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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

November 20, 2007

Re: Notice of *Ex Parte* Presentation
Free Press et al. Petition for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management" (RM- _____)
and
CC Docket No. 02-33, CC Docket No. 01-337, CC Docket Nos. 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, WC Docket No. 07-52

Dear Ms. Dortch,

This letter is to advise you, in accordance with Section 1.1206(b) of the Commission's rules, that on November 19, 2007, Marvin Ammori and Ben Scott of Free Press met with Ian Dillner, legal advisor to Chairman Martin, at the offices of the Federal Communications Commission.

We discussed the Petition for Declaratory Ruling filed by Free Press et al. and Complaint against Comcast filed by Free Press and Public Knowledge, both filed Nov. 1, 2007, and the Petition for Rulemaking filed by Vuze, Inc. on Nov. 14, 2007.

We discussed several procedural and substantive points.

Procedurally, first, we emphasized that the Commission must act promptly to signal that Comcast's actions will not be tolerated and violate the Commission's guiding Internet Policy Statement. The longer the Commission waits, the more likely it is that other ISPs may adopt Comcast's discriminatory practices. The Commission acted promptly in the Madison River case, and such swift action is required here. We also noted reports that Cox is engaging in similar activity.

Second, we noted that the Commission has authority to grant interim relief such as a preliminary injunction under its Title I authority. *See* Implementation of the Telecommunications Act of 1996, 12 FCC Rcd. 22497, ¶159 n.460 (1997).

Third, we emphasized that the FCC need not determine the precise procedures for handling the complaint *before* putting a petition for declaratory

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ruling or petition for rulemaking out for public comment. The petition can be noticed for comment promptly.

Fourth, we discussed the procedure by which the Commission would address the complaint, proposing procedures analogous to those the Commission already uses and with which the staff is familiar.

Fifth, we noted that the FCC, like any administrative agency, can make policy through adjudications or rulemakings, and the FCC unanimously stated that the Commission will incorporate the Internet Policy Statement's "principles into its ongoing policymaking activities." Therefore, the FCC can make policy through the complaint process.

Substantively, first, we reiterated that cable companies like Comcast and Cox have an incentive to block BitTorrent-based applications because these applications deliver high-quality video programming. As a result of this delivery, BitTorrent applications compete with the cable companies' cable television offerings, and the applications can undermine the companies' market power in video programming distribution.

Second, we noted that the Commission has already ruled in a closely analogous situation that discriminating against particular applications is not "reasonable network management." Comcast's lead public argument—which Comcast must believe is its strongest—is that blocking the BitTorrent protocol and other protocols and applications is "reasonable network management" because the protocols and applications employ considerable bandwidth (because consumers derive value from these protocols and applications). Even assuming that Comcast's argument is not attempted cover for anticompetitive motives, the Commission has squarely rejected this specious argument.

In Service Rules for the 698-746, 747-762, and 777-792 MHz Bands, Second Report & Order, 22 FCC Rcd. 15,289 (August 10, 2007) ("700 MHz Auction Order"), the Commission adopted open access requirements for "C Band" licensees. The Commission specified an exception for "reasonable network management" and explicitly stated that this did not include discriminating among applications. Further, it specifically anticipated and rejected arguments based on claims of even "unreasonable" bandwidth demands.

> C Block licensees cannot exclude applications or devices solely on the basis that such applications or devices would unreasonably increase bandwidth demands. We anticipate that demand can be adequately managed through feasible facility improvements or technology-neutral capacity pricing that does not discriminate against subscribers using third-party devices or applications.

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22 FCC Rcd. at 15370-71. This precedent therefore forecloses Comcast's leading public argument defending its discriminatory actions. Comcast doesn't have a leg to stand on because it's in clear and blatant violation of the Internet Policy Statement. The Commission should act quickly to stop and remedy Comcast's violations of the Policy Statement.

Sincerely,
Marvin Ammori