the windshield with a car, am I any less selling
14 you a windshield?

15 MR. HUNGAR: Well, I don't think we would say,
16 in that example, that you are offering windshields, per
17 se. I mean, to give an example, carmax.com offers cars
18 for sale over the Internet, but I don't think we would
19 ordinarily say that they are offering windshields or
20 steering wheels or tires for sale. Certainly, that's not
21 been necessary construction of a regulatory regime that,
22 say, is designed to focus on sellers of tires. It
23 wouldn't automatically, as a matter of law, have to be
24 applied to entities that are selling cars instead. And
25 the same is true here.

1 JUSTICE SCALIA: Well, suppose I just tie it in
2 with windshield wipers.

3 MR. HUNGAR: Well, again, I --

4 JUSTICE SCALIA: You can only buy my windshield
5 if you buy the windshield wipers with it. Am I no longer
6 selling a windshield because I'm selling it with -- only
7 with windshield wipers?

8 MR. HUNGAR: Well, I think it would depend on
9 the nature of the regulatory --

10 JUSTICE SCALIA: Fifty-fifty.

11 MR. HUNGAR: -- regime.

12 JUSTICE SCALIA: But don't you think that the
13 telecommunications aspect of what's going on here is at
14 least as important as the information aspect of it? The
15 information is useless unless it can be conveyed.

16 MR. HUNGAR: Well, the -- and, by the same
17 token, the transmission component is useless unless it
18 offers all of the -- all of the information-services type
19 functionality that Internet service offers.

20 JUSTICE SCALIA: Not necessarily. You could --
21 you can use that broadband service to go to other
22 information providers.

23 MR. HUNGAR: But, Your Honor, it's the -- it's
24 the capabilities that you purchase in the integrated
25 package -- not the pure transmission, but the other

1 capabilities, the computer data-processing, data-access
2 capabilities that are an essential part of that. If all
3 you had was the transmission, with none of the other
4 computer functionality -- if you typed in the Supreme
5 Court's Website, for instance, supremecourtus.gov, nothing
6 would happen, because all of the computer functionality,
7 like the domain-name system, which is a very
8 sophisticated, complex, distributed database involving
9 literally millions of computers around the world, that's
10 data processing. That's information-services capability
11 that you use every time you type in a Website.

12 JUSTICE SCALIA: I understand that.

13 MR. HUNGAR: It's not just transmission. It's
14 much more than that. And without the -- without the
15 computer data-processing aspects, it doesn't do anything.

16 JUSTICE SCALIA: I agree, but the question isn't
17 whether it doesn't do anything; the question is whether
18 you are still offering telecommunications services to the
19 public. And it seems to me -- look it, I offer you
20 broadband, initially without any information function at
21 the end of it, and you're using this broadband to do all
22 sorts of good stuff, going where you want, getting what
23 you want, conveying what you want. And then I change my
24 rules and I say, "You know, in the future the only way I'm
25 offering this broadband is if you, in addition to buying

1 the broadband communications capacity, buy my information
2 technology at the end of it." Have I suddenly stopped
3 selling the broadband -- or offering the broadband to the
4 public? I just don't think that's a reasonable --

5 MR. HUNGAR: Well --

6 JUSTICE SCALIA: -- use of language.

7 MR. HUNGAR: -- well, two points. Your question
8 starts with, I think, an incorrect assumption about the
9 nature of the world. The pure transmission function has
10 not been offered to the public, to consumers, separately
11 and apart -- again, it doesn't do anything. Consumers
12 don't use the pure transmission functions by itself.
13 "Internet service," by definition, includes the data-
14 processing aspects that the Commission so found on this
15 record, and that factual determine is reasonable and
16 supported by the record.

17 JUSTICE SCALIA: I was giving you a
18 hypothetical. I --

19 MR. HUNGAR: Well, in the -- in the
20 hypothetical, it's conceivable that a different result
21 might be reached by the regulatory agency with authority
22 for construing the statute and applying it to particular
23 fact situations. But I don't think the word "offering"
24 necessarily and always compels the conclusion that any
25 component of an integrated offering is also separately

1 being offered within the meaning of the statute. It
2 depends on the purposes of the statute, as construed by
3 the regulatory agency. "Offering" is ambiguous. And,
4 therefore, what the agency has done here is reasonable.

5 And it's supported, I would add, by the
6 consistent pre-1996 regulatory approach in this area,
7 which all parties agreed Congress incorporated into the
8 1996 Act.

9 JUSTICE SCALIA: But if you do the same
10 combination over telephone lines, you say they are -- they
11 are selling --

12 MR. HUNGAR: Your Honor --

13 JUSTICE SCALIA: -- offering to the public
14 communications service.

15 MR. HUNGAR: That's because the telephone
16 companies have always offered a standalone transmission
17 component which other -- which other ISPs can utilize.
18 They've done that because of the preexisting regulatory
19 regime. They've always made the separate offering;
20 therefore, it is a telecommunications service.

21 JUSTICE SCALIA: What bearing does history have
22 upon the definitional question of whether, when you sell a
23 bundled offering of information technology and
24 communications, you are selling communications?

25 MR. HUNGAR: Your Honor --

1 JUSTICE SCALIA: With respect to the telephone
2 long-lines, you say, yes, you are; and with respect to
3 cable, you say, no, you aren't.

4 MR. HUNGAR: Your Honor, it's certainly not
5 unusual for this Court, in construing a statute, to look
6 to the regulatory history that led up to the enactment of
7 the statute, particularly where it's clear in the
8 legislative history that Congress was in -- was
9 essentially borrowing from the pre-1996 regulatory
10 definitions, the definitional scheme that the Commission
11 adopted in 1980 in its Computer II report. All parties
12 agree that that definitional framework forms the
13 foundation for the very definitions at issue here. That's
14 undisputed.

15 JUSTICE O'CONNOR: Mr. Hungar, what is the
16 tentative decision the FCC has taken on the DSL
17 regulation?

18 MR. HUNGAR: Your Honor, the FCC has tentatively
19 concluded that when a telephone company makes an
20 integrated offering of the DSL transmission capacity with
21 the Internet service, as a combined offering to consumers,
22 that, tentatively that is an information service,
23 precisely the classification that you --

24 JUSTICE O'CONNOR: Even though --

25 MR. HUNGAR: -- read here.

1 JUSTICE O'CONNOR: -- telephone lines have
2 always been subject to common-carrier regulation.

3 MR. HUNGAR: That's correct. And even though --
4 when a telephone company is making a separate standalone
5 offering of just the pure DSL transmission capacity, which
6 is useful only to ISPs, to Internet Service Providers, not
7 to consumers, that that would be viewed, has traditionally
8 been viewed, as a common-carriage offering, because it's
9 pure transmission. But when it's a bundled -- or when
10 it's an integrated offering -- again, this goes back to
11 1980. This very issue, Justice Scalia, was addressed by
12 the Commission in 1980, and it said, if the offering is
13 limited to pure transmission, it is basic
14 telecommunications, basic service, the precursor to
15 telecommunications service; but if you add any computer
16 functionality to the offering, then it is not basic, it is
17 enhanced service. They said that at paragraphs 93 to 97
18 of the ---

19 JUSTICE SCALIA: I understand what --

20 MR. HUNGAR: -- Computer II order.

21 JUSTICE SCALIA: -- they're saying, but they're
22 doing it all on policy grounds. This definition means
23 this, because that produces a good result. With respect
24 to telephone lines, they say, yes, bundled is, or it
25 isn't, depending upon whether we like the result it

1 produces.

2 MR. HUNGAR: No, Your Honor.

3 JUSTICE SCALIA: It just doesn't seem to --

4 MR. HUNGAR: It depends on the nature of the
5 offering. If the entity is offering -- if cable
6 companies, tomorrow, start offering pure cable
7 transmission on an -- on a nondiscriminate basis, that
8 would regulated as a telecommunications service. But what
9 the Commission has always said is that you look at the
10 offering as a whole, and if it's a -- an integrated
11 offering that encompasses not just telecommunications, but
12 data-processing, and computer-type services, as well, it's
13 in the enhanced or information-service category that --
14 the Commission said, in 1980, "We're doing this, in part,
15 because it's not clear -- it's clear that Congress didn't
16 intend, in the 1934 Act, to extend regulation to this new
17 -- this novel, new type of intermingled service, and it
18 would be inappropriate, we think, to try and extend the
19 Act to that, for a number of reasons, including that it's
20 very hard to draw lines between which is -- which has more
21 of a communications versus data-processing component.
22 They had tried that, and concluded that it was
23 unworkable." And so, they drew the line. Basic
24 transmission, pure transmission, if the offering is
25 limited to that, it is on the telecommunications service,

1 or basic-service line; if it contains the computer-
2 processing capabilities, data acquisition and retrieval
3 and the like --

4 JUSTICE O'CONNOR: But it seems to be saying,
5 because the cable companies do not offer separate
6 telecommunications service, they don't have to offer it.

7 MR. HUNGAR: Correct.

8 JUSTICE O'CONNOR: I mean, it just -- it's
9 almost question-begging. It's peculiar.

10 MR. HUNGAR: I don't think so, Your Honor. It's
11 only -- it only -- it's only question-begging because the
12 Respondents have attempted to mischaracterize or
13 misdescribe what is going on here. The rule is, if you
14 are a common carrier, as the telephone companies are, and,
15 in 1980, the FCC was regulating in an environment when
16 there was only one avenue into the home, one
17 communications avenue, the telephone line, and they said,
18 "Under these circumstances, telephone common carriers are
19 not going to be allowed to escape Title II regulation
20 completely by offering enhanced services, if they can
21 offer an enhanced service, an intermingled -- integrated
22 transmission and computer data-processing service, and
23 that service, as a whole, when it's offered, will be
24 unregulated, because Title II does not extend to those
25 types of integrated service offerings." They said,

1 "However, if you -- if it is a telephone common carrier
2 that's making that offering, a facilities-based,
3 typically-monopoly common carrier, they will have an
4 obligation to also make a standalone offering of
5 transmission under Title II, because they were telephone
6 -- traditional common carriers."

7 Cable companies are not in that category. They
8 have not traditionally been --

9 JUSTICE GINSBURG: Did you say -- you say that
10 the FCC is changing its view. It has tentatively changed
11 its view. So it will bracket the telephone companies with
12 the cable companies.

13 MR. HUNGAR: Well, actually, that's an important
14 point, Justice Ginsburg. The FCC has never said that an
15 integrated offering of DSL that -- DSL Internet service,
16 the combined integrated offering, the analog to what we
17 have here, in the cable context -- the FCC has never said
18 that that is not an information service. They have -- and
19 they have tentatively concluded now that it is. What they
20 have said -- what they said in the 1998 order that
21 Respondents cite was that the telecommunications -- the
22 telephone companies are already offering DSL on a
23 standalone, pure-transmission basis to other competing
24 Internet Service Providers; therefore, it is a
25 telecommunications service. Indeed, it was undisputed

1 that it was a telecommunications service. And, again, the
2 reason they were doing that, we assume, is because the
3 preexisting Computer II and Computer III framework
4 required the telephone carriers to make that standalone
5 offering. But the Commission has not said the integrated
6 offering is also a telecommunications service, and it has
7 now tentatively concluded that it is an information
8 service, in keeping with 25 years of regulatory history
9 that --

10 JUSTICE GINSBURG: What would be left in the
11 common-carrier category?

12 MR. HUNGAR: Well, any standalone, pure-
13 transmission offering, including, under the Computer II
14 rationale, to the extent the Commission adheres to it --
15 and it hasn't overturned it yet; it's considering the
16 extent to which it should create an exception in the DSL
17 context -- but under Computer II, a basic, traditional
18 common carrier cannot get away -- cannot get out of Title
19 II regulation by offering an integrated offering. They
20 will also have to make the standalone offering, unless and
21 to the extent the Commission determines that that's not
22 necessary; for instance, because the enhanced or
23 integrated -- information-service market is sufficiently
24 competitive that it's not necessary and there are adequate
25 alternative --

1 JUSTICE SCALIA: Well, that's wonderful policy
2 --

3 MR. HUNGAR: -- communications pipelines.

4 JUSTICE SCALIA: -- that's wonderful policy, but
5 I don't -- what I'm still waiting to hear is how you get
6 that out of the definitions, which is the lever that the
7 Commission is using to implement this good policy. It is
8 saying, in some cases, that a bundled offering is an
9 offering of telecommunications; and, in other cases, it's
10 saying a bundled offering isn't. And the reason, you say,
11 is not because of the nature of the thing, because of the
12 definition, it's because you tell us it has good
13 consequences in one case, and doesn't have good
14 consequences in the other.

15 MR. HUNGAR: Your Honor, I'm sorry, but --

16 JUSTICE SCALIA: That's not my understanding --

17 MR. HUNGAR: -- that's --

18 JUSTICE SCALIA: -- of how definitions work.

19 MR. HUNGAR: Let me try to clarify what the
20 Commission's position is. The Commission has never said,
21 that I am aware of or that Respondents have pointed out,
22 that the integrated -- bundled, if you will -- the
23 integrated offering of transmission plus Internet service
24 functionality is a telecommunications service. They have
25 never said that. They have said that some companies,

1 telephone common carriers, will be required to make the
2 separate offering, but it is not correct that the
3 integrated offering is, itself, going to be classified as
4 a telecommunications service. It's classified --

5 JUSTICE SOUTER: So it's --

6 MR. HUNGAR: -- as information.

7 JUSTICE SOUTER: -- in effect, it's the
8 unbundling requirement which is your answer to Justice
9 Scalia's -- Why should that make a difference? I mean,
10 you could just as well make an unbundling requirement with
11 respect to cable.

12 MR. HUNGAR: You could. And, in fact, the
13 Commission is -- has issued a notice of proposed
14 rulemaking and an invitation for comment in the order
15 under review here to consider whether it should make such
16 a requirement under its ancillary Title I authority in
17 this context, and what -- and, if so, to what extent?

18 JUSTICE SOUTER: And the reason for a
19 distinction, at least at the present time -- the reason
20 for the reasonableness of the distinction at the present
21 time, as a source of applying this definition, is history,
22 basically.

23 MR. HUNGAR: History and, not unrelated to that,
24 the fact that the cable companies have not traditionally
25 been regulated as common carriers under the --

1 JUSTICE SOUTER: Yeah.

2 MR. HUNGAR: -- Title II of the Act. Yes,
3 that's correct.

4 And then just one final point, if I may --
5 Justice Scalia, I think this also goes to your question --
6 Respondents are the ones who are being inconsistent, and
7 that -- the states, for instance, they suggest that,
8 "Well, if" -- they say that, "Well, cable modem service
9 should be regulated as a telecommunications service, in
10 part." But, of course, traditional information service
11 providers, ISPs, should not be; they're pure information
12 service, even though ISPs also provide transmission. They
13 provide telecommunications. Information service -- excuse
14 me -- Internet service does not work unless you have
15 transmission from wherever the telephone call goes into
16 the central office, and it has to be transmitted from
17 there to the Internet Service Provider's point of presence
18 on the Internet, and from there out onto the Internet.
19 And Internet Service Providers either own or lease that
20 transmission capacity and offer that as part of the
21 bundled offering that they make.

22 So every Internet Service Provider would be a
23 telecommunications carrier under their position, and that
24 is contrary to what the FCC said before the '96 Act, and
25 it's contrary to what Congress said in the 1996 Act. They

1 said --

2 JUSTICE SCALIA: They claim that that's by
3 toleration of the FCC. I was going to ask them about
4 that, don't worry.

5 [Laughter.]

6 MR. HUNGAR: If I may reserve the balance of my
7 time.

8 CHIEF JUSTICE REHNQUIST: Very well, Mr. Hungar.
9 Mr. Cappuccio, we'll hear from you.

10 ORAL ARGUMENT OF PAUL T. CAPPuccio
11 ON BEHALF OF PETITIONERS IN 04-277

12 MR. CAPPuccio: Thank you, Mr. Chief Justice,
13 and may it please the Court:

14 Let me begin by trying to answer Justice
15 Scalia's question. The question here, Justice, is, Are we
16 offering two products, or are we offering two ingredients
17 that come together to form a separate product? And I
18 would submit that if you go back and read paragraph 120 of
19 the Computer II order, 1980, that's exactly what Congress
20 said was happening. What Congress said is, when you take
21 -- not Congress, I'm sorry; the FCC, of course -- when you
22 take the communications component and the data-processing
23 component and combine them, they are ingredients into what
24 is a new offering, and a new and unregulated offering.
25 They said, "We can't separate them. It's not useful to

1 try to separate them. And we view them as two
2 ingredients, forming a product that is a distinct
3 product."

4 JUSTICE BREYER: What is the -- what is the
5 data-processing part?

6 MR. CAPPUCCIO: In the case of cable modem
7 service, Your Honor, it's a number of things. It's the
8 ability to, for example, retrieve information from a
9 server that somebody has on the Web --

10 JUSTICE BREYER: So I guess, on that one, if, in
11 fact, you had a telephone system, and, at the other end of
12 the wire, Joe Smith, your friend, had recorded a message,
13 and when you rang the call, the service simply picked up
14 the message and played it to you, wouldn't it still be a
15 telephone system?

16 MR. CAPPUCCIO: Well, I think in your situation
17 -- in the hypothetical you give, Your Honor, that would be
18 somebody using just a regular transmission-only path to
19 hear what the other person --

20 JUSTICE BREYER: And how is this different?

21 MR. CAPPUCCIO: Well, because here, in the
22 example that I used, for example -- it's certainly not the
23 only one -- it is the capacity to retrieve information
24 that is stored otherwise. And that follows, Your Honor --

25 JUSTICE BREYER: Information that other people

1 have stored otherwise?

2 MR. CAPPUCCIO: Yes. And not -- and not
3 necessarily --

4 JUSTICE BREYER: Well, why isn't that even more
5 telecommunications than my answering service?

6 MR. CAPPUCCIO: Well --

7 JUSTICE BREYER: You know, I pick up my
8 messages.

9 MR. CAPPUCCIO: -- I would say, Your Honor, for
10 one thing, it fits squarely within the definition of
11 information service, which says --

12 JUSTICE BREYER: Well, yes, of course it does,
13 and so does my answering service.

14 MR. CAPPUCCIO: Well --

15 JUSTICE BREYER: I got -- what about the next
16 one? You were going to -- what I want to do is write down
17 a list --

18 MR. CAPPUCCIO: Okay.

19 JUSTICE BREYER: -- of those things that are not
20 telecommunications.

21 MR. CAPPUCCIO: It's the ability to engage in --
22 to use your e-mail, it's the ability --

23 JUSTICE BREYER: Well, the ability to engage or
24 use my e-mail is an ability to access messages that other
25 people, who don't work for you, have left for me. Now,

1 again, I keep thinking of my answering machine --

2 MR. CAPPUCCIO: Right.

3 JUSTICE BREYER: -- and it doesn't seem very
4 different.

5 MR. CAPPUCCIO: Right.

6 JUSTICE BREYER: But, anyway, what's the third
7 one?

8 MR. CAPPUCCIO: Well, it's anything that allows
9 you to browse the World Wide Web and to -- and to retrieve
10 information from the World Wide Web.

11 JUSTICE BREYER: Yes, indeed.

12 MR. CAPPUCCIO: Right.

13 JUSTICE BREYER: What it is, is a system where I
14 pick up the phone, and what my phone does is -- let's say
15 it had the ability to survey a number of possible people
16 who wanted to talk to me. Would that suddenly change it
17 from a phone to a computer or an information system?

18 MR. CAPPUCCIO: The --

19 JUSTICE BREYER: Because the other people are
20 leaving the information; it's not the phone that's doing
21 it.

22 MR. CAPPUCCIO: Your Honor, the ability to
23 retrieve information that is stored somewhere out on a
24 server is not the raw transmission functionality. It is
25 more than that. It is what the Congress has said it is,

1 it is the ability to retrieve information. It is not
2 simply sending bits over a line and having those bits not
3 changed and not interfered with. When you retrieve
4 something from a server, you have to take it in form it is
5 on the server, you have to then put it through the
6 transmission system, and you have to reconvert it back
7 into what you want to see. It's an interactive process
8 that is more than just sending information.

9 JUSTICE BREYER: Rather like when I phone
10 Europe, and they take the message and turn it into
11 electronic packets, and they send it all over the world
12 and on computers and so forth, and it comes back to me
13 eventually, sounds a lot like my brother-in-law.

14 [Laughter.]

15 MR. CAPPUCIO: Yeah, I guess -- look, Your
16 Honor, I am not disputing that an information service has
17 a component of it that's communications. It may, indeed,
18 have a component of it that's communication. But what the
19 FCC said in Computer II is that when you combine the --
20 you combine the communications with, for example, the
21 data-retrieval function, that that combination of things
22 is no longer the two separate products, it is a new
23 enhanced service that is beyond Title II.

24 And, Justice Scalia, part of the evidence that
25 these are not two separate products is, if they were, then

1 Congress never could have said if enhanced services were
2 outside of Title II. Computer II would have to be wrong
3 and overruled, even though it's now 20 --

4 JUSTICE SCALIA: The FCC --

5 MR. CAPPuccio: Yeah, I'm sorry, I keep saying
6 Congress; I meant the FCC.

7 The FCC could not have said that, because it
8 would have been forced -- if, as the theory goes, the
9 enhanced service has in it the separate product of
10 communications and has a separate status, then they
11 wouldn't have been able to take it out of Computer II.

12 But let me suggest, stepping back for a second
13 -- and, by the way, I should add that in this case, in the
14 paragraph 39 of the order under -- below, the FCC said the
15 two were not separable. Okay? I understand that to mean
16 they are ingredients intertwined, they are not separate
17 products. But the basic thing that the agency did here
18 was to decide which of two things is happening. Are these
19 two separate products? Is this communications and Chicken
20 McNuggets being bundled together? Or are these two
21 ingredients that are so interwoven, as they said in
22 Computer II, as to form a distinct product? -- is a
23 classic example of what an agency does, and it's really
24 not one that this Court, I think, would be likely to
25 secondguess. It is, indeed, in fact --

1 JUSTICE SOUTER: But the -- I mean, I think the
2 difficulty that we're having is that it says it in the
3 cable context, and then it doesn't say it in the wire
4 context. And you can say it just as intelligibly in the
5 wire context.

6 MR. CAPPuccio: Yeah.

7 JUSTICE SOUTER: It's just that you haven't been
8 saying it.

9 MR. CAPPuccio: Let me try to clarify that,
10 Justice Souter. The reason why DSL meets the definition
11 of "telecommunications service" and we don't is because
12 the telephone companies do, in fact, provide the
13 transmission-only component. Now, the reason they do
14 that, Justice Souter, is, as Mr. Hungar said, historical,
15 though it wasn't without basis in reasons in history, but
16 they do, in fact, provide it separately. They do, because
17 Congress required them to do it through a separate
18 subsidiary in Computer II. There were reasons for that.
19 They wanted to avoid cross-subsidies, they were the only
20 platform, they were worried about discrimination.

21 JUSTICE SOUTER: So is that really the nub of
22 the difference? It's Congress that is requiring them to
23 do it separately, and Congress doesn't have a comparable
24 requirement with respect to cable.

25 MR. CAPPuccio: I would -- I read the statute

1 this way. Congress takes the world as it comes. If you
2 are providing it as a common carrier, then you fall within
3 -- you're providing it separately -- then you fall within
4 the definition of "telecommunications service." The DSL
5 guys are. If you are not, and we are not, then you don't
6 fall within --

7 JUSTICE SOUTER: Yeah, but that begs the
8 question.

9 MR. CAPPUCCIO: Your Honor, I --

10 JUSTICE SOUTER: It begs the question.

11 MR. CAPPUCCIO: It just says that it's for
12 someone else to decide the second prong of the NARUC test,
13 which is, Should you be compelled? Okay? The Congress
14 doesn't decide that. It's crazy to think that Congress
15 decided, forever and ever and ever, that everybody who
16 came in would be a common carrier, no matter what the
17 market looked like. Congress, instead, took the world as
18 it came, and it relies on the FCC to decide whether you
19 should be compelled, under the second prong of NARUC, to
20 be a common carrier. They have declined, in this case, to
21 extend that to us. That, I would say, is -- you know,
22 that's entitled to the utmost deference. It's a --
23 deciding not to extend their own rules. And there are
24 perfectly fine reasons for that. The reasons that pushed
25 them to do it in 1980 to the telephone companies, about

1 cross-subsidies, have no application to us. And the
2 discrimination justifications back then, when there was
3 only one platform, had no application to us. Now, you may
4 say, Is this an odd result that it comes out differently
5 at the end? Well, it is, and it is being dealt with. The
6 FCC is in the process of reconsidering, in the wireline
7 order, Wireline NPRM, whether it still makes sense to use
8 Computer II to impose a common-carrier obligation, an
9 obligation to do it separately, to provide the
10 communications separately, on the telephone companies. If
11 they decide that no longer is the case and that they don't
12 have to provide it separately, and the telephone companies
13 stop doing that, they will no longer fall within the
14 definition of "telecommunications service" under the
15 statute.

16 In other words, the statute asks, What are you,
17 in fact, doing? Okay? There are two ways you could be
18 providing it separately: if you choose to it or if you're
19 forced to do it. We've done neither. The telephone
20 companies have been forced to do it. Congress has -- and
21 they've decided we shouldn't be forced to do it, and
22 they're entitled to deference on that.

23 JUSTICE SOUTER: Basically, you're saying
24 interstitial lawmaking, like other kinds of lawmaking, can
25 be reasonable without being absolutely consistent at a

1 given moment.

2 MR. CAPPUCCIO: Correct, Your Honor.

3 JUSTICE SCALIA: That still doesn't explain --
4 it still doesn't explain, to my satisfaction, why it
5 becomes a different product --

6 MR. CAPPUCCIO: Okay, let me try --

7 JUSTICE SCALIA: -- a different product when
8 you're selling it separately, and it is not a different
9 product when you're not selling it separately. I mean --

10 MR. CAPPUCCIO: Because, Your Honor, it's
11 whether the words "offering telecommunications" are
12 ambiguous. If I -- if I bake cakes, and someone was to
13 say, "If you offer cakes, you don't offer butter," there's
14 nothing in the English language, Justice Scalia, that
15 makes that unreasonable, that a person who offers cakes to
16 the public does not offer butter to the public. And if
17 you believe that example is correct, then you have to
18 uphold the FCC, because what it says is, the offer of the
19 final product is not offering, to the public, the
20 ingredient.

21 JUSTICE SCALIA: Unless you also sell butter.

22 MR. CAPPUCCIO: Separately.

23 JUSTICE SCALIA: If you sell butter --

24 MR. CAPPUCCIO: Separately.

25 JUSTICE SCALIA: -- separately, then when you

1 sell a cake --

2 MR. CAPPuccio: But, Your Honor --

3 JUSTICE SCALIA: -- you're selling butter.

4 MR. CAPPuccio: The ILECs do, we don't.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

6 Cappuccio.

7 Mr. Goldstein, we'll hear from you.

8 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

9 ON BEHALF OF RESPONDENTS

10 MR. GOLDSTEIN: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 The Court will want to have handy, I think, the
13 red brief of the Respondents Earthlink, et al., because I
14 will repeatedly take you to the text of the statute, which
15 is reproduced at the appendix to that brief.

16 Mr. Chief Justice, cable modem service refers to
17 the bundled sale, purely for marketing reasons, of two
18 different things: highspeed telecommunications over cable
19 wires, and computer software, like e-mail, that you can
20 access over that highspeed telecommunications. The
21 Commission admits -- and it is a critical admission --
22 that the standalone sale of the telecommunications piece
23 is a telecommunications service, notwithstanding that it
24 is on cable wires rather than telephone wires. The Ninth
25 Circuit correctly held that it makes no difference that

1 cable companies market the telecommunications with e-mail
2 and the like.

3 Congress cannot have intended to empower
4 carriers to deregulate themselves through the nicety of
5 adding some further feature to their common carriage. And
6 I think we can demonstrate that through the text of the
7 statute. I'd like to take you to two provisions at the
8 outset.

9 The first one is on 2a of the appendix, and it
10 goes, Justice Souter, to the question of whether there's
11 some difference that Congress has adopted between
12 telephone wires and cable wires. And the answer to that
13 question is, no. Subparagraph 46, the definition of
14 "telecommunications service," this is the provision that
15 leads to common-carrier regulation. The term
16 "telecommunications service" means "the offering of
17 telecommunications for a fee directly to the public or to
18 such classes of users as to be effectively available
19 directly to the public" -- and here is the critical clause
20 -- "regardless of the facilities used." Congress made
21 quite clear it was not drawing any distinction based on
22 cable wire versus telephone.

23 I'd like to point you to two other provisions.
24 They are not reproduced, because they're in the cable --
25 separate cable provisions, but they will be relevant to

1 your question. That is 47 USC 541(d) and 522. Those
2 specifically contemplate that cable companies will be
3 common carriers. Now, that's the answer to the question,
4 Is there a difference between a cable wire and a telephone
5 wire?

6 Let me now step back to what the FCC said in its
7 ruling. The FCC backed into its decision here, and it
8 will turn on the definition of "information service,"
9 which will be on 1a of the appendix. It said this. Look,
10 cable modem service fits within the definition of an
11 "information service." It's this bundled thing. And we
12 construe the definition of an "information service" to be
13 mutually exclusive of a telecommunications service. And
14 that is legal error. And let me take you through the
15 definition.

16 Subparagraph 20, information service. The term
17 "information service" means the offering of a capability
18 for, in a variety of things -- generating, acquiring,
19 storing, transforming, processing, retrieving, utilizing,
20 or making available information -- via telecommunications.
21 That is not language of exclusivity; it is language of
22 dependence. There has to be telecommunications involved.
23 If you all came to the court today via car, or I came via
24 metro, there was a car or a train involved.

25 Now, I want to contrast that with another series

1 of statutory provisions. And what these provisions do is
2 demonstrate, beyond peradventure, that Congress address
3 the problem you are now facing. It said, "We recognize
4 that there are definitional provisions that might
5 otherwise fall within the definition of 'common carriage.'
6 And if we don't want it to be a common carrier, we will
7 tell you expressly."

8 There are four of them. They are reproduced.
9 Again at 1A, the definition of a "common carrier." It's
10 the exclusion that appears at the bottom of the
11 definition, three lines from the bottom, "But a person
12 engaged in radio broadcasting shall not, insofar as such
13 person is so engaged, be deemed a common carrier."
14 There's nothing like that for "information services."
15 There's going to be one specific table that I think will
16 be particularly illustrative.

17 The next one, the definition of a
18 "telecommunications carrier." It's at 2a. There's a
19 specific exclusion. Telecommunications carrier, these are
20 the people that are common carriers. The term
21 "telecommunications carrier" means "any provider of
22 telecommunications services except" -- so Congress drew
23 this out -- "except that such term does not include
24 aggregators of telecommunications services."

25 The next two, and they are the final two, are at

1 8a, one that deals with private mobile services -- it's
2 denoted subparagraph 2 -- "A person engaged in the
3 provision of a service that is a private mobile service
4 shall not, insofar as such person is so engaged, be
5 treated as a common carrier for any purposes under this
6 Act." There's a definitional category of "private mobile
7 service." We don't want it to be common carriage.

8 And the final one is the cable one, and I think
9 it's very illustrative -- right below that, subparagraph c
10 -- "Any cable system shall not be subject to regulation as
11 a common carrier or utility by reason of providing any
12 cable service." Nothing at all about an information
13 service.

14 Justice Scalia, you are quite right, this is a
15 case about a statute, and the language has none of the
16 indications that the Commission is relying on here.

17 JUSTICE BREYER: Well, it does have this, that
18 what -- if you look at the definition of
19 "telecommunications," it means "transmitting information
20 without change in the form or content of the information."
21 Now, in respect to some of their services -- not, maybe, a
22 lot, but in response to some -- they certainly change the
23 content and the form. E-mail, for example, does. And
24 there are a number of others that do. So the language,
25 says the FCC -- I look to "telecommunications service."

1 They provide telecommunications service sometimes, and
2 sometimes this other thing, as well, and it's all bundled.
3 And we read the word "offering" to mean "offering
4 separately." And so, therefore, a person who offers only
5 a bundled service is not a person who's offering a
6 telecommunications service. That's how I read it, as
7 trying to understand their argument. And it seemed to me
8 that argument is logical, and it fits the language.

9 Now, why is it -- are -- do you agree that it is
10 logical and fits the language, and at least get them that
11 far, or not?

12 MR. GOLDSTEIN: No.

13 JUSTICE BREYER: No.

14 MR. GOLDSTEIN: All right, let me take you
15 through both parts. Telecommunications -- we're going to
16 talk about the definition of "telecommunications" and what
17 it is to "offer."

18 They are wrong in suggesting that there is not
19 telecommunications here, and I can prove it two ways. The
20 first is, remember, "telecommunications" is the phrase in
21 the definition of "information service," as well. Let me
22 take you back to it.

23 JUSTICE BREYER: (Inaudible)

24 MR. GOLDSTEIN: "Information service" -- I
25 apologize -- is at 1a. The term "information service"

1 means "the offering of a capability for (inaudible) via
2 telecommunications." They're categorizing this thing as
3 an information service, so they have to be acknowledging
4 there's telecommunications involved. So, obviously, cable
5 modem service --

6 JUSTICE SOUTER: No, no, but they're saying if
7 telecommunications and something else is involved, and
8 that's what you offer, you are not offering a
9 telecommunications service. That's their definition of
10 "offer," as "offer telecommunications service separately."
11 It would be obvious, for example, if you service were by
12 phone, to connect with the Library of Congress and you
13 owned the Library of Congress, as well as owning the
14 dedicated line. Then what you're doing is selling
15 information across the line. So they say that's what
16 they're doing, but just not as much.

17 MR. GOLDSTEIN: Let me explain why I answered
18 them separately. Because the Commission's argument -- if
19 this -- Chenery -- you have to review a Commission
20 decision -- the Commission's argument was that there was
21 no telecommunications involved. This is a different
22 argument from the fact that there is no offering. That
23 appears in the Solicitor General's reply brief. So I
24 wanted to bracket, set aside. It says, "That can't be
25 right. The Commission is ruling based on a pure legal

1 error."

2 Let me turn to "offering." We're the only ones
3 that have provided a straightforward dictionary definition
4 of "offering." An "offering" is to make something
5 available. And you say, "All right, is the bundle making
6 available the telecommunications?" The answer to that
7 question is, yes. At the very least, it's yes in the
8 context of this statute, which is a common-carriage
9 statute.

10 Imagine the following hypotheticals, Justice
11 Breyer. Pick any form of common carriage you want. If
12 someone said, "I'm not just giving you the railroad
13 bridge, but I'm also selling you -- you have to buy from
14 me the train that's running on it and the grain that's in
15 the train." You couldn't avoid common carriage by forcing
16 your customers to buy the unified package together.

17 The second point is that, remember, the great,
18 great, great majority of communications have nothing to do
19 with their information services. I have cable modem
20 service. Lots of people do. What do I do? I get up in
21 the morning, and I go to newyorktimes.com, I go to
22 supremecourtus.gov. You'll be pleased. I --

23 [Laughter.]

24 MR. GOLDSTEIN: And that has nothing to do with
25 what they're offering. I have cable modem service. I

1 don't use the e-mail program that's offered to me by Star
2 Power. I have my own e-mail program. It's true, they've
3 given me some extra stuff, but one thing that you know for
4 sure is that doesn't deny that they have given me,
5 fundamentally, the capability to send the information back
6 and forth. Nothing changes. And I can illustrate this
7 for you.

8 Remember the concession that I started with.
9 They admit that if they sell it alone, then that's a
10 telecommunications service. They say it makes it
11 different -- a difference that you market them together.
12 But if I get one bill for that or two bills for that, it
13 works just the same. I send the information back and
14 forth, over and over again. There is absolutely no
15 difference.

16 Now, Justice Souter, I want to come back to
17 history, because that's -- seems to me the leg that they
18 hope that they have to stand on. I certainly don't think
19 they have a textual leg to stand on. Let me make some
20 points about the history.

21 The context for this is the Computer Inquiries
22 and the modified final judgement under AT&T, and they are
23 simply misdescribing the history. And I will take you to
24 the actual quotes for what happened.

25 First, let me take you to the definition of a

1 "basic service" and an "enhanced service" under the
2 Computer Inquiries, and that is reproduced at 23 of our
3 brief. And the point I'm going to make through this is --
4 what the Commission said over and over and over again
5 under the Computer Inquiries -- is this, if you have a
6 telecommunications piece, we're going to call it a "basic
7 service." If you add information processing on top of
8 that, we're going to call the whole thing an "enhanced
9 service." So far, everybody's on the same page.

10 But the piece that they're leaving out is that
11 they made different decisions, policy decisions, Justice
12 Scalia, about how, ultimately, to regulate them, but the
13 definition never changed. If you added the enhancement on
14 it, just like you add the e-mail on top of it, you still
15 had the basic service.

16 So here's the quote. It's at 23 of our brief.
17 "We find that basic service is limited to the common-
18 carrier offering" -- they're picking -- Congress is
19 picking up precisely the words in the Computer Inquiries
20 -- "of transmission capacity for the movement of
21 information; whereas, enhanced service combines basic
22 service with computer-processing applications." The basic
23 service remained.

24 And then the Commission and the D.C. Circuit
25 confronted just the problem you are. What happened is

1 that providers, under the Computer Inquiries and under the
2 modified final judgement, tried to combine the two things
3 and say, "We're no longer regulated." They said, "Yeah, I
4 know we had telecommunications, but now we want to add
5 something onto it." And I can take you to what the courts
6 said and what the Commission said, and that is at pages 24
7 to 25. And I think it's exactly what Congress would think
8 if it were confronted with this problem under the plain
9 definitions.

10 The second block quote on 24. This is when the
11 Commission was confronted with this problem. It said that
12 the argument that they're accepting now would allow
13 circumvention of the Computer II and Computer III basic
14 enhanced framework. AT&T would be able to avoid Computer
15 II and Computer III, unbundling --

16 CHIEF JUSTICE REHNQUIST: Well, can't the
17 Commission change its mind, Mr. Goldstein?

18 MR. GOLDSTEIN: Mr. Chief Justice, on this
19 question, the answer is, no, because Mr. Hungar has
20 conceded, and the Commission conceded below, that Congress
21 was adopting a definitional framework. I agree, Mr. Chief
22 Justice, that the Commission can change its policy
23 judgement about how it wants to regulate within the
24 definitional framework that Congress adopted. So you've
25 pointed me to a critical point, and that is to reinforce

1 --

2 CHIEF JUSTICE REHNQUIST: Well, I'm glad I did.

3 [Laughter.]

4 MR. GOLDSTEIN: -- and that is to reinforce
5 this. Our position is that the Computer Inquiries and the
6 AT&T MFJ had definitions: What's a basic service? What's
7 an enhanced service? Congress adopted those for the
8 purposes of the definition of a "telecommunications
9 service" and an "information service."

10 Now, you can make policy judgments about how to
11 regulate, although you're going to have to do it under the
12 forbearance regime adopted in a response to Justice
13 Scalia's opinion for the Court in MCI. But, nonetheless,
14 the definitions are what they are. This is a statute
15 that's being interpreted.

16 So, let me come back. So, what did the
17 Commission say under those definitions? AT&T would be
18 able to avoid Computer II and Computer III unbundling and
19 tariff requirements for any basic service that it could
20 combine with an enhanced service. You know, we've got the
21 telecommunications, like we're going to tack e-mail onto
22 it. This is obviously an undesirable and unintended
23 result.

24 The D.C. Circuit, faced with precisely the same
25 question under the framework that Congress intended to

1 adopt, that is on the next page, on page 25, right below
2 the block quote. The block quote sets up the problem.
3 The D.C. Circuit, however, rejected that conclusion, the
4 one that's being proposed here by the Commission, as a
5 strained interpretation of the language of the decree that
6 could not have been intended because it would allow the
7 BOCs to, quote, "create an enormous loophole" in the core
8 restriction of the decree.

9 So, Justice O'Connor, this comes back to your
10 point in the first half of the argument, and that is, it
11 becomes completely circular. If the point is that you
12 will only be subject to common-carrier regulation when you
13 decide to provide telecommunications service, nobody ever
14 will. Everybody will always bundle.

15 JUSTICE BREYER: No, but they say we have the
16 authority, if they -- if there is a bundled service, by
17 looking at the competitive necessity, market power, the
18 need to protect consumers, to insist that an offeror of
19 bundled service split the bundle and then be regulated.

20 MR. GOLDSTEIN: I agree. There are five
21 (inaudible) where the Solicitor General, sort of, pulls
22 the ripcord here.

23 JUSTICE BREYER: Yeah.

24 MR. GOLDSTEIN: First, they have a Chenery
25 problem; and that is, this doesn't appear anywhere in the

1 Commission's ruling. What they said in the Commission's
2 ruling is that they could take a Title I information
3 service and regulate it as common carriage. This is an
4 entirely different animal. This is --

5 JUSTICE BREYER: No, but they're replying to
6 your argument, and they're saying it's really not right
7 that this means no regulation. And the reason it means no
8 regulation is because they've long had the authority to do
9 this, and then they cite some references where that is
10 pretty much what the Commission said.

11 MR. GOLDSTEIN: I still this is covered by
12 Chenery, but let's go to that. And so, here's the
13 proposition. The proposition is that the Commission has
14 the untethered authority to force someone to provide a
15 telecommunications service. And my question back to the
16 other side is, Where in the world in the statute is that?
17 There is no textural foundation for it whatsoever.

18 JUSTICE BREYER: Well, if you take them as
19 having a broad -- if you take the statute as throwing this
20 whole problem in the lap of the Commission --

21 MR. GOLDSTEIN: Yes.

22 JUSTICE BREYER: -- and then you say they have
23 authority, broadly, to interpret this term "offer," they
24 could give functional reasons, as in some circumstances,
25 to interpret the word "offer" to mean "offer

1 telecommunications separately," and, in other
2 circumstances, because they're functional differences, to
3 take a different position. Now, either they do or they
4 don't. If they don't, they're being inconsistent, and
5 that's the subject of a different legal proceeding. If
6 they do, so be it.

7 MR. GOLDSTEIN: Let me deal with the premise
8 that Congress threw this into the lap of the FCC, and also
9 how it is they propose to deal with it, on that
10 assumption. The answer is, they did not throw it into the
11 lap of the FCC. The '96 Act enacted these definitions,
12 which are very carefully calibrated, for which there is no
13 text -- textual support. I will come back to "offering."
14 But Congress did enact a specific provision in MCI versus
15 AT&T. It addressed not only the concern of the majority,
16 but also the concerns of the dissenters, that the
17 Commission needed some flexibility. And it told the
18 Commission how to address this problem. It said, in the
19 forbearance procedures, "Here are the rules that you will
20 apply in deciding to lift regulation." They're quite
21 detailed. They're -- now, let me take you to them again
22 -- they're at the end of our -- I'm sorry, they are at --
23 in our appendix, at 3a. This is what Congress said.
24 Congress said, "We recognize the Commission needs some
25 flexibility, but there are going to be rules, and there

1 are going to be rules so courts can, for example, review,
2 later on, whether or not you're actually applying what we
3 -- doing what you want -- what we wanted you to do."

4 And here's what the Commission has to do,
5 according to Congress. And it's what the Commission did
6 not do here. I'm going to start with the indented
7 paragraphs, 1, 2, and 3, and then subparagraph b. It told
8 the Commission to look at whether or not the former
9 regulation is not necessary to ensure that the charges --
10 and skipping again -- are just and reasonable and are not
11 unjustly or unreasonably discriminatory. Paragraph 2,
12 they have to make sure it's not necessary for the
13 protection of consumers, that it's in the public interest,
14 and that the competitive effects will be positive rather
15 than negative. The Commission did none of this,
16 notwithstanding that Congress specifically directed them
17 to.

18 Now, let me then turn to the question of whether
19 or not this is a reasonable interpretation of "offering."
20 Now, in different contexts, I admit, it's conceivable to
21 come up with different meanings of "offerings," but this
22 is a context, and I think if you take any example where
23 Congress actually -- I've given you the common carrier. I
24 don't think the railroad could ever get away with saying
25 it. I gave you the examples of the Computer Inquiries and

1 the AT&T MFJ, which are on point. But take anything that
2 Congress regulates. Take, for example, the fact that we
3 regulate offering of cigarettes to children. Now, a
4 merchandiser couldn't come along and say, "I'm not
5 offering cigarettes. What I've done is, I've created a
6 smoking service. I've taken the cigarettes, and I've put
7 a lighter in it, and you've just got one bill that you
8 have to pay for it." The idea that that would evade what
9 Congress is concerned about is loopy.

10 Think about what Congress is concerned about
11 with common-carriage regulations. There are three
12 principal consequences to being a telecommunications
13 service. And imagine if any of them changed a whit,
14 except to favor us, when you bundle the e-mail with it.

15 First, nondiscrimination. Would Congress want
16 you to have to charge just and reasonable rates to a
17 competitor any less when you're selling e-mail with the
18 telecommunications than the telecommunications alone? No.

19 Interconnection. Would Congress want a cable
20 modem service network to be less interconnected with all
21 the other networks simply because it has e-mail or a Web
22 browser on it? I don't know why, I suppose Congress would
23 want to be more sure, because there are more messages.

24 CHIEF JUSTICE REHNQUIST: But the Congress
25 apparently wanted to go in the direction of deregulation

1 here.

2 MR. GOLDSTEIN: Yes, Mr. Chief Justice, it's a
3 fair point, and it is basically -- aside for the, sort of,
4 nod at history, it -- Mr. Hungar started with that. And
5 our point is that Congress told them how to deregulate,
6 and that --

7 JUSTICE BREYER: Well, what about Congress
8 thinking, quite honestly, if they -- people do think about
9 it. I have no idea how broadband service will be provided
10 20 years from now. There may be a thousand competitors.
11 There may be wireless. People may be broadcasting it
12 through their teeth. I don't know --

13 [Laughter.]

14 JUSTICE BREYER: -- what it's going to be. But
15 since I don't know and have really no idea whether it
16 should or should not be regulated, because I don't know
17 the competitive situation, let's leave it up to the FCC.

18 MR. GOLDSTEIN: It did that, but with a critical
19 concession. It said --

20 JUSTICE BREYER: It sort of it did that in
21 broadcasting, didn't it? I guess they could have written
22 it to say that "the FCC shall regulate common-carrier
23 communications in the public interest, convenience, and
24 necessity," which would put the FCC in the same situation
25 with regard to this, as it's in with regard to

1 broadcasting.

2 MR. GOLDSTEIN: I think it's a very fair
3 comparison. But also, Justice Breyer, I think -- you
4 know, I think we're all on the same page about what
5 Congress intended, and that is, first of all, Congress was
6 aware of cable modem service. That's said expressly in
7 the Court's opinion in Gulf Power. It was emphasized by
8 the cable industry in Gulf Power itself. There is --
9 there are several statutory provisions that refer to cable
10 companies being common carriage. But, Justice Breyer,
11 what they said is this, "We have broad encompassing
12 definitions, and that is, it's not going to make a
13 difference if you combine two things together. But,
14 Commission, you go make those" -- Justice Breyer, all the
15 findings you're talking about are listed in the section 10
16 forbearance proceedings.

17 Now, imagine the world as the Commission sees
18 it. It says that forbearance applies to
19 telecommunications service. But when it comes to things
20 that aren't telecommunications service, it's "Katie bar
21 the door." We don't have any rules. What kind of logical
22 regulatory scheme is that? And that is that the
23 Commission is constrained with respect to its expertise.
24 But things that are information services that are outside
25 telecommunications, it can do whatever it wants.

1 Justice Breyer, I did want to make one
2 additional point, and that is, again, there is a statutory
3 provision here that addresses their claim that they can
4 force you to provide telecommunications service, and that
5 is the definition of a "telecommunications carrier." And
6 it is on 2a. I read the exception, so now I'm dealing
7 with the second sentence of the definition, "A
8 telecommunications carrier shall be treated as a common
9 carrier under this Act only to the extent that it is
10 engaged in providing telecommunications services."

11 This lines up perfectly with this Court's
12 decision in Midwest Video. There was a constraint on what
13 it -- what regulation you could impose on broadcasters.
14 This one says, "You are only going to be a common carrier
15 if you're providing a telecommunications service." But
16 the FCC has this vision that it can, sort of, solve all
17 the problems through its raw discretion and to force
18 someone to provide common carriage. But the statute's
19 very clear, if you are not providing a telecommunications
20 service, you are not going to be a telecommunications
21 carrier; and, therefore, you are not going to be providing
22 common carriage.

23 And, as I've said, I don't understand how it is,
24 even if one looked at this particular context, you could
25 decide that Congress thought the bundle made regulation

1 less regulated -- less necessary, rather than more
2 regulated -- more necessary.

3 I want, next, if I could, to talk about the
4 notion that you can self-deregulate, and how utterly
5 implausible this is, how is it that the Commission could
6 imagine that Congress created the following regime. And
7 that is, if you want to provide common carriage, you'll be
8 subject to this regulation; but if you don't feel like it,
9 well, that's okay. That will render the definition of
10 "telecommunications service" -- if you just want to tack
11 e-mail onto the thing, that will render the definition of
12 "telecommunications service" -- in the Internet, you're a
13 dead letter, because who in the world would ever do it?
14 If it's up to the regulated entity, why in the world would
15 anyone provide common carriage?

16 I think this has, actually, a remarkable
17 parallel to the Court's decision in the Oneida Indian
18 Nation case, where the Court rejected the suggestion that
19 what you could do is -- that it would be up to the Indians
20 to decide whether or not they would be able to get
21 property back. This is what the Court said, "If OIN may
22 unilaterally reassert sovereign control and remove those
23 parcels from the local tax rolls, little would prevent the
24 tribe from initiating a new generation of litigation to
25 free the parcels" -- remember, they're free from all

1 regulation at all -- "free the parcels from land zone --
2 local zoning or other regulatory controls that protect all
3 landowners in the area."

4 And then, Justice Ginsburg, the opinion goes on
5 to talk about section 465, which is exactly like section
6 10 forbearance, "Recognizing these practical concerns,
7 Congress has provided a mechanism for the acquisition of
8 the lands. The regulations implementing section 465 are
9 sensitive to the complex interjurisdictional concerns that
10 arise when the tribe seeks to retain -- regain sovereign
11 control over territory. The Secretary must consider" --
12 and it lists a whole series of things.

13 And the parallel, I think, is exact. You can't
14 have Congress enacting a scheme that tells you how to do
15 it.

16 Now, let me return to, then, Mr. Cappuccio's
17 suggestion, Justice Scalia, that this is an ingredient,
18 it's not a product. The straightforward answer is,
19 there's no mention of ingredients or products in the
20 statute. It says "telecommunications service." And the
21 question under the definition of "telecommunications
22 service" is, Are you providing telecommunications? Yeah,
23 the information's going back and forth. Is it to the
24 public? Sure, anybody can buy it. Is there a fee? You
25 bet, it's kind of expensive, actually. And that's all

1 that Congress cared about.

2 Now, this is not a question of whether or not
3 there's butter in a cake, because you -- it -- there are
4 two reasons. The first is, fundamentally, the
5 telecommunications is the same; it hasn't been "cooked"
6 into something else. And the second --

7 JUSTICE SOUTER: There's butter on the cake, not
8 in the cake.

9 [Laughter.]

10 MR. GOLDSTEIN: Right.

11 The second is, the reason all those
12 hypotheticals are -- wheels and cars and those sorts of
13 things -- don't make any sense here is that they assume a
14 few things. The first is, they're assuming a first sale
15 that gets regulated. Somebody buys the butter, somebody
16 buys the tires and gets regulated. But under their rules
17 it's never regulated at all. The telecommunications just,
18 poof, escapes all regulation. And the second is that, in
19 the car example, it's because there's -- the reason it has
20 intuitive appeal is that there's a regulatory scheme about
21 cars. So Congress has decided how all the inputs will be
22 regulated together.

23 But, again, remember the consequence of sticking
24 this into the unregulated "information services" box is,
25 it's all gone. There's no regulation of it whatsoever.

1 It's just not a scheme that makes any sense.

2 If there are no further questions --

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

4 Goldstein.

5 Mr. Hungar, you have four minutes left.

6 REBUTTAL ARGUMENT OF THOMAS G. HUNGAR

7 ON BEHALF OF PETITIONER IN 04-281

8 MR. HUNGAR: Thank you, Mr. Chief Justice.

9 Turning first to the question of the regulatory
10 history, Respondents continue to rely on the fact that,
11 under Computer II, the FCC required telephone common
12 carriers to separate out and separately offer the basic
13 transmission component. But, importantly, and what
14 refutes Respondent's attempts to rely on history, Congress
15 did not -- excuse me -- the FCC did not impose that
16 requirement on enhanced service providers. There were
17 entities called "value-added networks" that obtained the
18 telecommunications functionality, bundled it together with
19 information servicing protocol conversion-type computer
20 functions, and offered that bundled service as an enhanced
21 service. And the Commission said, in Computer II, "That
22 is an unregulated enhanced-service offering, it is not
23 subject to Title II of the Act, because we don't think
24 Congress intended Title II, which is aimed at traditional
25 telephone communications, to deal with this new form of

1 intermingled integrated service." It is not regulated,
2 even though it is true that there was a communications
3 component. And, under Respondent's rationale, that offer
4 or that value-added network should have been required to
5 make it file a tariff and comply with all the regulations
6 of Title II of the Act. And footnote 5 of our reply brief
7 cites the orders discussing this fact.

8 And in addition, under Computer II, the
9 Commission required AT&T and, later, the Regional Bell
10 Operating Companies, if they were going to offer enhanced
11 services, to offer them separately through subsidiaries,
12 unregulated subsidiaries, even though they were offering
13 bundles of enhanced service and telecommunications, the
14 telecommunications, which they obtained under tariff from
15 their parent corporation. But the entire bundled offering
16 was unregulated. And that's been true for 25 years.

17 And, again, Congress, in 1996, gave no
18 indication that it was overturning this well-established
19 situation in which enhanced services, now information
20 services, were not regulated. And to suggest that
21 Congress, in an act that talks about preserving the hands-
22 off approach to the Internet, in fact, regulated all
23 Internet Service Providers in a way that they had never
24 been regulated before, we submit, is certainly an unlikely
25 interpretation of the act, and clearly demonstrates that

1 the FCC was reasonable in rejecting that position.

2 Justice Breyer, you asked about voicemail or
3 similar type systems that would preserve a message. If
4 provided by a computer functionality, that service is an
5 information service. Voicemail is an information service.
6 But the FCC has at least suggested that voicemail and
7 basic telecommunications -- if a telephone company tried
8 to offer it -- say, "We're going to offer this bundled,
9 and we don't think it's regulated," telephone companies
10 try that sort of thing from time to time, and then the FCC
11 is faced with a decision, in its discretion, of whether
12 that should be viewed as an integrated offering or,
13 instead, as really two things that have just been added
14 together but aren't really -- that are really two distinct
15 services. And the FCC has suggested, in that context,
16 that telephone service and voicemail service, even if
17 they're bundled together, are two distinct services.

18 And there's an important difference, I think,
19 between that type of offering and the one here. You can
20 use your -- even if your telephone company offers you
21 voicemail, obviously, you -- a lot of your use of the
22 telephone system has nothing to do with the voicemail;
23 it's pure telephony, pure telecommunications; whereas,
24 with cable modem service, every time you use it,
25 essentially, you are utilizing at least some of the data-

1 processing, computer-enhanced functionality that is being
2 provided by your -- by your Internet Service Provider --
3 the domain-name system, as we discussed, caching. For
4 instance, Mr. Goldstein says he goes to supremecourtus.gov
5 every morning. I suspect he doesn't actually go to this
6 Court's computer. He probably gets at least the first
7 page off of the cache, which provided by the ISP.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hungar.
9 The case is submitted.

10 (Whereupon, at 12:11 p.m., the case in the
11 above-entitled matter was submitted.)
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