Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION ET AL. *v.* BRAND X INTERNET SERVICES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–277. Argued March 29, 2005—Decided June 27, 2005*

Consumers traditionally access the Internet through "dial-up" connections provided via local telephone lines. Internet service providers (ISPs), in turn, link those calls to the Internet network, not only by providing a physical connection, but also by offering consumers the ability to translate raw data into information they may both view on their own computers and transmit to others connected to the Internet. Technological limitations of local telephone wires, however, retard the speed at which Internet data may be transmitted through such "narrowband" connections. "Broadband" Internet service, by contrast, transmits data at much higher speeds. There are two principal kinds of broadband service: cable modem service, which transmits data between the Internet and users' computers via the network of television cable lines owned by cable companies, and Digital Subscriber Line (DSL) service, which uses high-speed wires owned by local telephone companies. Other ways of transmitting high-speed Internet data, including terrestrial- and satellite-based wireless networks, are also emerging.

The Communications Act of 1934, as amended by the Telecommunications Act of 1996, defines two categories of entities relevant here. "Information service" providers—those "offering . . . a capability for [processing] information via telecommunications," 47 U. S. C.

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*Together with No. 04–281, *Federal Communications Commission et al.* v. *Brand X Internet Services et al.,* also on certiorari to the same court.

§153(20)—are subject to mandatory regulation by the Federal Communications Commission as common carriers under Title II of the Act. Conversely, telecommunications carriers—*i.e.,* those "offering . . . telecommunications for a fee directly to the public . . . regardless of the facilities used," §153(46)—are not subject to mandatory Title II regulation. These two classifications originated in the late 1970's, as the Commission developed rules to regulate data-processing services offered over telephone wires. Regulated "telecommunications service" under the 1996 Act is the analog to "basic service" under the prior regime, the *Computer II* rules. Those rules defined such service as a "pure" or "transparent" transmission capability over a communications path enabling the consumer to transmit an ordinary-language message to another point without computer processing or storage of the information, such as via a telephone or a facsimile. Under the 1996 Act, "[i]nformation service" is the analog to "enhanced" service, defined by the *Computer II* rules as computer-processing applications that act on the subscriber's information, such as voice and data storage services, as well as "protocol conversion," *i.e.*, the ability to communicate between networks that employ different data-transmission formats.

In the *Declaratory Ruling* under review, the Commission classified broadband cable modem service as an "information service" but not a "telecommunications service" under the 1996 Act, so that it is not subject to mandatory Title II common-carrier regulation. The Commission relied heavily on its *Universal Service Report,* which earlier classified "non-facilities-based" ISPs—those that do not own the transmission facilities they use to connect the end user to the Internet—solely as information-service providers. Because Internet access is a capability for manipulating and storing information, the Commission concluded, it was an "information service." However, the integrated nature of such access and the high-speed wire used to provide it led the Commission to conclude that cable companies providing it are not "telecommunications service" providers. Adopting the *Universal Service Report*'s reasoning, the Commission held that cable companies offering broadband Internet access, like non-facilities-based ISPs, do not offer the end user telecommunications service, but merely use telecommunications to provide end users with cable modem service.

Numerous parties petitioned for review. By judicial lottery, the Court of Appeals for the Ninth Circuit was selected as the venue for the challenge. That court granted the petitions in part, vacated the *Declaratory Ruling* in part, and remanded for further proceedings. In particular, the court held that the Commission could not permissibly construe the Communications Act to exempt cable companies provid-

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ing cable modem service from mandatory Title II regulation. Rather than analyzing the permissibility of that construction under the deferential framework of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, however, the court grounded that holding in the *stare decisis* effect of its decision in *AT&T Corp.* v. *Portland,* 216 F. 3d 871, which had held that cable modem service is a "telecommunications service."

Held: The Commission's conclusion that broadband cable modem companies are exempt from mandatory common-carrier regulation is a lawful construction of the Communications Act under *Chevron* and the Administrative Procedure Act. Pp. 8–32.

1. *Chevron*'s framework applies to the Commission's interpretation of "telecommunications service." Pp. 8–14.

(a) *Chevron* governs this Court's review of the Commission's construction. See, *e.g., National Cable & Telecommunications Assn., Inc.* v. *Gulf Power Co.,* 534 U. S. 327, 333–339. *Chevron* requires a federal court to defer to an agency's construction, even if it differs from what the court believes to be the best interpretation, if the particular statute is within the agency's jurisdiction to administer, the statute is ambiguous on the point at issue, and the agency's construction is reasonable. 467 U. S., at 843–844, and n. 11, 865–866. The Commission's statutory authority to "execute and enforce" the Communications Act, §151, and to "prescribe such rules and regulations as may be necessary . . . to carry out the [Act's] provisions," §201(b), give the Commission power to promulgate binding legal rules; the Commission issued the order under review in the exercise of that authority; and there is no dispute that the order is within the Commission's jurisdiction. Pp. 8–10.

(b) The Ninth Circuit should have applied *Chevron*'s framework, instead of following the contrary construction it adopted in *Portland*. A court's prior construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. See *Smiley*, *supra*, at 740–741. Because *Portland* held only that the *best* reading of §153(46) was that cable modem service was "telecommunications service," not that this was the only permissible reading or that the Communications Act unambiguously required it, the Ninth Circuit erred in refusing to apply *Chevron*. Pp. 10–14.

2. The Commission's construction of §153(46)'s "telecommunications service" definition is a permissible reading of the Communications Act at both steps of *Chevron*'s test. Pp. 14–29.

(a) For the Commission, the question whether cable companies providing cable modem service "offe[r]" telecommunications within

§153(46)'s meaning turned on the nature of the functions offered the *end user*. Seen from the consumer's point of view, the Commission concluded, the cable wire is used to access the World Wide Web, newsgroups, etc., rather than "transparently" to transmit and receive ordinary-language messages without computer processing or storage of the message. The integrated character of this offering led the Commission to conclude that cable companies do not make a stand-alone, transparent offering of telecommunications. Pp. 15–17.

(b) The Commission's construction of §153(46) is permissible at *Chevron*'s first step, which asks whether the statute's plain terms "directly addres[s] the precise question at issue." 467 U. S., at 843. This conclusion follows both from the ordinary meaning of "offering" and the Communications Act's regulatory history. Pp. 17–25.

(1) Where a statute's plain terms admit of two or more reasonable ordinary usages, the Commission's choice of one of them is entitled to deference. See, *e.g., Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 498. It is common usage to describe what a company "offers" to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product. What cable companies providing cable modem service "offer" is finished Internet service, though they do so using the discrete components composing the end product, including data transmission. Such functionally integrated components need not be described as distinct "offerings." Pp. 17–21.

(2) The Commission's traditional distinction between basic and enhanced service also supports the conclusion that the Communications Act is ambiguous about whether cable companies "offer" telecommunications with cable modem service. Congress passed the Act's definitions against the background of this regulatory history, and it may be assumed that the parallel terms "telecommunications service" and "information service" substantially incorporated the meaning of "basic" and "enhanced" service. That history in at least two respects confirms that the term "telecommunications service" is ambiguous. First, in the *Computer II* order establishing the terms "basic" and "enhanced" services, the Commission defined those terms functionally, based on how the consumer interacts with the provided information, just as the Commission did in the order under review. Cable modem service is not "transparent" in terms of its interaction with customer-supplied information; the transmission occurs only in connection with information processing. It was therefore consistent with the statute's terms for the Commission to assume that the parallel term "telecommunications service" in §153(46) likewise describes a "pure" or "transparent" communications path not necessarily separately present in an integrated information-processing service

from the end-user's perspective. Second, the Commission's application of the basic/enhanced service distinction to non-facilities-based ISPs also supports the Court's conclusion. The Commission has historically not subjected non-facilities-based information-service providers to common carrier regulation. That history suggests, in turn, that the Act does not unambiguously classify nonfacilities based ISPs as "offerors" of telecommunications. If the Act does not unambiguously classify such providers as "offering telecommunications," it also does not unambiguously so classify facilities-based information-service providers such as cable companies; the relevant definitions do not distinguish the two types of carriers. The Act's silence suggests, instead, that the Commission has the discretion to fill the statutory gap. Pp. 21–25.

(c) The Commission's interpretation is also permissible at *Chevron*'s step two because it is "a reasonable policy choice for the agency to make," 467 U. S., at 845. Respondents argue unpersuasively that the Commission's construction is unreasonable because it allows any communications provider to evade common-carrier regulation simply by bundling information service with telecommunications. That result does not follow from the interpretation adopted in the *Declaratory Ruling*. The Commission classified cable modem service solely as an information service because the telecommunications input used to provide cable modem service is not separable from the service's data-processing capabilities, but is part and parcel of that service and integral to its other capabilities, and therefore is not a telecommunications offering. This construction does not leave all information-service offerings unregulated under Title II. It is plain, for example, that a local telephone company cannot escape regulation by packaging its telephone service with voice mail because such packaging offers a transparent transmission path—telephone service—that transmits information independent of the information-storage capabilities voice mail provides. By contrast, the high-speed transmission used to provide cable modem service is a functionally integrated component of Internet service because it transmits data only in connection with the further processing of information and is necessary to provide such service. The Commission's construction therefore was more limited than respondents assume.

Respondents' argument that cable modem service does, in fact, provide "transparent" transmission from the consumer's perspective is also mistaken. Their characterization of the "information-service" offering of Internet access as consisting only of access to a cable company's e-mail service, its Web page, and the ability it provides to create a personal Web page conflicts with the Commission's reasonable understanding of the nature of Internet service. When an end user

accesses a third party's Web site, the Commission concluded, he is equally using the information service provided by the cable company as when he accesses that company's own Web site, its e-mail service, or his personal webpage. As the Commission recognized, the service that Internet access providers offer the public is Internet access, not a transparent ability (from the end-user's perspective) to transmit information. Pp. 25–29.

3. The Court rejects respondent MCI, Inc.'s argument that the Commission's treatment of cable modem service is inconsistent with its treatment of DSL service and is therefore an arbitrary and capricious deviation from agency policy under the Administrative Procedure Act, see 5 U. S. C. §706(2)(A). MCI points out that when local telephone companies began to offer Internet access through DSL technology, the Commission required them to make the telephone lines used to provide DSL available to competing ISPs on nondiscriminatory, common-carrier terms. Respondents claim that the Commission has not adequately explained its decision not to regulate cable companies similarly.

The Court thinks that the Commission has provided a reasoned explanation for this decision. The traditional reason for its *Computer II* common-carrier treatment of facilities-based carriers was that the *telephone network* was the primary, if not the exclusive, means through which information service providers could gain access to their customers. The Commission applied the same treatment to DSL service based on that history, rather than on an analysis of contemporaneous market conditions. The Commission's *Declaratory Ruling*, by contrast, concluded that changed market conditions warrant different treatment of cable modem service. Unlike at the time of the DSL order, substitute forms of Internet transmission exist today, including wireline, cable, terrestrial wireless, and satellite. The Commission therefore concluded that broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market. There is nothing arbitrary or capricious about applying a fresh analysis to the cable industry. Pp. 29–31.

345 F. 3d 1120, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, and BREYER, JJ., joined. STEVENS, J., and BREYER, J., filed concurring opinions. SCALIA, J., filed a dissenting opinion, in which SOUTER and GINSBURG JJ., joined as to Part I.