NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals
for the District of Columbia Circuit

No. 12-1124

THE CONFERENCE GROUP, LLC,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION; and
THE UNITED STATES OF AMERICA,
Respondents

CISCO WEBEX LLC,
Intervenor for Petitioner

VERIZON and VERIZON WIRELESS,
Intervenors for Respondent

Petition for Review of a Decision of the
Federal Communications Commission

REPLY BRIEF OF INTERVENOR FOR PETITIONER CISCO WEBEX LLC

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APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
Cable Modem Order	*Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002)
DNS	Domain Name Service
FCC or Commission	Federal Communications Commission
Government	Collectively, Respondents Federal Communications Commission and the United States of America
Orders	*Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd. 10731 (2008); *Petitions for Reconsideration and Clarification of the InterCall Order*, Order on Reconsideration, 27 FCC Rcd. 898 (2012)
Prepaid Calling Card Order	*Regulation of Prepaid Calling Card Servs.*, Declaratory Ruling and Report and Order, 21 FCC Rcd. 7290 (2006)
Stevens Report	*In re Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501 (1998)
USF	Universal Service Fund
WebEx	Cisco WebEx LLC

INTRODUCTION

In its opening brief, Cisco WebEx LLC ("WebEx") focused on the most significant infirmity of the *Orders*[1] at issue: the Federal Communications Commission's ("FCC" or "Commission") potential adoption of a revolutionary "with or without accessing" standard for distinguishing between "telecommunications" and "information services." This standard would mark an abrupt and unexplained departure from existing precedent and would revoke the information-service classification from a wide array of advanced services. To the extent it adopted this standard, the Commission plainly erred because it failed to follow proper procedures and failed to provide an adequate justification for changing its standard.

Almost all of the FCC's brief defends the *Orders* as a straightforward application of the Commission's "functional integration" test to the plain-vanilla conferencing service offered by InterCall. In that regard, the brief is like the *Orders*, which primarily apply the functional integration test. But just as the *Orders* speak of a "with or without accessing" rule almost in passing, a short portion at the end of the FCC's brief attempts to defend the "with or without accessing" language in the *Orders*. In that portion of its brief, the FCC relies on

[1] *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator, Order*, 23 FCC Rcd. 10731 (2008); *Petitions for Reconsideration and Clarification of the InterCall Order*, Order on Reconsideration, 27 FCC Rcd. 898 (2012) (collectively "*Orders*").

the Supreme Court's *Brand X* decision and the Commission's *Cable Modem Order* and *Prepaid Calling Card Order*. A full reading of these authorities, however, reveals that a "with our without accessing" rule would be contrary to the *Cable Modem Order* and *Brand X*, and that the *Prepaid Calling Card Order* is merely a straightforward application of the functional integration test. Those precedents do not rescue the Commission's attempt to radically expand the contribution base for the Universal Service Fund ("USF") without providing a reasoned explanation or engaging in notice-and-comment rulemaking.

ARGUMENT

I. A "WITH OR WITHOUT ACCESSING" CLASSIFICATION STANDARD CONTRADICTS THE COMMISSION'S EXISTING STANDARD AND REQUIRES A SELECTIVE READING OF *BRAND X*.

In defense of its "with or without accessing" standard, the Commission attempts to boot-strap one carefully selected phrase from the Supreme Court's *Brand X* decision—that consumers must "always use … enhanced processing capabilities" of an information-service offering[2]—into a new classification standard. The Commission's selective citation, however, ignores the critical context: *Brand X* merely applied the Commission's existing classification standard, which directly contradicts a "with or without accessing" standard.

[2] *See* Resp. Br. at 54.

Both the Commission and the Court have long held that regulatory classifications turn on the service a provider "offers" to its customers. In the *Cable Modem Order*, the Commission applied an information-service classification, finding that the providers offered a service that integrated Internet access with transmission. The Commission explicitly applied that classification regardless of whether customers actually used all features the provider "offers." Subsequently, the Commission has relied on this standard to apply information-service classifications to a wide variety of information services that include an integrated telecommunications component.

In stark contrast, the Commission's new "with or without accessing" standard asks whether consumers can use a service "without accessing" the enhanced features—contradicting the *Cable Modem Order*'s explicit holding. This standard would extend beyond an analysis of the provider's "offering" and, instead, look at how consumers can use the offering's component parts. Nothing in *Brand X* supports this approach. Indeed, the Supreme Court, like the Commission, focused exclusively on the product that cable providers "offered." The Court never considered actions—such as using the service only for transmission—a customer could take after purchasing that "offering." Rather, the Court, like the Commission, simply analyzed the service as it was offered by the cable providers. Accordingly, because the Commission's new standard focuses on a possible post-

purchase consumer behavior instead of the provider's offering, the *Orders* contradict the existing standard announced in the *Cable Modem Order* and affirmed in *Brand X*.

A. The Commission's Existing Functional Integration Standard Focuses Solely on the Nature of the Service a Provider Offers

In the *Cable Modem Order*, the Commission acknowledged that "the classification of cable-modem service turns on the nature of the functions that the end user is *offered*," and that "cable modem service is an *offering* of Internet access service…."[3] The Commission recognized in the Cable Modem Order that users may choose not to use all of an offering's components, and such a post-purchase user contingency did not impact the cable-modem service's classification as an information service.[4] Indeed, the Commission explicitly applied an information-service classification "regardless of whether subscribers use all of the functions provided as part of the service…."[5] Still, the Commission applied this information-service classification even though users could bypass the enhanced features and use the cable modem service for pure transmission.

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[3] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4822 ¶ 38 (2002) (emphasis added) ("*Cable Modem Order*").

[4] *Id*. at 4823 ¶ 38 n.153.

[5] *Id*. at 4822 ¶ 38.

The Commission contended that "*[n]early* every," and notably *not* "every," "cable modem service subscriber... accesses the DNS that is provided as part of the service."[6] The inclusion of DNS in the service, however, does not *prevent* a customer from using cable-modem service for pure transmission purposes. The Commission has described DNS as "an online data retrieval and directory service" most commonly used "to provide an IP address associated with the domain name (such as www.fcc.gov) of a computer …."[7] While it may be true that most Internet-access providers "offer" DNS access, a subscriber can choose to use a completely independent DNS provider. Indeed, a knowledgeable consumer can bypass DNS entirely, as reflected by the Commission's statement that "[n]early every"—not "every"—cable-modem service subscriber uses DNS.[8]

If, however, a subscriber—without using any other features such as file transfer, e-mail, or Usenet newsgroup access—uses an independent DNS provider or bypasses DNS entirely, then the cable-modem service provides only high-speed data transmission. In other words, the subscriber can choose to use his or her cable-modem service for pure data transmission, "without accessing" any of the enhanced features that the provider "offers." Thus, under a "with or without accessing" standard, cable-modem service—though today classified as an

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6 *Id*. at 4823 ¶ 38 n.153 (emphasis added).

7 *Id*. at 4821 ¶ 37.

8 *Id*. at 4823 ¶ 38 n.153.

information service—would be telecommunications, and providers of cable-modem service would be required to contribute to the Universal Service Fund.

Other Commission orders confirm that classification decisions turn on a provider's "offering." For example, in the *Prepaid Calling Card Order*, the Commission focused on how prepaid calling cards were "marketed to consumers."[9] In contrast with Internet-access services, however, prepaid calling cards offered enhanced services wholly unrelated to any telecommunications component. Indeed, the Commission found that the cards were primarily "marketed to consumers as a vehicle for making traditional telephone calls."[10] Though the cards' menus gave consumers "an option to access additional information," the Commission found that "the information service features and telecommunications service are not engaged or used simultaneously."[11] In other words, the providers' offerings themselves did not require any simultaneous use of telecommunications and information-service components. Thus, the providers' "offering" was not "functionally integrated," and the Commission—*focusing strictly on the offering and not on possible uses of the offering's components*—properly applied individual

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[9] *See Regulation of Prepaid Calling Card Servs.*, Declaratory Ruling and Report and Order, 21 FCC Rcd. 7290, 7294 ¶ 13 (2006) ("*Prepaid Calling Card Order*").

[10] *Id.*

[11] *Id.*

classifications to each separate service.[12] Nothing in the *Prepaid Calling Card Order* suggested that the Commission considered how consumers might behave after they purchased the calling cards.

B. *Brand X* Focused Exclusively on the Provider's Offering, Regardless of the Possible Post-Purchase Uses of the Offering's Components.

In *Brand X*, the Supreme Court affirmed the *Cable Modem Order*. Just as the Commission did in the *Cable Modem Order*, the Supreme Court focused on the characteristics of the provider's "offering."[13] In its brief here, the Commission attempts extract a particular phrase—stating that a consumer must "always use … enhanced processing capabilities" of an information-service offering[14]—to justify its "with our without accessing" standard. A full reading, however, reveals that *Brand X* did not endorse a departure from the existing functional integration standard.

To illustrate how the functional integration standard works, the Supreme Court provided an instructive analogy to car dealerships: "One might well say that a car dealership 'offers' cars, but does not 'offer' the integrated major inputs that make purchasing the car valuable, such as the engine or the chassis."[15] Indeed, the

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[12] *Id*.

[13] *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005) (emphasis added) ("*Brand X*").

[14] *See* Resp. Br. at 54.

[15] *Brand X*, 545 U.S. at 990.

Court found, it would "be odd to describe a car dealership as 'offering' the car's components in addition to the car itself."[16]

As this analogy illustrates, classification decisions apply to the product or service a provider sells, not the underlying components that constitute the product or service. The Court's analogy focused on a car at a specific point in time: on the dealer's lot. The Court gave no consideration to what an individual buyer can do once he or she drives the car off the lot. Indeed, a buyer, once he or she takes the car home, could very well separate "the discrete components" that make up the car and use the engine for some other purpose. Though the dealer does not "offer" engines, nothing prevents a car buyer from using the engine "without accessing" the rest of the car's parts. Yet, the Supreme Court did not consider that contingency, instead focusing exclusively on whether the provider "offered" an integrated product—not on the array of post-purchase actions a consumer could undertake with that product's components. And a dealer "offers" an integrated car, regardless of what a buyer chooses to do with the car.

This concept applies with full force to the Supreme Court's analysis of cable-modem service. The Court found that a cable-modem service provider "offers" Internet access, not transmission-facilities access.[17] To deploy that

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[16] *Id.*

[17] *See id.* at 989 ("Cable companies in the broadband Internet service business offer consumers an information service in the form of Internet access and they

"offering," the provider gives customers access to both information services and the transmission facilities needed to access those services, which, used in tandem, allow the customer to access the Internet. Thus, the cable-modem service provider "offers" an integrated product properly classified as an information service.[18]

The Supreme Court's majority, however, did not consider what consumers might do after they purchase cable-modem service. For example, the opinion did not ask whether consumers could choose independent DNS providers or forego DNS entirely—which would mean that consumers could use cable-modem service's component parts "without" ever "accessing" any enhanced features. Rather, the Supreme Court focused on the Internet-access product—which included integrated transmission and other components such as DNS and e-mail access—as it was "offered" to consumers.[19] As a result, the Supreme Court upheld the Commission's information-service classification of cable-modem service, without ever considering any possible alternative post-purchase uses of the offering's components.

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do so via telecommunications, but it does not inexorably follow as a matter of ordinary language that they also offer consumers the high-speed data transmission (telecommunications) that is an input used to provide this service") (internal citations and quotation marks omitted).

[18] *See id*. at 990.

[19] *See id*.

C. A "With or Without Accessing" Standard Would Require Reversal of Nearly a Decade and a Half of Commission Precedent and Requires a Selective Reading of *Brand X*.

Contrary to the standard applied in the *Prepaid Calling Card Order* and *Cable Modem Order*, and affirmed in *Brand X*, a "with or without accessing" standard would extend well beyond the contours of the product a provider "offers." Rather, this new standard would shift the focus from the provider's offering to the consumer's post-purchase behavior. Under this standard, if the consumer, regardless of what the provider offers, could conceivably utilize the underlying facilities for pure transmission purposes—*i.e.*, could use the service "without accessing" the enhanced features he or she purchased—then the service would be foreclosed from an information-service classification.

Thus, the *Orders* directly conflict with the *Cable Modem Order*'s holding that integrated services are information services, regardless of whether subscribers use all of the functions provided as part of the service. Moreover, under a "with or without accessing" standard, a cable-modem subscriber's ability to forego enhanced services and utilize only the transmission component would require the Commission to revoke cable-modem service's information-service classification. The result would be the same for all other Internet-access facilities, including

wireline and wireless services, to which the Commission has applied the *Cable Modem Order*'s standard.[20]

Beyond specific service classifications, a "with or without accessing" standard contradicts core findings in the Commission's foundational 1998 Report to Congress—also known as the "*Stevens Report*"—which refused to apply dual classifications to information services.[21] By statutory definition, every information service includes a telecommunications component, and as discussed above, a purchaser of virtually any information service can use that telecommunications component "without accessing" any information-service components.

Under a "with or without accessing" standard, every information service would also require, at minimum, a telecommunications classification on its transmission component. According to the *Stevens Report*, however, such dual classifications would conflict with the Telecommunications Act of 1996's clear

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[20] *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd. 5901, 5909 ¶¶ 20-21 (2007) (citing *Cable Modem Order* in classifying wireless broadband Internet access as an information service); *Appropriate Framework for Wireline Broadband Internet Access Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, 14862 ¶ 12 (2005) (citing *Cable Modem Order* in classifying wireline broadband Internet access as an information service).

[21] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, 11529 ¶ 57 (1998). Because this Report to Congress addresses many issues raised by Senator Stevens, among others, it is frequently described—and will hereinafter be referred to—as the "*Stevens Report*."

statutory separation between the two classifications.[22] As a result, a "with or without accessing" standard stands in direct conflict with the *Stevens Report*.

The consequences of the Commission's departure from longstanding precedent appear most plainly in its treatment of "whiteboarding." The *Orders* never actually defined "whiteboarding," yet provided a conclusory statement that "whiteboarding" does not convert an offering to an information service.[23] Here, the FCC's brief provides a bit more detail, defining whiteboarding as a service that "permits conference call participants to interact with a screen on which a computer image (for example, of other callers) appears."[24] Despite this skeletal definition, the FCC concedes that whiteboarding—which allows multiple users in remote locations to collaborate and modify the contents of a computer screen—represents "comput[ing] capabilities."[25] Yet, the FCC boldly applies a telecommunications classification to a hypothetical service that bundles whiteboarding with teleconference services, on the theory that the "service could be used 'with or without' those features."[26] This attempt to apply a telecommunications classification without ever examining the characteristics of an actual whiteboarding

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22 *Id*.

23 *See* WebEx Br. at 23-24 (discussing the Commission's treatment of whiteboarding).

24 Resp. Br. at 19 n.7.

25 *Id*. at 19.

26 *Id*.

offering is truly remarkable, and it highlights the Commission's apparent eagerness to use this new classification standard to expand the USF contribution base—without explaining why such an expansion is warranted and without analyzing or even acknowledging the revolutionary consequences of adopting a "with or without accessing" standard.

Moreover, whiteboarding is notably absent from the FCC's policy justification for the "with or without accessing" standard. Using InterCall's service as an example, the FCC asserts that "providers should not be able to evade their USF contribution obligations … by the simple expedient of repackaging their offering to include add-ons that customers need not use in order to access the basic telecommunications function."[27] But the functional integration test is adequate to deal with claims, such as InterCall's, that the inclusion of "muting" in its offering converts its service into an information service. Indeed, audio-bridge providers need not integrate features like muting in order to offer basic conferencing services to their customers—such features are truly adjunct to the actual offering.

In contrast, providers like WebEx must include components such as whiteboarding— which allows real-time editing of documents on-screen by multiple users—in order to offer customers more sophisticated online-collaboration services. Thus, whiteboarding is functionally integrated into an

[27] *Id*. at 56-57.

online-collaboration offering, not an "add-on" designed to evade USF payments, even if a consumer could conceivably use other components of WebEx's offering without using whiteboarding. In any event, nothing in the Commission's *Orders* or brief adequately deals with advanced features such as whiteboarding, as opposed to basic, adjunct features such as muting.

The Commission's selective reading of *Brand X* does not resolve the intractable conflict between Commission precedent and the new "with or without accessing" standard. As discussed above, *Brand X*, like the Commission's classification orders, focused on the nature of the provider's "offering," not on consumers' possible post-purchase behavior. To borrow the Court's analogy, a "with or without accessing" standard is tantamount to saying that, if a car buyer can separate the engine from a car, then the car dealer must be viewed as selling engines. Similarly, it should not matter whether a buyer conceivably could use a product without accessing a particular feature. For example, a convertible can be driven with the top up, and an "on-demand" four-wheel drive truck can be driven in two-wheel drive. But the fact that a consumer might not put the top down does not change a convertible into a coupe, nor does failure to use four-wheel drive change a truck with that feature into a vehicle lacking that capability. Moreover, given the extra cost of advanced features on a vehicle—or the extra cost of interactive services such as those WebEx offers, while also providing voice

services—buyers most likely pay for a more sophisticated product because they desire the more advanced, integrated offering, even if they refrain, on occasion, from using the advanced features.

II. THE FCC IMPLICITLY CONCEDES THAT IT FAILED TO FOLLOW THE PROCEDURES REQUIRED BEFORE ADOPTING A CHANGE TO ITS RULES.

In response to WebEx's procedural arguments—that the Commission failed to provide adequate notice or opportunity for comment and failed to provide a reasoned explanation for departing from existing precedent—the Commission insists that it "neither creates any rights or duties, nor does it amend any existing rule or depart from agency precedent."[28] In its brief here, the Commission does not and cannot defend its utter failure to provide public notice or seek comment on a potentially revolutionary change in its classification standard.[29] Nor does the Commission even attempt to claim that it provided a reasoned explanation for departing from its existing rules.

The Commission's claim—that it has applied existing law—is flatly incorrect. As discussed above, the *Orders* potentially impose a substantial new "duty" for information-service providers to make direct USF contributions.

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[28] Resp. Br. at 21.

[29] *See* WebEx Initial Br. at 22 (describing Commission's utterly deficient notice procedures).

Accordingly, the *Orders* depart from nearly a decade and a half of agency precedent freeing such providers from USF contributions.

This Court has rebuked this behavior from the Commission before. Previously, the Commission attempted to reject a set of telecommunications carriers' attempts to increase their price-cap index ("PCI") based on Commission-mandated changes in accounting treatment of retirement costs. Though the carriers fully complied with Commission precedent, the Commission attempted to impose a series of new requirements before allowing the PCI increases, while claiming to apply existing rules. This Court reversed and remanded, citing the Commission's prohibited attempt at "concocting a new rule in the guise of applying the old."[30]

Here, the Commission is "concocting" a new "with or without accessing" service-classification standard in the "guise of applying the old" functional-integration standard. Because the Commission denies making any rule changes, it apparently felt no need to comply with its requirements to provide notice, seek comment, or provide a reasoned explanation. Thus, any attempt to adopt a "with or without accessing" standard in the *Orders* violates the APA.

CONCLUSION

WebEx respectfully requests that the Court, if it does not grant Petitioner's request to vacate the rulings at issue in this appeal, make clear that the *Orders*

[30] *See Southwestern Bell Tel. Co. v. FCC*, 28 F.3d 165, 173 (D.C. Cir. 1994).

cannot be upheld on the theory that an information service should be treated as telecommunications merely because it is capable of being used without accessing the enhanced features.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Circuit Rule 32(a)(1) because this brief contains 3490 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman, Font Size 14.

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CERTIFICATE OF SERVICE

I, Yana C. Vierboom, hereby certify that, on January 7, 2013, I caused the foregoing Reply Brief of Intervenor for Petitioner to be filed electronically with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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