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July 10, 2008

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **In the Matter of Broadband Industry Practices, WC Docket No. 07-52;**
Ex Parte Communication

Dear Ms. Dortch:

On June 12, 2008, Free Press filed a 112-page ex parte submission comprising a cover letter and three separate memoranda setting forth new legal theories for how the Commission can take enforcement action against Comcast for its network management practices. We respectfully submit the attached Response of Comcast Corporation ("Response") to that filing. The Response includes an executive summary, but we want to take this opportunity to summarize some of its essential points and to highlight additional policy problems with Free Press' position.

The new Free Press memoranda are remarkable in multiple respects, *the most significant being that the memoranda effectively abandon the legal theory on which Free Press has sought enforcement action against Comcast.* Accordingly, they make a compelling case for why the Commission should dismiss both Free Press' Petition for Declaratory Ruling ("Petition") and its self-styled "Formal Complaint" ("Complaint"). In addition, the memoranda advance a variety of audacious and badly-reasoned proposals for new Internet policies and regulations that would completely overturn more than a decade's worth of successful Commission and congressional policy towards the Internet, and enmesh the Commission in detailed oversight of Internet service providers and especially their network management.

I. Free Press Has Abandoned Its Original Legal Justification for Commission Enforcement Action and Its Petition and Complaint Should Be Dismissed.

The central legal premise of Free Press' original Petition and Complaint was that Comcast had "violate[d] the FCC's Internet Policy Statement."¹ In its filings and public statements, Free Press repeatedly urged the Commission to "enforce" the Internet Policy Statement and asserted that the agency had authority to do so.²

Back *then*, Free Press' demands for Commission enforcement action relied *solely* on the Policy Statement; neither the Petition nor the Complaint cited a single provision of the Communications Act or a single Commission rule or order that was alleged to have been violated. Accordingly, the *sole issue* on which the Commission sought comment with respect to the Petition pertained to alleged violations of the Policy Statement:

The Wireline Competition Bureau seeks comment on a petition filed by Free Press *et al.* (Petitioners), seeking a declaratory ruling "that the practice by broadband service providers of degrading peer-to-peer ['P2P'] traffic *violates the FCC's Internet Policy Statement*" and that such practices do not meet the Commission's exception [in the Policy Statement] for reasonable network management.³

Now, more than seven months after it filed its Petition, more than three months after comments and reply comments were filed by dozens of interested parties, and almost two months after the Commission held the second of its public en banc hearings on the subject, Free Press renounces its demand that the Commission enforce the Internet Policy Statement.⁴ Apparently conceding that the Policy Statement is not enforceable (as Comcast and other parties have

¹ See *In re Petition of Free Press et al. 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"*, WC Docket No. 07-52, at i, iii, 3, 14 (Nov. 1, 2007) ("Free Press Petition"); *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications* at i, 1, 12, 13, 34, 35 (Nov. 1, 2007) ("Free Press Pleading"); see also Free Press et al. Comments, WC Docket No. 07-52, at 8, 15, 16, 17, 18, 54 (Feb. 13, 2008); Free Press et al. Reply Comments, WC Docket No. 07-52, at 3, 22, 31, 48 (Feb. 28, 2008).

² See, e.g., Free Press Petition at 15, 16; Free Press Pleading at ii, 1 (calling for injunction and forfeitures), 24-35 (same); Free Press Comments at 17, 67; Free Press Reply Comments at 44-52.

³ *Comment Sought on Petition for Declaratory Ruling Regarding Internet Management Policies*, WC Docket No. 07-52, Public Notice, DA 08-91, at 1 (Jan. 14, 2008) (footnotes omitted and emphasis added).

⁴ Disregarding the fact that it opposed granting commenters an extra two weeks to file reply comments, see Free Press Opposition to Motion for Extension of Time, WC Docket 07-52 (Feb. 22, 2008), Free Press has taken for itself an *extra three months* to respond to arguments that Comcast raised in the initial comment cycle. See Letter to Marlene H. Dortch, Secretary, FCC, from Marvin Ammori, General Counsel 1 (June 12, 2008) ("Free Press Cover Letter"); Letter to Marlene H. Dortch, Secretary, FCC, from Marvin Ammori, General Counsel, Free Press Attachment 1, at 6 (June 12, 2008) ("Free Press Jurisdictional Memorandum #1"); Letter to Marlene H. Dortch, Secretary, FCC, from Marvin Ammori, General Counsel, Free Press Attachment 2, at 1 (June 12, 2008) ("Free Press Jurisdictional Memorandum #2").

persuasively and consistently argued),⁵ Free Press now argues *for the first time* that the Commission should take enforcement action based on an entirely new theory: that Comcast has violated the terms of the Communications Act.⁶ Instead of asking the Commission to enforce the Internet Policy Statement, Free Press now asks the Commission to “interpret[] and enforc[e] the Communications Act.”⁷

Free Press asserts that what it said in its Petition and Complaint was not at all what it meant. Free Press claims that its previous, repeated references to “‘enforcing’ the Policy Statement” were a form of “short-hand,” intended to “save words on a more detailed expression: ‘making policy based on announced principles set forth in a Policy Statement by using adjudication to enforce rights guaranteed to consumers, and which the FCC must ensure because of obligations imposed on the FCC by the Communications Act.’”⁸ In its belated effort to salvage its Petition and Complaint by amending the legal bases for Commission enforcement action, Free Press advances a new and disjointed theory of how the Commission should cobble together various provisions in the communications laws to simultaneously create new obligations and prohibitions regarding network management -- without a rulemaking -- and to enforce these new obligations against Comcast through forfeitures and an injunction/cease and desist order.⁹

The Commission cannot do so -- and it should not do so even if it could. As the attached Response makes clear, Free Press’ new legal theory for enforcement fares no better than its now-abandoned prior theory; the extreme action advocated by Free Press is impermissible as a matter of law. The procedure that Free Press now advocates -- the creation of a new legal standard, where none before existed, to be imposed against Comcast in response to the Complaint -- lacks any support in law and to the best of our knowledge is entirely unprecedented. In fact, the law

⁵ As Comcast explained in its initial comments, general statements of policy are not enforceable. *See* Comcast Comments, WC Docket No. 07-52, at 45-46 (Feb. 12, 2008) (“Comcast Comments”); *see also Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (citation omitted) (“A general statement of policy, on the other hand, does not establish a ‘binding norm.’ It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy.”). Consistent with this bedrock principle of administrative law, the Communications Act does not include violations of policy statements among the enumerated violations that may legally serve as the basis for a cease-and-desist order (injunction) or a monetary forfeiture. *See* 47 U.S.C. §§ 312(b), 503(b)(1).

⁶ *See* Free Press Jurisdictional Memorandum #2 at 3.

⁷ *Id.* at 8; *see also id.* at 2 (stating that “[t]he Commission does not ‘enforce’ the Policy Statement but would adjudicate a complaint and make policy in line with its announced statement of policy that interprets its Congressional directives”).

⁸ *Id.* at 2 (quoting itself without citation to any relevant precedent). There is scant evidence that Free Press was trying to “save words.” The Petition totaled 39 pages, and the “Formal Complaint,” which Comcast obtained from Free Press’ website, totaled another 48 pages. Free Press filed Comments on its own Petition to the tune of an additional 100 pages, and filed 62 more pages of Reply Comments.

⁹ Free Press Jurisdictional Memorandum #1 at 17-38.

strongly suggests that such action would constitute an abuse of discretion.¹⁰ Where no statutory provision creates any rule of conduct, and where the Commission has consciously refrained from adopting any binding norms, adjudication cannot properly be used to create -- much less create and simultaneously enforce -- a new binding norm, whether retroactive or prospective.¹¹ This is particularly true where any such decision would reverse long-standing Commission policies.

Free Press asserts that the Commission has authority under Section 706(a) of the Telecommunications Act of 1996 and Section 230(b) of the Communications Act, but in fact neither of these statutory provisions imposes any statutory obligations or binding norms in any way related to broadband network management. Rather, for the most part, they simply set forth congressional policies and purposes.¹² And Free Press' effort to make a case for ancillary authority, implicitly recognizing that no directly enforceable statutory provisions exist, also fails; Free Press' proposed regulations are not reasonably ancillary to a single one of the

¹⁰ See *Pfaff v. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996) (noting that it is an abuse of discretion for an agency to adopt a new legal standard "where the new standard, adopted by adjudication, departs radically from the agency's previous interpretation of the law") (citing *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009-10 (9th Cir. 1981)); see also *Rapp v. Dep't of Treasury*, 52 F.3d 1510, 1522 (10th Cir. 1995) (noting possible abuse of discretion where agency "sought to impose a new liability for past actions which were taken in good-faith reliance on [agency] pronouncements"). Adjudication would be a particularly inappropriate way to create a new normative standard that necessarily would reverse long-standing Commission policies. As Comcast discussed in its initial comments, ever since the *Second Computer Inquiry*, the Commission's policy with respect to interstate information services (of which high-speed cable Internet is one) has been one of *deregulation*. See Comcast Comments at 44. Although the Commission has consistently maintained that it possesses subject-matter jurisdiction over interstate information services, it has steadfastly declined to establish any binding norms for such services. In fact, over the past 20-plus years, and particularly in the past six years, the Commission has initiated a variety of proceedings to consider whether to adopt particular rules pertaining to information services, but, with rare and narrowly delineated exceptions, it has consciously refrained from doing so.

Free Press' claim that cable modem service has been "reclassified" as an information service, Free Press Jurisdictional Memorandum #1 at 14 & n.70, is incorrect. The Commission has never classified cable modem service in any other way.

¹¹ Free Press' theories would subject numerous Internet service providers to retroactive liability, potentially including "astronomical" forfeitures, for violations of legal norms they had no reason to believe existed (because they have never been adopted).

¹² For example, Section 706(a) of the Telecommunications Act of 1996 simply provides that the Commission "shall encourage" the deployment of advanced telecommunications capability, a hortatory provision that the Commission has held does not even provide it with independent regulatory authority. See *In re Deployment of Wireline Servs. Offering Telecomms. Capability*, Memorandum Opinion & Order & NPRM, 13 FCC Rcd. 24011 ¶ 69 (1998), recon. denied, *In re Deployment of Wireline Services Offering Telecomms. Capability et al.*, Order on Reconsideration, 15 FCC Rcd. 17044 ¶¶ 6-7 (2000). Thus, Section 706(a) can hardly itself impose an independent binding norm on private parties as Free Press would have it do. Similarly, the Commission has recognized that Section 230(b) of the Communications Act is simply one of "many goals" in the Communications Act, *In re Tel. Number Requirements for IP-Enabled Servs. Providers; Local Number Portability Porting Interval & Validation Requirements et al.*, Report and Order, Declaratory Ruling, Order on Remand, and NPRM, 22 FCC Rcd. 19531, 19548 n.101 (2007). Again, such a "goal" cannot itself impose an independent binding norm.

Commission's statutorily-mandated responsibilities contained in the laundry list of statutes that Free Press cites.¹³

II. Besides Being Legally Suspect, Free Press' New Proposals Would Stifle Broadband Investment, Harm Consumers, and Enmesh the Commission in Detailed Oversight of Internet Service Providers.

Free Press' about-face on the enforceability of the Internet Policy Statement represents a tacit concession that its Petition and Complaint lack any legal foundation;¹⁴ therefore, the Commission should dismiss both without further consideration. *Comcast, however, has no legal objection to the ability of the Commission to revisit the issues, through the established rulemaking process, of what rules, if any, should apply to Internet service providers in general or to their network management activities in particular and whether it has the statutory authority to adopt those specific rules.* As Comcast has said repeatedly, it is entirely legitimate to debate those issues in a properly conducted rulemaking proceeding.¹⁵

Many of the theories advanced by Free Press would make for an interesting (albeit fruitless) debate in a properly framed notice of proposed rulemaking. For example, Free Press urges the Commission to adopt an unprecedented standard of review that would effectively prohibit *all* network management by ISPs.

- Every network service provider that filed comments (and practically every other commenter with the conspicuous exception of Free Press) recognized that it is essential that service providers have latitude to manage their networks. Yet Free Press now asks

¹³ Nor can these statutory provisions serve as a means for direct enforcement action against Comcast because a private party cannot "violate" congressional policies or purposes -- which are only hortatory provisions in statutes that are not binding -- and thus cannot be the subject of a forfeiture or cease-and-desist order for any such "violation." See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 & n.18 (1981) (holding that findings in a statute were "merely an expression of federal policy" that were "hortatory, not mandatory") (emphasis in original); *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 297 (D.C. Cir. 1975) (referring to section 396(g) of the Communications Act entitled "Purposes and Activities of Corporation" as "a guide to Congressional oversight policy and as a set of goals to which the Directors of CPB should aspire . . . not a substantive standard, legally enforceable by agency or courts," and referring to "this hortatory language").

¹⁴ Even before the latest Free Press letter, the state of the record on that matter was already quite definitive. In all the comments and reply comments filed in February, and in various hearings and ex parte submissions, not one party articulated a coherent legal theory that would allow the Commission to enforce the Internet Policy Statement.

¹⁵ Contrary to Free Press' claims, Comcast has not been inconsistent with respect to the issue of whether the Commission has subject-matter jurisdiction over Internet service providers. We explicitly and unambiguously agreed in our initial response to the Free Press Petition that the Commission has subject-matter jurisdiction. See Comcast Comments at 52. So too has Comcast been consistent with respect to whether that subject matter jurisdiction *alone* provides the Commission with authority to adopt and enforce rules regulating the Internet; it does not. See *id.* at 52-53.

the Commission to “impose a standard on network discrimination analogous to strict scrutiny,” which it then acknowledges “is generally fatal.”¹⁶

- Such a standard would require a network operator to prove that it uses the *least restrictive means* for addressing any particular network management issue, as viewed with the benefit of hindsight, long after engineering decisions have been made, capital has been committed, and network facilities deployed.
- And a legal standard designed to curtail government interferences with private action would instead become the basis for the heaviest imaginable regulatory hand.
- Additionally, Free Press tries to load the dice by saying that, although government actions reviewed under strict scrutiny can properly balance one social goal against another, the Commission “cannot defer to a network provider’s decision to promote one social goal at the expense of another.”¹⁷ And it argues that service providers cannot take cost into account when making network management choices.¹⁸

Free Press also asks the Commission to jettison due process.

- Free Press insists that network providers are entitled only to “minimal procedural baselines” when accused of engaging in a network management practice that any single consumer (or self-styled “consumer advocate”) believes is unreasonable.¹⁹
- It calls for the Commission to adopt (as part of a ruling on Free Press’ Petition or Complaint or in a rulemaking) an informal adjudication process that can be commenced upon the presentation of minimal evidence, and that process would include a mandatory public hearing whenever 1000 (or multiple hearings when 5000) of the Internet’s one billion users can be instigated to click on a website’s inflammatory call to action.²⁰

¹⁶ Letter to Marlene H. Dortch, Secretary, FCC, from Marvin Ammori, General Counsel, Free Press Attachment 3, at 7, 9 (June 12, 2008) (“Free Press Residual Issues Memorandum”).

¹⁷ *Id.* at 10.

¹⁸ *See id.* at 11 (arguing that “there can be no compelling *social* interest for avoiding the cost of maintaining the Internet”) (emphasis in original).

¹⁹ Free Press Jurisdictional Memorandum #2 at 9.

²⁰ *See* Free Press Residual Issues Memorandum at 11-13. Adoption of such a proposal would mire the FCC in constant investigations and hearings second-guessing Internet service providers’ network management decisions.

- In short, Free Press proposes to eviscerate the due process rights of all ISPs: “the Commission can deprive a network provider of property and liberty . . . so long as it meets only the most minimal administrative and constitutional baselines required of an informal adjudication.”²¹

Free Press further proposes that the FCC define “the Internet” so that those entities that actually invest in network facilities -- and they alone -- are subject to regulation.

- Although Free Press admits that Congress established a national policy that the Internet should be unfettered by regulation, it claims that Congress did not intend to apply that policy to what it calls “Internet access providers,” whom it characterizes as merely providing on-ramps to the Internet.²² Thus, the Commission would now be free -- and under Free Press’ theory, duty-bound -- to regulate cable Internet, DSL, wireless broadband, private networks, public library networks, school and university networks, and the many thousands of other “Internet access providers” that comprise the network of networks.²³
- Under Free Press’ extraordinary theory, only “*non-facilities-based* information providers” should be deemed to constitute the Internet, and only they would be protected against regulation.²⁴ This theory, of course, is utterly at odds with the universal understanding that the Internet is an interconnected series of *networks* -- that is, facilities.²⁵ Moreover, even were Comcast’s broadband network not considered part of the Internet, Section 230’s express language states that it is the policy of the United States

²¹ Free Press Jurisdictional Memorandum #2 at 1.

²² Free Press Jurisdictional Memorandum #1 at 27-28, 40-41.

²³ It bears emphasis that many broadband providers are far more restrictive of P2P traffic than Comcast has been with its current network management practices. Comcast successfully transmits billions of P2P flows every day, of which only a small percentage are delayed due to its current practices. But many other broadband providers flatly prohibit all P2P use. *See, e.g., Verizon Wireless, Terms & Conditions: National Access/BroadbandAccess and GlobalAccess* (“Examples of prohibited usage include: (i) server devices or host computer applications, including . . . peer-to-peer (P2P) file-sharing applications that are broadcast to multiple servers or recipients such that they . . . denigrate network capacity or functionality . . .”), at http://support.vzw.com/terms/products/broadbandaccess_nationalaccess.html (last visited July 10, 2008); AT&T, *Wireless Data Service Terms and Conditions* (“Examples of prohibited use include, without limitation, the following: (i) server devices or host computer applications, including, but not limited to, . . . peer-to-peer (P2P) file sharing. . . . This means, by way of example only, that checking email, surfing the Internet, downloading legally acquired songs, and/or visiting corporate intranets is permitted, but downloading movies using P2P file sharing services . . . is prohibited.”), at <http://www.wireless.att.com/learn/messaging-internet/media-legal-notice.jsp> (last visited July 10, 2008).

²⁴ *See* Free Press Jurisdictional Memorandum #1 at 40-41. Even they would be protected only against “[c]ertain [but unspecified] intrusive regulations.” *See id.*

²⁵ Free Press concedes that the Internet is “the international computer network of both Federal and non-Federal interoperable packet switched data networks,” but without explanation refuses to acknowledge that Comcast’s network is one of those “non-Federal interoperable packet switched data networks.” *Id.* at 27 (quoting 47 U.S.C. § 230(f)(1)).

“to preserve . . . the Internet *and other interactive computer services*, unfettered by Federal or State regulation,” and Comcast’s high-speed Internet service falls clearly within Section 230’s definition of “interactive computer service.”²⁶

- Free Press’ eleventh-hour filing effectively asks the Commission, in the context of an adjudication, to completely redefine what the Internet is, bypassing the more-than-half-dozen rulemakings and inquiries the Commission has underway to determine whether and how to regulate “the Internet.”

III. Even as Free Press Continues To Conjure Up Wild New Theories and Proposals, Comcast Remains Focused on Meeting the Needs of Consumers in a Robustly Competitive Marketplace.

Over the past several months, Comcast has continued its efforts to collaborate with the Internet community to provide the best possible Internet experience. We have detailed many of these efforts in several letters to the Commission. We also have detailed the steps Comcast has taken on its own to improve its customers’ Internet experience and address their concerns, including deploying the next generation of wideband service, increasing upload capacity, and committing to migrate all of our systems to protocol-agnostic management techniques by December 31, 2008. In the two earnings releases since Free Press filed its Petition and Complaint, during which time the Commission has publicly debated the reasonableness of Comcast’s current network management, and during which time potential customers have received from us the most detailed network management disclosure provided by any American Internet service provider, Comcast has announced it has added nearly a million more high-speed Internet customers.²⁷ The secret to this success is simple: *Comcast delivers consumers a high-quality Internet experience that, consistent with the principles in the Internet Policy Statement, enables its customers to access all of the content and use any of the applications and services that they choose.*²⁸

²⁶ 47 U.S.C. §§ 230(b)(2), (f)(2) (emphasis added). Section 230 defines “interactive computer service” to “mean[] any information service, system, or access software provider that provides or enables computer access . . . including specifically a service or system that provides access to the Internet.” *Id.* § 230(f)(2).

²⁷ Comcast now delivers its high-speed Internet service to over 14 million American homes.

²⁸ And, in sharp contrast to claims that Comcast is somehow trying to prevent customers from using the Internet to consume or distribute video services that compete with cable services, Comcast permits, encourages, and facilitates -- and it does not thwart -- use of its high-speed Internet service to receive or transmit video, including via P2P protocols. In any event, we are migrating to a protocol-agnostic network management technique by year-end 2008.

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Secretary, FCC
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We sincerely believe that these latest developments remove any conceivable basis for any enforcement action or adjudication of any other kind. We believe that our actions, taken in good faith in response to consumers' concerns, further confirm the wisdom of the Commission's long-standing policy showing show regulatory restraint. Accordingly, we respectfully ask the Commission to dismiss the Free Press Petition and Complaint.

Please let me know if you have any questions.

Sincerely,

/s/ Kathryn A. Zachem
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Enclosure

RESPONSE OF COMCAST CORPORATION TO FREE PRESS'
JUNE 12, 2008 EX PARTE LETTER AND LEGAL "MEMORANDA"

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July 10, 2008

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I. INTRODUCTION & EXECUTIVE SUMMARY

Free Press recently submitted a series of lengthy “memoranda” in an effort to persuade the Commission that taking enforcement action against Comcast in response to Free Press’ “Formal Complaint”¹ or Petition for Declaratory Ruling² regarding Comcast’s broadband network management practices could survive judicial review.³ In these memoranda, Free Press attempts to redefine completely both the nature of the claim alleged and the relief sought in the Complaint and Petition. Specifically, Free Press now argues that it did not mean to allege a violation of the *Internet Policy Statement* (“*Policy Statement*”) but, rather, violations of several provisions of the Communications Act that, according to Free Press, the *Policy Statement* interprets.⁴ Free Press also now downplays its original request that the FCC impose retroactive liability against Comcast and focuses instead on forward-looking remedies.⁵ Based on this entirely new theory of its case, Free Press contends that in response to the Complaint the agency could simultaneously: adopt a brand new binding legal norm regarding network management;⁶ enforce that norm against Comcast; enjoin Comcast from future “violations” of the new norm; and, to the extent Comcast continues to engage in “violations” of this new norm after the issuance of an injunction, impose fines of more than \$30 million per day – all pursuant to undefined ancillary authority.⁷

Free Press’ new focus on the Communications Act as opposed to the *Policy Statement*, and on injunctions as opposed to retroactive remedies, effectively concedes that the imposition of liability on Comcast for past conduct that “violated” the *Policy Statement* would be impermissible. As explained below, however, Free Press’ new approach does not solve the legal problems fatal to its original request for relief, and thus the Complaint and Petition must be dismissed, and Free Press’ eleventh-hour attempt to reformulate its claims rejected.

In addition to undermining the legal credibility of its original request and failing to provide any lawful basis for its latest theory for punitive action against Comcast, Free Press’

¹ *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications* (Nov. 1, 2007) (“Free Press Complaint” or “Complaint”).

² *Petition of Free Press et al. 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”* (Nov. 1, 2007) (“Free Press Petition” or “Petition”).

³ See Letter from Marvin Ammori, Free Press, to Marlene H. Dortch, FCC, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, WC Docket No. 07-52 (June 12, 2003) (“Free Press June 12 *Ex Parte*”). Appended to the letter were three memoranda. See Jurisdictional Memorandum # 1: The Commission’s Ancillary Authority Under Title I to Address Unreasonable Discrimination by Network Providers (“Free Press Memo 1”); Jurisdictional Memorandum # 2: Policy Statement/Informal Adjudication (“Free Press Memo 2”); Residual Issues Memorandum: Narrow Rulings, Complaint Processes, Scrutiny Levels, etc. (“Free Press Memo 3”).

⁴ See Free Press Memo 2 at 2, 8.

⁵ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) (“*Policy Statement*”).

⁶ See Free Press Memo 2 at 1-8.

⁷ See Free Press Memo 3 at 13-17.

memoranda repeatedly mischaracterize Comcast's position regarding the FCC's authority to take action relating to the conduct of broadband Internet service providers ("ISPs"). Contrary to Free Press' misstatement, Comcast does not believe, nor has it ever remotely suggested, that it is "above the law."⁸ Nor has Comcast suggested that the Commission is powerless to regulate broadband ISPs.

The reality is that there is simply no "law" to enforce. Comcast's position – made abundantly clear in its previous filings on this issue and in written and oral testimony – is that while it respects and abides by the FCC's *Policy Statement*, that document is, under the most basic principles of administrative law, not enforceable.⁹ In other words, the agency cannot impose any remedy, whether retroactive *or* prospective, for the "violation" of the *Policy Statement*. Indeed, Free Press now admits that policy statements are "unenforceable"¹⁰ and that the *Policy Statement* "did not announce rules,"¹¹ and it claims that it does not ask the Commission to "enforce" the *Policy Statement* in any ordinary sense of that term.¹²

In light of these admissions, Free Press attempts to recast its Complaint and Petition as alleging violations of the provisions of the Communications Act referenced in the *Policy Statement*. Free Press' new interpretation, however, is irreconcilable with the *Policy Statement* itself. That document never purported to provide guidance on how the FCC would interpret and enforce the cited provisions¹³ – Sections 230(a)-(b) of the Communications Act¹⁴ and Section 706(a) of the Telecommunications Act of 1996.¹⁵ It was simply a freestanding statement of policy, expressed in the language of consumer expectations¹⁶ and by its terms entirely hortatory,¹⁷ a statement that the agency merely observed was "consistent with" the provisions it cited.¹⁸ Thus, the fact of the matter is that the Commission had taken no binding legal action in

⁸ Free Press Memo 1 at 1.

⁹ *E.g.*, Comments of Comcast Corporation, WC Docket No. 07-52 (filed Feb. 12, 2008), at 42-51 ("Comcast Comments"); Reply Comments of Comcast Corporation, WC Docket No. 07-52 (filed Feb. 28, 2008), at 40-45 ("Comcast Reply Comments"). These comments and reply comments were filed in response to two public notices issued by the Wireline Competition Bureau that related, respectively, to the Free Press Petition and a Petition for Rulemaking filed by Vuze, Inc. regarding broadband network management issues. *See Comment Sought on Petition for Declaratory Ruling Regarding Internet Mgmt. Policies*, Public Notice, 23 FCC Rcd 340 (2008) ("*Declaratory Ruling Public Notice*"); *Comment Sought on Petition for Rulemaking To Establish Rules Governing Network Mgmt. Practices by Broadband Network Operators*, Public Notice, 23 FCC Rcd 343 (2007).

¹⁰ Free Press Memo 2 at 6.

¹¹ *Id.* at 3.

¹² *Id.* at 2, 8.

¹³ *Policy Statement*, 20 FCC Rcd at 14987 (¶ 2).

¹⁴ 47 U.S.C. § 230(a)-(b).

¹⁵ 47 U.S.C. § 157 note (incorporating Section 706 of the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, § 706, 110 Stat. 56, 153, into the Communications Act).

¹⁶ *Policy Statement*, 20 FCC Rcd at 14988 (¶ 4) (declaring various things to which "consumers are entitled").

¹⁷ *Id.* at 14988 n.15 (¶ 5 n.15).

¹⁸ *Id.* at 14987 (¶ 3).

this area at the time the Complaint and Petition were filed (and indeed has not yet done so). In this regard, it is telling that there is not, and never has been, any FCC process for the adjudication of “complaints” based on the *Policy Statement* or the statutory provisions at issue, as Free Press candidly acknowledges in asking the Commission to create such a process now.¹⁹ Free Press’ “Formal Complaint” fits under no established category of FCC complaint proceedings and is at best only an informal request for Commission action,²⁰ as even Free Press now concedes.²¹ And the statutory provisions upon which Free Press attempts to rely are not independently enforceable either. Simply put, there is no existing rule or legal standard that Comcast could be found to have “violated” or that can be “enforced” against Comcast.

Tacitly recognizing this problem, Free Press now switches gears and argues that the agency could create a *new* binding legal norm regarding network management and simultaneously apply it against Comcast as the basis for punitive measures in an enforcement order.²² For this astonishing proposition, Free Press relies on judicial precedent establishing that administrative agencies have discretion to announce new policies in adjudicatory proceedings rather than through notice-and-comment rulemaking.²³ This precedent does not support the weight that Free Press places on it. The discretion to choose between adjudication and rulemaking does not extend to circumstances where, as here, there is no extant underlying legal provision that establishes a binding norm the agency would apply or refine in an adjudication and that notifies parties of their basic legal rights and obligations. Were an agency to possess such unrestricted discretion, it could use adjudication to create and enforce new standards of conduct and apply them to parties that lack an awareness even of the *potential* for regulation. Fundamental principles of fairness and due process do not permit such an outcome.

Thus, contrary to Free Press’ misleading characterization, the principal cases that set forth an agency’s discretion to proceed by adjudication *never* suggest, by word or implication, that an agency may do so absent a validly promulgated legal norm. To the contrary, the relevant agency in these cases was operating under the auspices of some prior legal standard, typically a statute setting forth a broad governing standard for the regulation of certain conduct, and fleshing out the meaning of that standard; in none of these cases did the agency announce a brand new legal obligation without any prior explicit basis in federal law. These decisions comport with the text, structure, and purpose of the Administrative Procedure Act (“APA”), as well as case law interpreting the APA, all of which teach that adjudications are to be limited to the resolution of uncertainty and controversy in *existing* law. Free Press’ radical proposal for the use of adjudicatory processes to create new federal legal obligations where none before existed thus has no support in law. Indeed, the case law indicates that this highly anomalous, and to the best of our knowledge unprecedented, approach would constitute an abuse of discretion if employed by the Commission.

¹⁹ See Free Press Memo 3 at 11-13.

²⁰ See 47 C.F.R. § 1.41.

²¹ See Free Press Memo 2 at 8.

²² See *id.* at 1-8.

²³ See *id.* at 4-6.

The FCC also cannot award Free Press any of the remedies that it seeks. As Free Press seems now to realize, the imposition of any retroactive liability would constitute a violation of due process and fundamental principles of fair notice, given the irrefutable absence of *any* legal standard governing past conduct. Even if the principles in the *Policy Statement* constituted binding legal norms, which they do not, they are vague and wholly undefined. Further, the *Policy Statement* is explicitly qualified by the statement that the principles are “subject to reasonable network management,” a term for which no guidance whatsoever is provided.²⁴ In the face of these obvious weaknesses, Free Press now largely retreats to a demand for prospective relief – forward-looking fines and a cease-and-desist order – but that tactic provides Free Press no quarter and, indeed, raises additional legal barriers to Commission action.

As an initial matter, the issuance of an injunction or imposition of forward-looking fines under current circumstances would exceed the agency’s statutory authority. Under the Communications Act, the FCC can only issue a cease-and-desist order or a forfeiture for violation of a pre-existing, validly imposed, legal duty.²⁵ Free Press, however, cites no statutory provisions or other enforceable legal norms that have been violated, because there are none.

In addition, were the Commission now to attempt to adopt the broad “principles” of the *Policy Statement* as “merely” prospective standards of conduct to be enforced via an injunction or other forward-looking remedy, it would violate the rulemaking requirements of the APA.²⁶ An agency may not use its adjudicatory powers to promulgate generally applicable standards of future effect – those are “rules” within the meaning of the APA.²⁷ To do so would be to displace the rulemaking procedures of the APA with a process of the agency’s own devise. Free Press attempts to evade the law of administrative procedure by reframing its requested action as the formulation of “policy,”²⁸ but even cursory review of its Complaint and Petition show that Free Press seeks the announcement of broad standards of general applicability and application of those standards to Comcast’s future conduct in a binding way – that is, it seeks the creation and application of rules regarding network management. With Free Press’ latest request that the agency adopt and enforce a new “unreasonable discrimination” principle, and judge the reasonableness of network providers’ management activities based on a new “strict scrutiny” standard that also assigns the burden of proof to the provider, the APA violations it urges are even more obvious.

Finally, even assuming that the FCC could “adopt” and enforce the principles of the *Policy Statement* in an adjudication, it would still be required to show that Congress had delegated to the agency the power to take such action. Free Press identifies no statutory provision that expressly confers the necessary power on the Commission, arguing instead that the agency has “ancillary” authority to act and providing a laundry list of possible bases for the exercise of such authority. This list is dubious, at best. Comcast has consistently recognized that

²⁴ *Policy Statement*, 20 FCC Rcd at 14988 n.15 (¶ 5 n.15)

²⁵ 47 U.S.C. §§ 312(b), 503(b)(1).

²⁶ *See generally* 5 U.S.C. § 553.

²⁷ *Id.* § 551(4).

²⁸ *See, e.g.*, Free Press Memo 2 at 2.

the FCC has subject matter jurisdiction over the Internet. That is necessary, but not sufficient, to support the exercise of ancillary authority. To be within the Commission's ancillary authority, a regulation must: (i) fall within the agency's jurisdiction; and (ii) *reasonably relate* to the effective performance of the FCC's *statutorily mandated* responsibilities. Free Press' argument that the Commission can draw both jurisdiction and authority from Title I is highly questionable. The remaining provisions and "analogies" on Free Press' list all fail to satisfy one or both of the elements of the second prong of the ancillary authority test. Thus, Free Press' memorandum on ancillary authority has done nothing to clear up the grave questions that surround the agency's statutory authority to adopt the rule Free Press seeks in a rulemaking, much less an adjudication.

In sum, there was clearly no provision of law that governed the network management conduct at issue at the time the Complaint and Petition were filed. Nor can a brand new rule regarding network management spring full-grown from the head of Free Press' filings and be used as the basis for punitive action, whether retroactive or prospective, against Comcast. The FCC simply cannot, consistent with basic principles of administrative law and fundamental fairness, place the enforcement cart *before* the regulatory horse, as Free Press asks the agency to do. Accordingly, the only legally proper action here is to dismiss the Complaint and Petition. If the Commission wishes to pursue the policy questions that Free Press raises and to create enforceable rules, it can and should explore those issues in a rulemaking, as Comcast has previously stated.

II. THE FREE PRESS COMPLAINT AND PETITION SHOULD BE DISMISSED BECAUSE THEY ALLEGED ONLY VIOLATIONS OF THE POLICY STATEMENT AND, AS FREE PRESS NOW CONCEDES, THE POLICY STATEMENT IS NOT ENFORCEABLE.

As Comcast has previously explained, although it respects and fully abides by the *Policy Statement*, the "principles" that the *Policy Statement* enunciates are not enforceable as a matter of law.²⁹ The APA distinguishes between "general statements of policy," on the one hand, and "rules" and "orders" (which must be adopted in conformity with the APA's relevant procedural requirements), on the other, and only agency statements in the latter category are legally enforceable.³⁰ By its plain terms, the *Policy Statement* merely "offers guidance and insight into [the FCC's] approach to the Internet and broadband [Internet access]" and sets forth "principles," not rules.³¹ Significantly, the *Policy Statement* is not contained in the Code of Federal Regulations and was not even published in the Federal Register (though the APA requires

²⁹ See Comcast Comments at 43-48.

³⁰ See, e.g., *Wilderness Soc'y v. Norton*, 434 F.3d 584, 597 (D.C. Cir. 2006) (denying claims based on document entitled "MANAGEMENT POLICIES" "because they are predicated on unenforceable agency statements of policy"); *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487, 489 (D.C. Cir. 1998) (explaining that "a 'policy statement' . . . does not bind the Commission to a result in any particular case").

³¹ *Policy Statement*, 20 FCC Rcd at 14987-88 (¶¶ 3, 4).

“general statements of policy” to be so published),³² further demonstrating that it was not intended to, and cannot, have binding legal effect.³³

Moreover, at the time of its issuance, Chairman Martin correctly observed that “policy statements do not establish rules nor are they enforceable documents.”³⁴ Commissioner Copps similarly distinguished between the hortatory nature of the principles announced in the *Policy Statement* and “a rule that we could use to bring enforcement action.”³⁵ And Thomas Navin, then-Wireline Competition Bureau Chief, explained in a press conference immediately following adoption of the *Policy Statement* that it set forth “principles” that “are not enforceable.”³⁶ Further, the *Policy Statement* was harshly criticized by “net neutrality” advocates for the fact that the agency did *not* take binding regulatory action and instead announced aspirational goals.³⁷ Just last year, the FCC reiterated that “[t]he *Policy Statement* did not contain rules.”³⁸

Further confirming that the *Policy Statement* is not and never has been independently enforceable – and that this was indeed the clear understanding of the law by all interested entities – the agency has required several parties to merger proceedings legally to commit to abide by its principles as a condition of obtaining agency approval.³⁹ Indeed, Commissioner Adelstein

³² 5 U.S.C. §§ 552(a)(1)(D), 553(d).

³³ See, e.g., *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (“The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the statute authorizes to contain only documents ‘having general applicability and legal effect,’ . . . and which the governing regulations provide shall contain only ‘each Federal regulation of general applicability and current or future effect.’” (citations omitted)).

³⁴ FCC, News Release, *Chairman Kevin J. Martin Comments on Commission Policy Statement* (Aug. 5, 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A2.pdf.

³⁵ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report & Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14980 (2005) (Copps, Comm’r, concurring) (“*Wireline Broadband Report and NPRM*”).

³⁶ *FCC Adopts a Policy Statement Regarding Network Neutrality*, TechLawJournal.com, Aug. 5, 2005, available at <http://www.techlawjournal.com/topstories/2005/20050805.asp>.

³⁷ See, e.g., “Public Wants Government to Ensure Net Neutrality, Consumer Groups Say,” *Telecom A.M.* (Jan. 19, 2006) (quoting an analyst for Consumers Union – a frequent ally of Free Press – as complaining that “the FCC ‘went out of its way’ to stress that its . . . policy statement on net neutrality wasn’t ‘enforceable’”).

³⁸ *Broadband Industry Practices*, Notice of Inquiry, 22 FCC Rcd 7894, 7900 n.20 (¶ 11 n.20) (2007) (“*Broadband Industry Practices NOF*”).

³⁹ E.g., *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Mem. Op. & Order, Appendix F, 22 FCC Rcd 5662, 5814 (2007) (“*AT&T/BellSouth Order*”); *SBC Commcn’s Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Mem. Op. & Order, Appendix F, 20 FCC Rcd 18290, 18414 (2005) (“*SBC/AT&T Order*”); *Verizon Commcn’s Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18561, Mem. Op. & Order, Appendix F (2005) (“*Verizon/MCI Order*”). Of course, the FCC previously found that imposing such a condition on Comcast was unnecessary. *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelpia Commc’ns Corp., to Time Warner Cable Inc., and Comcast Corp.*, Mem. Op. & Order, 21 FCC Rcd 8203, 8299 (¶ 223) (2006) (“The Commission held out the possibility of codifying the *Policy Statement*’s principles where circumstances warrant in order to foster the creation, adoption, and use of Internet broadband content, applications, services, and attachments, and to ensure consumers benefit from the innovation that comes from competition. Accordingly, the Commission chose not to adopt rules in the *Policy Statement*.” (emphases added)).

referred to the inclusion of “explicit, enforceable provisions” mandating compliance with the *Policy Statement* as the “hallmark” of one such approval order.⁴⁰ With respect to two others, Commissioner Copps stated that only through imposition of the merger condition requiring compliance with the *Policy Statement*’s principles did the Commission “[t]oday . . . make these principles enforceable.”⁴¹ The conditions imposed on these mergers would have been unnecessary, and Commissioners Adelstein’s and Copps’ descriptions inapt, if the *Policy Statement* was independently enforceable.

It is also telling that there is not, and never has been, any Commission process for the adjudication of “complaints” based on the *Policy Statement*. Indeed, Free Press candidly acknowledges the lack of any existing procedures for the filing of complaints regarding broadband network management in its memorandum arguing for the establishment of such processes.⁴²

The various Congressional attempts to impose or authorize regulation of “net neutrality” issues (including broadband network management) since the adoption of the *Policy Statement* reinforce the point that there is currently no legal duty in connection with broadband network management that the FCC could possibly “enforce” against Comcast. For example, the COPE Act, which Free Press cites,⁴³ would have given the agency the power to enforce the *Policy Statement* on a case-by-case basis.⁴⁴ Other bills would amend the Communications Act to include, among other things, network management mandates,⁴⁵ or require the Commission to “report” to Congress on “recommendations for appropriate enforcement mechanisms.”⁴⁶

These legislative efforts do not demonstrate that the *Policy Statement* is enforceable, as Free Press seems to suggest.⁴⁷ Rather, they evidence Congress’ recognition that, at a minimum, the FCC does not currently have enforceable rules or requirements in this area. Drawing any other conclusion from this legislative activity would flatly contravene the presumption against finding statutory language – let alone entire enactments – superfluous.⁴⁸ Taken as a whole, the

⁴⁰ *AT&T/BellSouth Order*, 20 FCC Rcd at 5836 (Adelstein, Comm’r, concurring); *see also id.* at 5831 (Copps, Comm’r, concurring) (referring to the condition as “most important” and stating that the principles had been “made enforceable in the context of the Bell mergers completed last year”).

⁴¹ *SBC/AT&T Order*, 20 FCC Rcd at 18427 (Copps, Comm’r, concurring); *Verizon/MCI Order*, 20 FCC Rcd at 18575 (Copps, Comm’r, concurring).

⁴² *See* Free Press Memo 3 at 11-13.

⁴³ *See* Free Press Memo 1 at 29.

⁴⁴ Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong., 2d Sess., § 201 (2006).

⁴⁵ Internet Freedom Preservation Act, S. 215, 110th Cong., 1st Sess. (2007); *see* Network Neutrality Act of 2006, H.R. 5273, 109th Cong., 2d Sess. (2006); Internet Freedom Preservation Act, S. 2917, 109th Cong., 2d Sess. (2006); Internet Non-Discrimination Act of 2006, S. 2360, 109th Cong., 2d Sess. (2006).

⁴⁶ Communications, Consumer’s Choice, and Broadband Deployment Act of 2006, S. 2686, 109th Cong., 2d Sess., § 901 (2006); *see* Internet Freedom Preservation Act of 2008, H.R. 5353, 110th Cong., 2d Sess., § 4 (2008).

⁴⁷ *See* Free Press Memo 1 at 29.

⁴⁸ *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Free Press notes that members of Congress have “offered to ensure that the Commission has the authority to enforce the *Policy Statement*.” Free Press Memo 1 at 3

pertinent legislative efforts, far from supporting Free Press' claims, only highlight the clear absence of any enforceable legal duties.

In fact, Free Press now expressly concedes that the *Policy Statement* is not enforceable. Free Press admits that “[t]he Policy Statement . . . *did not announce rules*”;⁴⁹ that “the Policy Statement itself *reveals why it is not a ‘rule’*”;⁵⁰ that it is “*phrased as a guide* for future, more precise, policy-making”;⁵¹ and that “courts have made clear that policy statements” are “*themselves ‘unenforceable.’*”⁵² As it rapidly retreats from its original and longstanding characterization of the dispute as being about whether Comcast had “violated” the *Policy Statement* and whether the agency could “enforce” the *Policy Statement* itself, Free Press now seeks to recast completely the claims alleged in its “Formal Complaint,” insisting that they are founded instead upon various provisions of the Communications Act (primarily Sections 230(b) and 706) that it claims undergird the *Policy Statement*. In particular, Free Press states that:

- “In referring to ‘enforcing’ the Policy Statement, Free Press and others merely save words on a more detailed expression: ‘*making policy* based on announced principles set forth in a Policy Statement by using adjudication to enforce rights guaranteed to consumers, and which the FCC must ensure because of obligations imposed on the FCC by the Communications Act.’”⁵³
- “In comments, ‘enforce’ serves as short-hand. The Commission *does not ‘enforce’ the Policy Statement* but would adjudicate a complaint and *make policy* in line with its announced statement of policy that interprets its Congressional directives.”⁵⁴

n.13. If the agency already *had* such authority, then such offers would be unnecessary. Moreover, the sponsors of pertinent legislation have expressly recognized that, absent passage of one of their bills, the FCC does not have such authority. See, e.g., *Hearing on the Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252*, 109th Cong., 152 Cong. Rec. H3551, H3577 (daily ed. June 8, 2006) (Statement of Sen. Joe Barton) (“We give the FCC the *explicit authority* to enforce th[e] principles [of the *Policy Statement*]. . .”) (emphasis added); *Hearing on S. 2686, Communications Reform Bill (as revised) Hearing III Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. (2006) (Statement of Sen. Ted Stevens) (“We have a watchdog in the FCC who’s got a flag out there, and they’re told annually to report to us, *but more than that if they really see something they can define as a violation of net neutrality, to immediately tell us, and we’ll tackle it on legislation.*” (emphasis added)), available at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement_ID=68ad4632-2e35-49e8-90cb-7497e7512d07; see also *Hearing on Network Neutrality: Competition, Innovation, and Nondiscriminatory Access Before the H. Comm. on the Judiciary*, 109th Cong. 2 (2006) (Statement of Rep. Chris Cannon) (“Principles of net neutrality have been successfully articulated, *but the mechanism to enforce them has not.*” (emphasis added)), available at <http://judiciary.house.gov/media/pdfs/printers/109th/27225.pdf>.

⁴⁹ Free Press Memo 2 at 3 (emphasis added).

⁵⁰ *Id.* at 8 (emphasis added).

⁵¹ *Id.* (emphasis added).

⁵² *Id.* at 6 (emphasis added).

⁵³ *Id.* at 2 (emphasis added) (quoting itself without citation to any relevant precedent).

⁵⁴ *Id.* (emphasis added).

- “[T]he Commission’s adjudication and the adjudication’s announced policy derive from the *Communications Act* itself, not from the *Policy Statement*. . . .”⁵⁵
- “Here, the Commission will not be interpreting and enforcing the *Policy Statement* itself. Rather, the Commission will be interpreting and enforcing the *Communications Act*.”⁵⁶

While these concessions are welcome because they implicitly acknowledge that the agency cannot sanction Comcast for purported “violations” of the *Policy Statement*, they are irreconcilable with Free Press’ earlier filings. The Free Press Complaint by its plain language repeatedly alleged “violations” of the *Policy Statement*⁵⁷ and provided not a single citation to any statutory or regulatory provision as the basis for its claims.⁵⁸ Although Free Press now seems to be making a case for enforcement action limited to the Complaint,⁵⁹ Comcast notes that the same is true of Free Press’ Petition.⁶⁰ This is how the FCC itself understood the allegations.⁶¹

Even Free Press’ comments in response to the Commission’s Public Notice on its Petition repeatedly alleged “violations” of the *Policy Statement*,⁶² and those comments – submitted before these most recent memoranda – referenced only three of the seven statutory provisions that it now suggests provide a basis for punitive action against Comcast.⁶³ As to those provisions, Free Press had never before claimed that Comcast was “violating” those provisions, only that the “Congressional policy” underlying them was implicated.⁶⁴ Thus, it is clear that Free Press has *never* before articulated the new legal theories presented in its latest filings, and certainly did not do so in the Complaint or the Petition.

⁵⁵ *Id.* (emphasis added)

⁵⁶ *Id.* at 8 (emphasis added).

⁵⁷ *See e.g.*, Free Press Complaint at i (“Degrading [peer-to-peer] protocols . . . violates the FCC’s Internet Policy Statement.”); *id.* at 1 (“Comcast . . . is . . . violating the FCC’s Internet Policy Statement. . . .”); *id.* at 12 (“Degrading Applications Violates the Commission’s Internet Policy Statement . . .”).

⁵⁸ *E.g.*, Comcast Comments at 53; Comcast Reply Comments at 41; *see also* Free Press Memo 1 at 2 (acknowledging that the Memo “provide[s] more detail than any party has to date on this issue”).

⁵⁹ *See* Free Press Memo 2 at 1 (arguing that “the FCC has . . . authority to impose injunctions and fines based on *informal complaints* brought for violations of the *Policy Statement*’s principles” (emphasis in original)).

⁶⁰ *See* Free Press Petition at i, iii, 3, 7, 14, 16, 22-24. Indeed, the Free Press Petition was *captioned* “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.’” Free Press Petition (emphasis added).

⁶¹ *See Declaratory Ruling Public Notice*, 23 FCC Rcd at 340 (summarizing Free Press’ request for a declaratory ruling “that the practice by broadband service providers of degrading peer-to-peer [‘P2P’] traffic *violates the FCC’s Internet Policy Statement*” (emphasis added)).

⁶² *E.g.*, Comments of Free Press et al., WC Docket No. 07-52 (filed Feb. 13, 2008), at 8, 15, 16, 17, 54 (“Free Press Comments”); Reply Comments of Free Press et al., WC Docket No. 07-52 (filed Feb. 29, 2008), at 3, 22, 31, 49, 52 (“Free Press Reply Comments”).

⁶³ Free Press Comments at 18-22 (discussing Section 706 of the 1996 Act and 47 U.S.C. § 230(b)(2), (3)); Free Press Reply Comments at 15 (same).

⁶⁴ *E.g.*, Free Press Comments at 18 (discussing “Congressional policy”).

Free Press is as a matter of law, and should be as a matter of fairness, bound by its original allegations. Certainly, were the Free Press Complaint considered under any potentially applicable provisions relating to “formal complaints,” an eleventh-hour amendment that worked a total revision of its underlying basis (submitted via *ex parte* memoranda) would be procedurally improper.⁶⁵ Free Press now admits that its Complaint is only properly considered, if at all, under “the Commission’s test for informal complaints” set forth in 47 C.F.R. § 1.41.⁶⁶ Even the informal procedures therein require that a request “set forth clearly and concisely . . . the statutory and/or regulatory provisions (if any) pursuant to which the request is filed and under which relief is sought.”⁶⁷ This makes clear that even in “informal” processes, the legal basis on which relief is sought must be set forth clearly *at the initiation* of the process and cannot be changed in the middle or near the end of a proceeding. Otherwise, both the party whose conduct is the target of such a filing, and the FCC staff who must evaluate it, would be shooting at a constantly moving target, resulting in a tremendous waste of both administrative and private resources in considering arguments that could be altered at any stage of the game.

Moreover, it is a gross mischaracterization of the *Policy Statement* to claim, as Free Press does, that it purported to set forth an enforcement policy for Section 230(b) of the Communications Act and Section 706(a) of the 1996 Act.⁶⁸ That is simply not what the *Policy Statement* said. Instead, it merely noted that the “guidance and insight” that it provided was “consistent with” those Congressional enactments.⁶⁹ More importantly, neither of these provisions is independently enforceable by the Commission against private parties and, thus, it would make no sense to construe the *Policy Statement* as setting forth guidance regarding how the agency would “interpret the Act” to determine in an adjudicatory proceeding whether a “violation” of those provisions had occurred. Section 706 merely sets forth general goals for the FCC and state regulators to pursue in order to encourage the deployment of broadband services, and directs the Commission to prepare reports regarding the status of such deployment and to take deregulatory action if it finds – which it has not – that deployment is not occurring on a “reasonable and timely” basis.⁷⁰ The agency has rightly determined that the provision “does not

⁶⁵ E.g., 47 C.F.R. § 1.728(a) (“Any document purporting to be a formal complaint which does not state a cause of action under the Communications Act will be dismissed. In such case, any amendment or supplement to such document will be considered a new filing.”); see also, e.g., *Knology, Inc. v. Ga. Power Co.*, 18 FCC Rcd 24615, 24617 n.16 (¶ 5 n.16) (2003) (declining to address an argument that the respondent failed to raise in its opening response to a pole attachment complaint).

⁶⁶ See Free Press Memo 2 at 8 (stating that “our Complaint clearly meets at least the Commission’s test for informal complaints”). The “Formal Complaint” was procedurally, as well as substantively, defective. The only procedures referenced in the Commission’s rules are those that apply to common carriers, see 47 C.F.R. §§ 1.720-1.736, and Comcast is not a common carrier. Even if Comcast were subject to those rules, Free Press did not comply with them. Among other things, the Free Press pleading was never served on Comcast, does not cite to any “section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated,” does not certify that Free Press “has, in good faith, discussed or attempted to discuss the possibility of settlement with each defendant prior to the filing of the formal complaint,” and fails to include a declaration that Free Press has paid the relevant filing fees required by Commission rules. See *id.* § 1.721(a).

⁶⁷ *Id.* § 1.41.

⁶⁸ Free Press Memo 2 at 3.

⁶⁹ *Policy Statement*, 20 FCC Rcd at 14987 (¶ 3) (emphasis added).

⁷⁰ See *infra* Section IV.B.2.a.

constitute an independent grant of regulatory authority.”⁷¹ Section 230(b) provides no authority – adjudicatory or otherwise – to the agency, but, like Section 706 simply sets forth policy goals.⁷² Accordingly, the *Policy Statement* cannot be construed to set forth “guidance on how the Commission would interpret the Act” in an adjudicatory proceeding concerning either of those provisions,⁷³ because neither provision creates any binding norms for third parties nor provides the FCC with authority to adjudicate anything.⁷⁴

Free Press’ effort to liken the *Policy Statement* to other agency statements providing guidance as to future adjudicatory actions⁷⁵ only underscores that the *Policy Statement* did not serve that traditional function⁷⁶ but was purely hortatory in nature. For example, the FCC’s policy statement on broadcast license renewal criteria “interpret[s] the statutory terms that govern the . . . renewal process” and advises parties on how the Commission intends to act in future adjudicatory proceedings;⁷⁷ that is, it is directly tied to the *pre-existing statutory scheme* in Title III that the agency has *explicit authority* to administer.⁷⁸ Similarly, the *Indecency Policy Statement*⁷⁹ sets forth guidance on the enforcement approach under Section 1464 of Title 18,

⁷¹ *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, Mem. Op. & Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24047 (¶ 77) (1998) (“*First Advanced Servs. Order*”); *see id.* at 24046 (¶ 74).

⁷² 47 U.S.C. § 230(b); *see also infra* Section IV.B.2.b.

⁷³ Free Press Memo 2 at 2.

⁷⁴ Free Press also notes that the Commission “alluded to” Section 256 of the Communications Act, 47 U.S.C. § 256, in the *Policy Statement*. Free Press Memo 1 at 19. To the extent that Free Press means to suggest that the *Policy Statement* set forth guidance on how the agency would enforce Section 256, that claim is even weaker than its similar ones regarding 230(b) and 706, as the FCC did not mention Section 256 at all. In any case, as discussed below, Section 256 is also not itself enforceable, but instead sets forth goals that the Commission should pursue and requires or permits the agency to oversee or participate in coordinated network planning to ensure telecommunications interconnectivity. *See infra* Section IV.B.2.d. Nor are any of the other statutory provisions listed in Free Press’ memorandum on ancillary authority, *see generally infra* Sections IV.B.2.a-c, independently enforceable.

⁷⁵ *See* Free Press Memo 2 at 5.

⁷⁶ *See* U.S. Dep’t of Justice, Attorney General’s Manual on the Administrative Procedure Act 30 n.3 (1947) (“Attorney General’s Manual on the APA”) (defining general statements of policy as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a *discretionary power*” (emphasis added)); *see also Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (“An agency policy statement does not seek to impose or elaborate or interpret a legal norm. It merely represents an agency position with respect to how it will treat – typically enforce – *the governing legal norm.*” (emphasis added)). These pronouncements regarding the nature of agency policy statements presuppose an already-existing source of discretionary power under a statute or validly-promulgated regulation, which, as shown herein, does not exist in relation to broadband network management issues.

⁷⁷ *Implementation of Sections 204(a) and 204(c) of the Telecomms. Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363, 6364 (¶ 5) (1996).

⁷⁸ *See* 47 U.S.C. § 303(l)(1) (granting the FCC authority to issue licenses); *id.* § 309(k) (prescribing the conditions under which the FCC shall grant applications for renewal of broadcast station licenses).

⁷⁹ *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001) (“*Indecency Policy Statement*”); *see* Free Press Reply Comments at 49 (discussing the *Indecency Policy Statement*).

which the FCC has the *express power* to enforce, and the Commission’s implementing regulations governing indecency.⁸⁰ These are classic examples of proper policy statements issued to explain how the agency intends to act pursuant to *existing statutory schemes under which the FCC has direct responsibility for adjudicatory functions*. These policy statements starkly contrast with the *Policy Statement*, which, by its own terms, is simply “consistent with” statutory provisions that do not confer substantive authority and instead simply sets forth aspirational consumer expectations.⁸¹

In sum, the *Policy Statement* is not enforceable as a matter of law, as Free Press now concedes;⁸² the Free Press Complaint by its plain language alleged only “violations” of the “principles” in that document (not any violations of a rule or statute); and the statutory provisions cited in the *Policy Statement* are not independently enforceable. The fact that the Commission has no procedures for the submission of complaints stating a claim regarding broadband network management, as Free Press candidly acknowledges in urging that such procedures be created,⁸³ only underscores the complete absence of any such legal claim. For all these reasons, the Complaint fails to state any valid claim and can and should, on that ground alone, be dismissed. Similarly, the proper response to the Free Press Petition is to explain that there is no law to clarify or any controversy under the law to resolve.⁸⁴

III. THE COMMISSION CANNOT LAWFULLY ANNOUNCE BRAND NEW STANDARDS OF CONDUCT IN AN ADJUDICATORY PROCEEDING AND SIMULTANEOUSLY ENFORCE THEM, WHETHER THROUGH RETROACTIVE OR PROSPECTIVE REMEDIES.

Although Free Press admits that the FCC cannot “enforce” the *Policy Statement* in any ordinary sense of that word, it now advances an astonishing and novel procedural theory under which the agency could simultaneously announce brand new binding standards of conduct, apply them, and impose remedies for their violation, all in an adjudicatory. As shown below, however, this theory has no support in law and, if embraced, would constitute a clearly impermissible and arbitrary and capricious departure from proper agency process.

⁸⁰ See 18 U.S.C. § 1464 (prohibiting the utterance of “any obscene, indecent, or profane language by means of radio communication”). The Commission is provided authority to enforce this prohibition in a variety of ways. See 47 U.S.C. § 312(a)(6) (expressly authorizing the FCC to “revoke a[] station license for . . . violation of section . . . 1464 of Title 18[, United States Code]”); *id.* § 503(b)(1)(D) (expressly authorizing the agency to “determine” whether a person “violated any provision of section . . . 1464 of Title 18[, United States Code],” and making any person liable for a forfeiture penalty); *see also id.* § 503(b)(2)(E) (stating that “[t]he amount of such forfeiture shall be assessed by the Commission”).

⁸¹ *Policy Statement*, 20 FCC Rcd at 14987 (¶ 3); *see id.* at 14988 (¶ 4) (declaring various things to which “consumers are entitled”).

⁸² Free Press Memo 2 at 3, 6, 8.

⁸³ Free Press Memo 3 at 11-13.

⁸⁴ See 5 U.S.C. § 554(e) (defining limits of authority to issue “a declaratory order”); 47 C.F.R. § 1.2 (same).

A. Absent an Extant Statutory or Regulatory Duty – Which Does Not Exist Here – the FCC Cannot Announce and Apply Brand New Standards of Conduct in an Adjudicatory Proceeding.

Having realized – and admitted – that the *Policy Statement* alone cannot provide a basis for the relief that it seeks, Free Press now contends that the Commission has the discretion in an adjudication simply to “announce” and “apply” *new* standards regarding broadband network management, and thereby give Free Press the outcome it seeks.⁸⁵ Relying on *Securities & Exchange Commission v. Chenery Corp.*⁸⁶ and *NLRB v. Bell Aerospace Co.*,⁸⁷ Free Press emphasizes the oft-cited and by now unremarkable principle that “the choice between rulemaking and adjudication lies in the first instance within [an agency’s] discretion.”⁸⁸ Free Press argues that this principle allows the FCC to announce an entirely new standard of conduct in an adjudication, without undertaking the notice-and-comment rulemaking that the APA requires.⁸⁹

To be sure, agencies have some discretion to announce new standards by adjudication rather than by rulemaking. But that discretion is not unbounded. Indeed, as the Supreme Court recognized in *Bell Aerospace*, “there may be situations where [an agency’s] reliance on adjudication would amount to an abuse of discretion.”⁹⁰ Courts have explained that “[s]uch a situation may present itself where the new standard, adopted by adjudication, departs radically from the agency’s previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application.”⁹¹

In the circumstances presented here, where there is no pre-existing statutory or regulatory requirement regarding broadband network management, it would be a clear abuse of discretion for the Commission to announce entirely new standards of conduct through adjudication. The *Policy Statement* does not create legally binding norms, and there is no statutory provision regarding broadband network management that Congress has expressly charged the FCC with administering (as evidenced by the fact that Congress has on several occasions considered and declined to grant such statutory authority) or that is independently enforceable.⁹² Free Press’ own position proves that fact. Were there such a clear statutory directive, Free Press would not

⁸⁵ Free Press Memo 2 at 1.

⁸⁶ 332 U.S. 194 (1947) (“*Chenery II*”).

⁸⁷ 416 U.S. 267 (1974).

⁸⁸ Free Press Memo 2 at 4 (quoting *Bell Aerospace*, 416 U.S. at 292).

⁸⁹ *Id.* (asserting that “[a]gencies can announce policy in adjudications”).

⁹⁰ *Bell Aerospace*, 416 U.S. at 294.

⁹¹ *Pfaff v. U.S. Dep’t of Hous. & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996) (citing *Bell Aerospace*, 416 U.S. at 295; *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009-10 (9th Cir. 1981); *Patel v. INS*, 638 F.2d 1199, 1203-05 (9th Cir. 1980); and *Ruangswang v. INS*, 591 F.2d 39, 44 (9th Cir. 1978)); see also *Rapp v. U.S. Dep’t of Treasury*, 52 F.3d 1510, 1522 (10th Cir. 1995) (noting possible abuse of discretion where agency “sought to impose a new liability for past actions which were taken in good-faith reliance on [agency] pronouncements”).

⁹² See *supra* Section II.

be relying entirely on the doctrine of *ancillary* authority to support its underlying claim for relief,⁹³ because that doctrine gives the Commission the circumscribed power to take “reasonably *ancillary*” action where by definition there is no directly applicable statutory mandate.⁹⁴ What Free Press wants would not merely be a radical departure from a prior interpretation of law, which courts have found troubling in itself, but the creation of a brand new federal standard out of whole cloth pursuant to ancillary authority.

Indeed, the relevant legal authority makes plain that the discretion to choose between rulemaking and adjudication exists only where there are *pre-existing* statutory or regulatory mandates. In *Chenery* and *Bell Aerospace*, the Supreme Court explained that an agency has the discretion to announce new principles in an adjudication so that it can “effective[ly] administ[er] . . . a statute” and “evol[ve] . . . statutory standards” on a “case-by-case” basis.⁹⁵ The Court also explained that an agency has the discretion in an adjudication to “formulate new standards of conduct” “within the framework” of an existing statute and to “fill[] in the interstices” of an existing statute or rule.⁹⁶ When an agency has a “statutory duty” to decide an issue, it has discretion to proceed by either adjudication or rulemaking.⁹⁷ Contrary to Free Press’ misleading characterization, neither of those decisions suggests that an agency has such discretion absent a statute or validly promulgated regulation that establishes an existing legal norm.

Quite the opposite, both cases involved adjudicatory agency action to spell out the scope or meaning of pre-existing statutory or regulatory mandates. In *Chenery*, the Supreme Court first *rejected* an attempt by the Securities and Exchange Commission (“SEC”) to make new law in an adjudication absent “some [pre-existing] standards of conduct prescribed by an agency of government authorized to prescribe such standards – either the courts or Congress or an agency to which Congress has delegated its authority.”⁹⁸ When the case returned to the Supreme Court following remand, the SEC had revised its approach and had instead interpreted, in an adjudicatory context, the meaning of Sections 7 and 11 of the Public Utility Holding Company Act of 1935.⁹⁹ The Court approved this new approach, but *only* because the SEC had cured the fatal defect – an attempt to proceed by adjudication to announce wholly new requirements not founded on some pre-existing legal mandate – that the Court had previously identified. Similarly, in *Bell Aerospace*, the question was whether the National Labor Relations Board could, in an adjudication, determine whether a class of employees fell within a longstanding Board-created limitation on the scope of the statutory protections of the National Labor Relations Act.¹⁰⁰

⁹³ See generally Free Press Memo 1.

⁹⁴ *Am. Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (emphasis added).

⁹⁵ *Chenery II*, 332 U.S. at 202; accord *Bell Aerospace*, 416 U.S. at 292-93 (quoting *Chenery II*).

⁹⁶ *Chenery II*, 332 U.S. at 202.

⁹⁷ *Bell Aerospace*, 416 U.S. at 292.

⁹⁸ *SEC v. Chenery Corp.*, 318 U.S. 80, 92-93 (1943) (“*Chenery I*”).

⁹⁹ *Chenery II*, 332 U.S. at 202.

¹⁰⁰ *Bell Aerospace*, 416 U.S. at 291-95.

Nothing about these two principal cases suggests that an agency's discretion to announce new principles and standards in an adjudication extends to circumstances where, as here, there are no pre-existing statutory or regulatory mandates that the agency is refining or interpreting.¹⁰¹ This understanding of these cases is supported by the legal authority that defines adjudication as concerning "what the law was," rather than "what the law will be."¹⁰² The D.C. Circuit has explained, for instance, that an agency's resolution of a dispute over existing but unclear law is "the stuff that adjudications are made of."¹⁰³ Thus, "ad hoc [adjudication]" is appropriate "[w]here a statute or legislative rule has created a legal basis for enforcement."¹⁰⁴ The Supreme Court has also explained, albeit in a different context, "that adjudications involve application of existing laws to the facts of a particular case, while legislative acts '[look] to the future and [change] existing conditions by making a new rule to be applied thereafter to all or some part of those subject to [their] power[s].'"¹⁰⁵

This understanding is also consistent with the text, structure, and purpose of the APA, which similarly suggests that adjudication is concerned only with existing law. As the Attorney General explained shortly after the Act became law, "[t]he [APA] is based upon a dichotomy between rule making and adjudication . . . [where] adjudication is concerned with the determination of past and present rights and liabilities."¹⁰⁶ By contrast, the statute defines rulemaking as the process for formulating an agency statement of "future effect."¹⁰⁷ Thus, in drafting the APA, the House Judiciary Committee explained that "[r]ules formally prescribe a course of conduct for the future rather than pronounce past or existing rights or liabilities."¹⁰⁸ It is true that an agency may announce new principles and fill statutory gaps in an adjudication, but it is limited in that context to "mak[ing] law at the margin of existing law."¹⁰⁹

¹⁰¹ The Supreme Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which Free Press cites as an example of the Commission applying new policy in an adjudication, also involved a pre-existing legal mandate. There, the agency set forth in an adjudication its view of the law under an existing statutory provision that forbade "the use of 'any obscene, indecent, or profane language by means of radio communications.'" *Id.* at 731 (quoting 18 U.S.C. § 1464).

¹⁰² *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Scalia, J., concurring).

¹⁰³ *Atchison, Topeka & Santa Fe Ry. Co. v. Interstate Commerce Comm'n*, 851 F.2d 1432, 1437 (D.C. Cir. 1988); accord *United Food & Commercial Workers Int'l Union v. NLRB*, 1 F.3d 24, 35 (D.C. Cir. 1993) (quoting *Atchison*).

¹⁰⁴ *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993).

¹⁰⁵ *Jordahl v. Democratic Party of Va.*, 122 F.3d 192, 199 (4th Cir. 1997) (quoting *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 477 (1983)); see also *Doe ex dem. Elmore v. Grymes*, 26 U.S. 469, 473 (1828) (Johnson, J., dissenting) ("[T]he province of [adjudication] is to operate only upon existing laws.").

¹⁰⁶ Daniel V. Yager & Joseph J. LoBue, *Is the Chevron Deference Standard Too High-Octane for the NLRB?*, 23 Emp. Rel. L.J. 67, 81 (1998) (quoting Attorney General's Manual on the APA at 13-14).

¹⁰⁷ 5 U.S.C. § 551(4).

¹⁰⁸ Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule"*, 56 Admin. L. Rev. 1077, 1083 (2004) (quoting Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, at 13 (1946)).

¹⁰⁹ Ernest Gellhorn & Glen O. Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. Chi. L. Rev. 201, 201 (1981).

Without a pre-existing statutory or regulatory mandate, it would be a clear abuse of discretion for the Commission to announce new standards of conduct in response to either the Complaint or Petition.¹¹⁰ Even Free Press recognizes the necessity of identifying some pre-existing statutory or regulatory mandate.¹¹¹ Although it now openly admits that the *Policy Statement* does not establish any enforceable legal norms, Free Press takes pains to suggest that the agency would “interpret its *statutory directives*,” “interpret its enabling statute,” and “interpret[] and enforc[e] the Communications Act.”¹¹² Notwithstanding Free Press’ loose language, however, there is no pre-existing legal duty regarding broadband network management or any statute expressly conferring power on the agency to create one.

The absence of a pre-existing statutory or regulatory mandate, moreover, points to a particularly acute lack of notice. Free Press is asking not only for new standards of conduct to be imposed in an adjudication, but also that the new standards be imposed in an area not previously regulated or subject to regulation at all – an area that the FCC has historically and consciously left *unregulated* and which Congress has explicitly commanded remain so.¹¹³ As the statutory authority for such action, Free Press relies purely on vague theories of implied agency power.

Free Press’ procedural proposal would allow an agency to act when there may not be an awareness on the part of a to-be-regulated entity even of the *potential* for regulation, much less what the specifics of the new regulation might be. In *Bell Aerospace*, the Supreme Court suggested there may be an abuse of discretion where “some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements.”¹¹⁴ The lack of notice here is far more dramatic. The Court also suggested that the existence of “fines or damages,” which are at issue here, could raise questions.¹¹⁵ It would be an abuse of discretion for the Commission not to proceed by a proper notice-and-comment rulemaking in which these serious notice issues could be avoided, should it choose to proceed at all.¹¹⁶

¹¹⁰ See *First Bancorporation v. Bd. of Governors of the Fed. Reserve Sys.*, 728 F.2d 434, 438 (10th Cir. 1984) (finding an abuse of discretion where agency “attempt[ed] to propose legislative policy by an adjudicative order”). Although Free Press only discusses its Complaint in its memorandum proposing its novel procedural approach, see Free Press Memo 2 at 1, 8-12, the limitations on adjudicatory proceedings, discussed below, apply equally to the Petition. It is well-settled that “declaratory ruling[s] belong[] to the genre of adjudicatory rulings.” *Chisholm v. FCC*, 538 F.2d 349, 364 n.30 (D.C. Cir. 1976). Whether in the context of adjudicating Free Press’ Complaint or issuing a declaratory ruling, the Commission has discretion to announce a principle or interpretation only where there is some law to interpret or expound upon in the first place. See *British Caledonian Airways, Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, 990 (D.C. Cir. 1978) (noting that a “distinguish[ing]” feature of declaratory orders is that they “serve[] only to clarify and state an agency’s interpretation of an existing statute or regulation”).

¹¹¹ See Free Press Memo 2 at 9 (“In an informal adjudication, the FCC can interpret and apply a statute . . .”).

¹¹² *Id.* at 2, 3, 8.

¹¹³ See *infra* notes 239-241 and accompanying text.

¹¹⁴ *Bell Aerospace*, 416 U.S. at 295.

¹¹⁵ *Id.*

¹¹⁶ See 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.9, at 386 (4th ed. 2002) (noting that “due process requirements of ascertainable standards and adequate notice” may “support a judicial order requiring an agency to engage in rulemaking”).

In sum, the retreat by Free Press from demanding enforcement of the *Policy Statement* to a new argument for the FCC's supposed discretion to announce new principles in adjudicatory proceedings does not improve Free Press' case. Because there is no pre-existing statutory or regulatory mandate, the agency does not have any discretion simply to announce and apply *new* standards of conduct in an adjudication, and then to impose punishment on Comcast. If the Commission believes there is a need to prescribe brand-new norms regarding network management, it must proceed through a rulemaking proceeding in order to comply with the notice requirements of the APA and to avoid major due process and fairness concerns.

B. Imposing Fines or Any Other Remedy Against Comcast Based on Past Conduct Found to “Violate” Any Newly Adopted Binding Legal Norms Would Be Impermissibly Retroactive and Inconsistent with Fundamental Due Process Principles.

In addition to the absence of authority to declare for the first time in an adjudicatory proceeding the new legal obligations that Free Press desires, the backward-looking relief that Free Press seeks for Comcast's alleged “violation” of the nonexistent standard governing network management is, as Comcast has previously shown,¹¹⁷ flatly impermissible. Free Press now downplays its request for backward-looking relief and urges the Commission instead to impose “only” an injunction, although it continues to seek an “enormous” “detering fine for Comcast's past actions” as well.¹¹⁸ As Free Press' shift in focus from backwards-looking penalties to forward-looking ones implicitly acknowledges, however, any fines or other remedies predicated on Comcast's past conduct would, in the circumstances here, be unlawfully retroactive and violate the Due Process Clause.

As a matter of constitutional due process and hornbook administrative law, an agency may not impose a fine or other liability for past conduct without having previously given “fair notice.”¹¹⁹ Under the Constitution, “[d]ue process requires that parties receive fair notice before being deprived of property.”¹²⁰ Thus, the Due Process Clause demands that an agency “give fair warning of the conduct it prohibits or requires.”¹²¹ “In the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability.”¹²² These “[t]raditional concepts of due process [have also been] incorporated into administrative law [and thereby] preclude an agency from penalizing a private party for violating a rule without first

¹¹⁷ Comcast Comments at 51

¹¹⁸ Free Press Memo 3 at 15.

¹¹⁹ See, e.g., *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995).

¹²⁰ *Gen. Elec. Co.*, 53 F.3d at 1328; see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (“The Due Process Clause . . . protects the interests in fair notice and repose that may be compromised by retroactive legislation . . .”).

¹²¹ *Gen. Elec. Co.*, 53 F.3d at 1328 (quoting *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

¹²² *Id.* at 1328-29.

providing adequate notice of the substance of the rule.”¹²³ It is by now well-settled that “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.”¹²⁴ As the Supreme Court has succinctly put it, “[r]etroactivity is not favored in the law.”¹²⁵

Comcast has not received “fair notice” consistent with either constitutional due process or administrative law that would permit the Commission to impose fines or other liability for Comcast’s past conduct. The alleged behavior for which Free Press would have the FCC impose fines has always been and still is lawful, as Free Press has never pointed to, nor is there in fact any, properly promulgated legal requirement that prohibits the behavior. Free Press has only asserted that the *Policy Statement* rendered such conduct unlawful, but, as Free Press now admits, the Commission did not adopt any enforceable rules in the *Policy Statement*.¹²⁶ Indeed, even where an agency has *enacted* a regulation to govern certain conduct, that regulation provides “fair notice” only if the standards of conduct are set forth with “ascertainable certainty,”¹²⁷ which requires that the standards be “‘in[] [the regulation] itself, or at least [be] referenced . . . in [the regulation].’”¹²⁸ Here, where there has been and still is no statute, rule, regulation, or order spelling out any standards of conduct, Comcast could certainly not have discerned any such standards with *any*, much less “ascertainable,” certainty.¹²⁹ Accordingly, it would be impermissibly retroactive and in obvious conflict with the Due Process Clause for the FCC to grant Free Press the backward-looking relief that it demands.

Free Press’ assertion that the *Policy Statement* provided Comcast adequate notice of vague, yet-to-be formulated standards regarding broadband network management¹³⁰ misrepresents the nature and contents of the *Policy Statement* and attempts to obscure Free Press’ constantly shifting position regarding just what “rule” it wants the Commission to impose here. The *Policy Statement* never purported to provide guidance,¹³¹ and it certainly never proposed to

¹²³ *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987); *see also Rollins Envtl. Servs. Inc. v. EPA*, 937 F.2d 649, 654 n.1 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in part) (“It is basic hornbook law in the administrative context that the application of a regulation in a particular situation may be challenged on the ground that it does not give fair warning that the allegedly violative conduct was prohibited.” (internal quotation marks omitted)).

¹²⁴ *Landgraf*, 511 U.S. at 265.

¹²⁵ *Bowen*, 488 U.S. at 208.

¹²⁶ *See supra* Section II.

¹²⁷ *Gen. Elec. Co.*, 53 F.3d at 1329.

¹²⁸ *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 631 (D.C. Cir. 2000) (quoting *Chrysler*, 158 F.3d at 1356).

¹²⁹ Free Press’ discussion of the requirements of due process once an adjudication has commenced, *see* Free Press Memo 2 at 9-11, misses the point. The informal inquiry that followed the submission of Free Press’ Complaint is no substitute for the absence of any prior notice of any legal standard whatsoever. Indeed, it is revealing that Free Press does not address any of the cases, discussed above, that articulate the “fair notice” requirement.

¹³⁰ *Id.* at 10.

¹³¹ *See supra* Section II.

adopt any rules for network management, either in terms of general substance or specific text, as required in a proper notice of proposed rulemaking.¹³²

The “principles” of the *Policy Statement* are vague on their face are also “subject to reasonable network management,” a term for which no guidance is provided.¹³³ What is more, the “principles” do not even encompass all of the standards that Free Press has asked the agency to adopt. In addition to “enforcement” of the *Policy Statement*, Free Press also now seeks an additional “rule” prohibiting “unreasonable discrimination”¹³⁴ and a “strict scrutiny” standard of review with the “burden of proof” on network operators,¹³⁵ neither of which are included in the *Policy Statement*, as four members of the FCC have expressly acknowledged.¹³⁶

Thus, to the extent that the *Policy Statement* could be deemed to have provided some notice to Comcast of impending regulation, it did not set forth “with ‘ascertainable certainty’ . . . the standards with which the [Commission] expects parties to conform”¹³⁷ if, indeed, those “standards” are those which Free Press here wants the agency to impose. Free Press attempts to prove too much when it contends that the *Policy Statement* provided Comcast notice of impending regulation because the statement is “the most famous” policy statement “in history.”¹³⁸ The *Policy Statement*’s “fame” grew from the fact that the FCC chose *not* to take binding regulatory action and instead announced hortatory statements.¹³⁹ The message “shouted from the rooftops”¹⁴⁰ was not one of impending regulation, but of agency abstention from regulation.

¹³² *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000) (“The Administrative Procedure Act requires that an agency publish notice of its proposed rulemaking that includes ‘either the terms or substance of the proposed rule or a description of the subjects and issues involved.’” (quoting 5 U.S.C. § 553(b)(3))).

¹³³ *Policy Statement*, 20 FCC Rcd at 14988 n.15 (¶ 5).

¹³⁴ Free Press Memo 1 at 18.

¹³⁵ Free Press Memo 3 at 7-11; *id.* at 9 n.27 (discussing *The Future of the Internet: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 110th Cong. 7 (2008) (written statement of Kevin J. Martin, Chairman, Federal Communications Commission), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281690A1.pdf). In addition, while Free Press’ discussion leaves substantial doubt regarding the contours of the proposed “strict scrutiny” test, it appears that it would actually be *inconsistent* with the “reasonableness” inquiry that the *Policy Statement* seems to envision. The term “reasonable network management” in the *Policy Statement* at least implies a substantial degree of discretion on the part of the network operators. But the proposed “strict scrutiny” standard would create a nearly *per se* rule *against* network management, under which management activities would be unlawful unless they were shown to be absolutely necessary.

¹³⁶ *See AT&T/BellSouth Order*, 22 FCC Rcd at 5831 (Copp, Comm’r, concurring) (explaining that the “four principles of net neutrality” in the *Policy Statement* did not include a principle of nondiscrimination, which he then described as a new, “fifth principle”); *id.* at 5836 (Adelstein, Comm’r, concurring) (describing the imposition of a nondiscrimination “5th principle” as “a long-awaited and momentous” step); *see also id.* at 5827 (Martin, Chmn., and Tate, Comm’r, concurring) (“[T]oday’s order does not mean that the Commission has adopted an additional net neutrality principle.”).

¹³⁷ *Gen. Elec. Co.*, 53 F.3d at 1329.

¹³⁸ Free Press Memo 2 at 10.

¹³⁹ *See supra* note 34-37 and accompanying text.

¹⁴⁰ Free Press Memo 2 at 10 (internal quotation marks omitted).

C. Issuance of Forward-Looking Relief in the Form of an Injunction and Fines Would Exceed the Commission’s Statutory Authority and Violate the Rulemaking Requirements of the APA.

In apparent recognition of the fatal flaws in its original request for backward-looking relief, Free Press now attempts to salvage its claim by focusing on forward-looking remedies.¹⁴¹ In particular, Free Press suggests that the FCC should “enjoin Comcast and impose a fine for every violation for every day following its injunction.”¹⁴² This tactical shift cannot save Free Press’ case but, instead, raises additional legal barriers to its claim. Under the circumstances here, where there has been no violation of the Communications Act or any Commission rule, regulation, or order, an award of injunctive relief or forward-looking fines would exceed the agency’s statutory authority.¹⁴³ In addition, the promulgation of purely prospective rules of general applicability in an adjudicatory proceeding would violate the rulemaking requirements under the APA.

Free Press has asked that the Commission “enjoin Comcast and require Comcast to *cease and desist* all discrimination against lawful content and applications.”¹⁴⁴ But the agency’s cease-and-desist authority, as it may be relevant here, is statutorily limited.¹⁴⁵ Section 312(b) of the Communications Act grants the FCC the authority to order a person to “cease and desist” from, among other acts clearly not applicable here,¹⁴⁶ a “violat[ion] or fail[ure] to observe *any of the provisions of this [Act] . . . or any rule or regulation of the Commission authorized by this [Act].*”¹⁴⁷ As already shown, no violation by Comcast of any provision of the Communications Act, nor any FCC rule or regulation, has been alleged, much less proven.

¹⁴¹ Free Press Memo 3 at 15 (contending that forward-looking relief will avoid the “notice” problems presented by backward-looking fines).

¹⁴² *Id.* at 13.

¹⁴³ Again, Free Press focuses primarily on its request for an injunction and fines contained in the Complaint. *See id.* at 13-17; Free Press Memo 2 at 8-13. The Petition, however, could be construed also to seek both such remedies. *See* Petition at 33-34. The limitations discussed in this Section apply to either form of adjudication. Further, the award of such remedies in a declaratory ruling proceeding would transgress the limits of the APA and the Commission’s rules. *See* 5 U.S.C. § 554(e) (defining limits of authority to issue “a declaratory order”); 47 C.F.R. § 1.2 (same).

¹⁴⁴ Free Press Memo 3 at 13 (emphasis added).

¹⁴⁵ *See Trans-Pacific Freight Conference of Japan v. Fed. Maritime Bd.*, 302 F.2d 875, 880 (D.C. Cir. 1962) (“The law is settled that an administrative agency can exercise only those powers conferred on it by Congress.”).

¹⁴⁶ Section 312(b) also allows the FCC to issue cease-and-desist orders “[w]here any person[] has failed to operate substantially as set forth in a license,” has “violated or failed to observe . . . Section 1304, 1343, or 1464 of Title 18 [of the United State Code]” or any “rule or regulation of the Commission authorized by . . . a treaty ratified by the United States.” 47 U.S.C. § 312(b). Clearly, none of these alternative bases is applicable here.

¹⁴⁷ *Id.* (emphases added). While certain other provisions of Titles II and III provide the FCC with the power to issue cease-and-desist orders, Free Press does not suggest that any of them apply here and, in fact, they obviously do not. Each applies to telecommunications carriers (or certain classes thereof), “utilit[ies]” controlling pole attachments, or satellite carriers, none of which describe Comcast, and applies in certain limited circumstances. *See, e.g., id.* §§ 205(a) (unjust and unreasonable rates charged by telecommunications carriers), 224(b)(1) (unjust and unreasonable rates charged by utilities for pole attachments), 274(e)(2) (Bell Operating Companies engaged in

Free Press suggests that the Commission has far broader injunctive authority under Section 4(i) of the Communications Act¹⁴⁸ to enjoin conduct that neither violates any provision of the Communications Act nor any rule or regulation of the agency.¹⁴⁹ That simply misstates the law. Section 4(i) provides that the “Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions.”¹⁵⁰ When the FCC has relied on that statutory provision, however, it has done so only to issue *temporary* injunctions in certain cases “involving alleged violations of the Act or [the Commission’s] rules or orders,”¹⁵¹ not as freewheeling equitable power, as Free Press suggests. Moreover, well-settled canons of statutory construction suggest that Section 4(i) does not provide the agency with any broader injunctive authority than that set forth in Section 312(b). Congress added the cease-and-desist power to Section 312(b) in 1952,¹⁵² when Section 4(i) was already in the Act. This suggests that Section 4(i) does not provide the FCC *any* injunctive authority, because Congress should not be considered to have added a superfluous provision.¹⁵³ To the extent that Section 4(i) might be deemed to provide the Commission some injunctive authority, however, that power must be read in light of and consistent with Section 312(b). It is fundamental that, in construing a statute, a specific statutory provision governs a general one.¹⁵⁴ Further, even assuming that Section 4(i) authorizes general injunctive power, it cannot validly be invoked unless the proposed injunction is “not inconsistent with the Act” and “necessary in the execution of its functions.”¹⁵⁵ As explained below,¹⁵⁶ agency action in response to the Free Press Complaint or Petition would not relate to the execution of any Congressionally-directed function of the FCC.¹⁵⁷

prohibited electronic publishing), 325(e)(8)(B) (satellite carriers unlawfully retransmitting television broadcast stations), 340(f)(1) (satellite carriers violating network nonduplication and syndicated exclusivity requirements); *see also id.* §§ 260(b) (local exchange carriers unlawfully providing telemessaging services), 275(c) (Bell operating companies unlawfully operating alarm monitoring services).

¹⁴⁸ *Id.* § 154(i).

¹⁴⁹ Free Press Memo 1 at 9.

¹⁵⁰ 47 U.S.C. § 154(i).

¹⁵¹ *E.g., Implementation of the Telecomms. Act of 1996*, 12 FCC Rcd 22497, 22566 (¶ 159) (1997) (emphasis added).

¹⁵² *See* An Act of July 16, 1952, Pub. L. No. 82-554, 66 Stat. 711, 717.

¹⁵³ *See, e.g., Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004). This conclusion is supported by the legislative history of the 1952 amendment. *See* H.R. Rep. No. 82-2426, at 20 (1952) (Conf. Rep.) (explaining that the bill “add[s] new provisions authorizing the Commission to issue cease and desist orders in certain specified situations”); H.R. Rep. No. 82-1750, at 13 (1952) (“As has been explained, the authority to issue cease-and-desist orders is not contained in the present law.”); S. Rep. No. 82-142, at 10 (1951) (“The cease-and-desist procedure is a time-tried and wholly successful one in many administrative agencies and the committee believes that its adoption by the Federal Communications Commission will be salutary.”).

¹⁵⁴ *Edmond v. United States*, 520 U.S. 651, 657 (1997).

¹⁵⁵ 47 U.S.C. § 154(i).

¹⁵⁶ *See infra* Section IV (discussing ancillary authority).

¹⁵⁷ Free Press opaquely suggests, by unexplained citation, that the Supreme Court’s decision in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), is to the contrary. *See* Free Press Memo 1 at 9 n.39. To the extent

The Commission’s authority to issue fines is also statutorily limited and is, as Free Press notes,¹⁵⁸ defined by Section 503 of the Act. As relevant here, Section 503(b) grants the agency the authority to order forfeitures only for the “willful[] or repeated[] fail[ure] to comply with *any of the provisions of this [Act] or of any rule, regulation, or order issued by the Commission under this [Act.]*”¹⁵⁹ Thus, both the cease-and-desist power and the authority to issue fines provide the FCC with power to remedy violations of *pre-existing* law, something that, as already shown, does not exist here.

In short, the agency would exceed its statutory authority if it were to issue a cease-and-desist order or impose a fine against Comcast under present circumstances. There are no “violations” of anything to be remedied. Even if the Commission were to attempt to announce a new, prospective standard of conduct regarding broadband network management in the middle of a purported enforcement proceeding, the FCC still could not simultaneously impose an injunction or fines against Comcast based on that standard, as Free Press demands. The statutorily mandated procedures for the issuance of cease-and-desist orders or the imposition of fines preclude such immediate enforcement. A cease-and-desist order cannot be issued unless the agency has first served an order to show cause allowing a party at least thirty days to submit evidence at a hearing.¹⁶⁰ As for the imposition of fines, the Commission must first issue a “notice of apparent liability” identifying in writing the substantive legal obligation alleged to have been violated,¹⁶¹ and following that step, the recipient must be given a “reasonable period

Free Press intended to make such an argument, that position is clearly mistaken. As discussed below, *Southwestern Cable* involved a permissible exercise of the Commission’s ancillary authority under Section 4(i) because the agency action at issue was taken in furtherance of specific substantive statutory duties under Title III, *see Sw. Cable*, 392 U.S. at 180, and was not inconsistent with the Communications Act, thus the basic statutory predicate for the application of Section 4(i) existed there. But *Southwestern Cable* is distinguishable for at least two other reasons. First, in *Southwestern Cable* the FCC merely issued an order that preserved the status quo, as distinguished from the sort of affirmative order that Free Press here, which would appear to require significant alterations of the manner in which Comcast manages its network. *Id.* at 180 (explaining that the “prohibitory order” at issue involved only the question “whether an existing situation should be preserved”). Indeed, the Supreme Court went to great effort to distinguish the order at issue in that case from an order, such as the one that Free Press requests here, that would require modification of existing conduct. *Id.* Further, the Supreme Court “assume[d]” (correctly) that cease-and-desist orders can be issued only pursuant to, and in compliance with, Section 312. *Id.* at 179. Second, *Southwestern Bell* only involved “interim relief,” *id.* at 180, as compared to the permanent injunction that Free Press has requested here, *see* Free Press Complaint at 32-33; *see also* Free Press Memo 3 at 13.

¹⁵⁸ Free Press Memo 3 at 13.

¹⁵⁹ 47 U.S.C. § 503(b)(1)(B) (emphases added). Section 503(b) also allows the FCC to impose forfeitures where a party has “willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission,” *id.* § 503(b)(1)(A), “violated any provision of section 317(c) or 509 of this [Act],” *id.* § 503(b)(1)(C), or “violated any provision of section 1304, 1343, or 1464 of Title 18[, United States Code],” *id.* § 503(b)(1)(D). None of these alternative bases for imposing a forfeiture is applicable here.

¹⁶⁰ *See id.* § 312(c).

¹⁶¹ *Id.* § 503(b)(4) (requiring identification of “each specific provision, condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which [a person subject to an NAL] apparently violated or with which [the person] apparently failed to comply”).

of time” to respond.¹⁶² In addition, an unreasonable effective date that failed to give an entity suddenly subject to new regulations time to come into compliance, factoring in the magnitude of the changes required, would be arbitrary and capricious.¹⁶³

In fact, it appears that no standard of conduct newly promulgated in an adjudicatory proceeding could *ever* serve as the basis for a cease-and-desist order under Section 312(b). By definition, an adjudication is the “agency process for the formulation of an order.”¹⁶⁴ As described above, however, Section 312(b) grants the FCC the authority to order a person to “cease and desist” from a “violat[i]on or fail[ure] to observe any of the provisions of this [Act] . . . or *any rule or regulation* of the Commission authorized by this [Act].”¹⁶⁵ Significantly, it does not grant the agency the authority to act upon a violation of any *order* of the FCC. Thus, unless the Commission was willing to admit that the newly-created standard was actually a rule – which would be flatly inconsistent with any FCC decision not to engage in rulemaking, as we explain next – the agency could never issue a cease-and-desist order for violation of its new “policy.”

Free Press’ argument that attempts to limit any new standard of conduct to purely prospective effect also runs afoul of the APA. Under the APA, a rulemaking requires notice and comment and other specific procedural elements that an adjudication does not.¹⁶⁶ Courts have therefore cautioned that an agency may not engage in a rulemaking under the guise of an adjudication, as that would allow the agency to use an adjudication “to circumvent the [rulemaking] requirements of the [APA].”¹⁶⁷ “There is no warrant in law for [an agency] to replace the statutory scheme with a rule-making procedure of its own invention.”¹⁶⁸

But if the Commission were to adopt the “principles” of the *Policy Statement* on a purely prospective basis, as Free Press now advocates, the agency would necessarily engage in just such conduct. The “principles” of the *Policy Statement* are of broad applicability; by its own terms, the *Policy Statement* covers “the Internet and broadband” ISPs.¹⁶⁹ Accordingly, the FCC would

¹⁶² *Id.* § 503(b)(4)(C).

¹⁶³ *Cf. Nuvio Corp. v. FCC*, 473 F.3d 302, 305-309 (D.C. Cir. 2006) (affirming 120-day deadline for provision of E911 service by certain VOIP providers on grounds that record evidence supported agency’s determination that compliance was technologically feasible within that time period).

¹⁶⁴ 5 U.S.C. § 551(7).

¹⁶⁵ 47 U.S.C. § 312(b) (emphasis added).

¹⁶⁶ *Compare* 5 U.S.C. § 553(b) (requiring notice and comment for an agency rulemaking) *with id.* § 554 (providing no such requirement for agency adjudications).

¹⁶⁷ *Union Flights, Inc. v. Administrator, Fed. Aviation Admin.*, 957 F.2d 685, 688 (9th Cir. 1992); *see also NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion) (explaining that the rulemaking requirements under the APA “may not be avoided by the process of making rules in the course of adjudicatory proceedings”); *Marseilles Land & Water Co. v. Fed. Energy Regulatory Comm’n*, 345 F.3d 916, 920 (D.C. Cir. 2003) (“[A]n administrative agency may not slip by the notice and comment rule-making requirements needed to amend a rule by merely adopting a de facto amendment to its regulation through adjudication.”).

¹⁶⁸ *Wyman-Gordon*, 394 U.S. at 764 (plurality opinion).

¹⁶⁹ *Policy Statement*, 20 FCC Rcd at 14987 (¶ 3).

have adopted principles of general applicability with prospective effect only. As described below, those are the hallmarks of a rulemaking and not an adjudication.¹⁷⁰

At the most basic level, a rulemaking is a “proceeding[] for the purpose of promulgating policy-type rules or standards”¹⁷¹ of “general import”¹⁷² and “affects . . . broad classes of unspecified individuals.”¹⁷³ It “is prospective in operation”¹⁷⁴ and “has a definitive effect on individuals only after the rule subsequently is applied.”¹⁷⁵ It has, by statutory definition, “future effect.”¹⁷⁶ In contrast, an adjudication is a “proceeding[] designed to adjudicate disputed facts in particular cases”¹⁷⁷ and has “an immediate effect on specific individuals.”¹⁷⁸ Indeed, “the [APA] does not countenance agency use of adjudicatory powers to announce rules of prospective effect only.”¹⁷⁹

What Free Press advocates is the promulgation of “rules” within the meaning of the APA¹⁸⁰ and not, as it tries to call its desired new legal norms, “policies.” Thus, should the Commission choose to adopt the “principles” of the *Policy Statement* on a prospective basis only, it must follow the requirements for proper rulemaking. Those obligations include procedures for notice and comment,¹⁸¹ as well as the requirement that a final rule be published for at least 30 days prior to taking effect.¹⁸² This latter requirement recognizes that there must be some minimum period of transition between the time a final rule is published (not merely adopted) and its effectiveness – and for good reason, given the massive changes that compliance with agency rules can require. Contrary to Free Press’ suggestion, the agency could not haphazardly adopt the “principles” of the *Policy Statement* in an adjudicatory proceeding and simultaneously enforce them, from the day of the order forward, via an immediately effective injunction.

¹⁷⁰ See, e.g., *Am. Airlines, Inc. v. Dep’t of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000) (“In determining whether an agency action constituted adjudication or rulemaking, we look to the product of the agency action.”).

¹⁷¹ *Hercules, Inc. v. EPA*, 598 F.2d 91, 118 (D.C. Cir. 1978) (quoting *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 245 (1972)).

¹⁷² *Ass’n of Nat’l Advertisers Inc. v. FTC*, 627 F.2d 1151, 1161 (D.C. Cir. 1979).

¹⁷³ *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994) (citing *Fla. E. Coast Ry.*, 410 U.S. at 244-45).

¹⁷⁴ *Trans-Pacific Freight Conference*, 650 F.2d at 1245.

¹⁷⁵ *Yesler Terrace Cmty. Council*, 37 F.3d at 448.

¹⁷⁶ 5 U.S.C. § 551(4); see also *Bowen*, 488 U.S. at 476 (Scalia, J., concurring) (“[R]ules have legal consequences *only* for the future.”) (emphasis added).

¹⁷⁷ *Hercules, Inc.*, 598 F.2d at 118 (quoting *Fla. E. Coast Ry.*, 410 U.S. at 245).

¹⁷⁸ *Yesler Terrace Cmty. Council*, 37 F.3d at 448.

¹⁷⁹ *Gen. Am. Transp. Corp. v. Interstate Commerce Comm’n*, 872 F.2d 1048, 1061 (D.C. Cir. 1989); see *Bowen*, 488 U.S. at 221 (Scalia, J., concurring) (“[A]djudication [can] *not* be purely prospective, since otherwise it would constitute rulemaking.”).

¹⁸⁰ 5 U.S.C. § 551(4).

¹⁸¹ *Id.* § 553(b).

¹⁸² *Id.* § 553(d).

This same reasoning applies to the other network management standards – a rule against “unreasonable discrimination” and a “strict scrutiny” standard of review (including assignment of the “burden of proof” to the network operator) – that Free Press urges the FCC to implement prospectively.¹⁸³ Like the “principles” of the *Policy Statement*, both of these proposals would be of general applicability. Thus, as with the *Policy Statement* “principles,” the Commission must follow the requirements for proper rulemaking if it wishes to adopt them going forward. The procedural protections of notice and comment are actually even more necessary as to these elements of Free Press’ proposed relief because, as discussed above, they are not included in the *Policy Statement* and therefore have not even benefited from whatever minimal (and legally insufficient) notice the *Policy Statement* may have provided.

In a futile attempt to show that rulemaking is not necessary, Free Press provides a lengthy list of items that it asks the FCC *not* to address.¹⁸⁴ Again, Free Press’ contentions prove too much. By highlighting the many interrelated complexities in this area, the list only serves to reinforce that the issue of network management standards can only be properly addressed in a rulemaking, if indeed the agency chooses to regulate in this space at all. As the Supreme Court has noted, “[t]he rule-making provisions of [the APA] . . . were designed to assure fairness and *mature consideration* of rules of general application,” such as those that Free Press suggests here, not a rush to judgment on the creation of a standard and concurrent punishment under the rule.¹⁸⁵ Where, as here, the Commission has already initiated relevant rulemakings and an inquiry, it certainly should not use an adjudication to “bypass” those proceedings.¹⁸⁶

¹⁸³ See *supra* notes 134-136 and accompanying text. In addition to the notice problems associated with all of the elements of the proposed new standards, any decision that placed the burden of proving the absence of a “violation” on the network operator and resulted in the issuance of an injunction would also violate the Communications Act. As to cease-and-desist orders, Section 312(d) expressly specifies that “the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.” 47 U.S.C. § 312(d). Similarly, imposing forfeitures pursuant to such a burden of proof would be inconsistent with the Commission’s own practices in even informal complaint proceedings. See, e.g., *SBC Commc’ns, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 16 FCC Rcd 19091, 19105 & n.49 (¶ 41 & n.49) (2001) (stating that in forfeiture proceedings under Section 503 “[t]he Commission will . . . issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule” and citing 47 U.S.C. § 312(d) (emphases added)). Worse, it would violate the bedrock legal maxim *necessitas probandi incumbit ei qui agit* – “the necessity of proof lies with he who complains.” See e.g., 18 U.S.C. § 983 (providing that in civil forfeiture proceedings “the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture”); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (holding that a movant for summary judgment in civil litigation bears the burden of proof).

¹⁸⁴ Free Press Memo 3 at 1-7.

¹⁸⁵ *Wyman-Gordon*, 394 U.S. at 764 (plurality opinion) (emphasis added).

¹⁸⁶ *Union Flights*, 957 F.2d at 689 (noting that agency may not use an adjudication to “bypass a pending rulemaking proceeding”).

IV. FREE PRESS HAS PROVIDED NO PRUDENT BASIS FOR THE EXERCISE OF ANCILLARY AUTHORITY IN CONNECTION WITH THE COMPLAINT AND PETITION.

Even if Free Press' novel procedural theory were correct, which it is not, the Commission *still* could not grant the relief that Free Press seeks absent substantive statutory authority to do so.¹⁸⁷ To this end, Free Press contends that the agency could rely on ancillary authority to adopt a binding standard in adjudicating the Complaint or Petition. Contrary to Free Press' mischaracterization of Comcast's position, Comcast has never suggested that the FCC is powerless to regulate broadband ISPs. Comcast has observed, however, that the doctrine of ancillary authority is "constrained"¹⁸⁸ and that its applicability to regulation of broadband network management is subject to substantial question.¹⁸⁹ Furthermore, there is reason to believe that the Commission can exercise ancillary authority *only* in the context of promulgating regulations (rules), and *not* in the context of adjudicatory decisions.¹⁹⁰ In any event, Free Press provides no prudent basis for the exercise of ancillary authority here and thus does nothing to resolve these difficulties.

A. Free Press Misstates the Governing Legal Standard Regarding Ancillary Authority.

In an attempt to make the answers to the difficult questions of statutory authority seem easy, Free Press misstates the governing legal standard for the lawful exercise of ancillary authority. Free Press argues that such authority extends to any action that "[m]erely [a]dvance[s] the Act's [g]oals."¹⁹¹ Under the relevant caselaw, however, ancillary authority exists only when: "(1) the Commission's general jurisdictional grant under Title I covers the subject of the regulation; and (2) the regulations are *reasonably ancillary* to the Commission's *effective performance of its statutorily mandated responsibilities*."¹⁹² In other words: (1) the FCC must

¹⁸⁷ See *Am. Library Ass'n*, 406 F.3d at 698 ("The FCC . . . 'literally has no power to act . . . unless and until Congress confers power upon it.'" (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986))); *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (explaining that an agency has "no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress").

¹⁸⁸ *Am. Library Ass'n*, 406 F.3d at 692.

¹⁸⁹ See Comcast Comments at 52-54; Comcast Reply Comments at 45-50.

¹⁹⁰ See *Am. Library Ass'n*, 406 F.3d at 700 (explaining the test for ancillary authority as being related to the existence of the power to make "*regulations*" (citing *Sw. Cable*, 392 U.S. at 177-78 (emphasis added))); *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 795 (8th Cir. 1997), *aff'd in part, rev'd in part on other grounds sub nom. AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999), *aff'd in part, rev'd in part sub nom. Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467 (2002), *remanded to and vacated in part by Iowa Util. Bd. v. FCC*, 301 F.3d 957 (8th Cir. 2002) (explaining that Title I "merely suppl[ies] the FCC with ancillary authority to issue *regulations*" (emphasis added)). Indeed, Comcast has previously noted that "ancillary authority relates solely to [the Commission's] statutory authority to adopt rules and regulations that are ancillary to an express grant of statutory authority." Comcast Comments at 49. By addressing – out of prudence – the substance of Free Press' argument on ancillary authority for FCC action on the Complaint or Petition, Comcast does not concede this point.

¹⁹¹ Free Press Memo 1 at 11.

¹⁹² *Am. Library Ass'n*, 406 F.3d at 700 (citing *Sw. Cable*, 392 U.S. at 177-78).

have subject matter jurisdiction, (2) its action must be founded on a substantive statutory obligation, and (3) it must be reasonably ancillary to that obligation.

Free Press is also mistaken that a court would afford deference to the agency's determination on ancillary authority.¹⁹³ Its argument on this score is based solely on the Supreme Court's use of variations of the term "reasonable" in *Southwestern Cable*.¹⁹⁴ But *Southwestern Cable* was decided sixteen years before the Supreme Court's decision in *Chevron*, which today sets forth the governing legal framework for judicial review of agency interpretations of statutes.¹⁹⁵ Under *Chevron* and its progeny, such an interpretation "is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue."¹⁹⁶ As the Supreme Court has explained, "a congressional delegation of administrative authority" is a "precondition to deference under *Chevron*."¹⁹⁷ Thus, "[w]hen an agency's assertion of power into new arenas is under attack, . . . courts . . . perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue."¹⁹⁸ Any decision on ancillary authority clearly would be subject to close and skeptical judicial review.

B. Free Press Has Failed to Show Any Basis for the Exercise of Ancillary Authority in Connection With the Complaint and Petition.

At the outset, it bears emphasis that it is difficult if not impossible to assess the applicability of ancillary authority in the absence of any clear articulation of the standards that Free Press would have the agency impose on Comcast. As discussed above, no proper notice has been given as to what would be the new obligation regarding network management that the FCC would purport to establish, and even Free Press inconsistently articulates its preferred legal

¹⁹³ Free Press Memo 1 at 12.

¹⁹⁴ *Id.*

¹⁹⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁹⁶ *Am. Library Ass'n*, 406 F.3d at 699 (quoting *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("MPAA")).

¹⁹⁷ *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

¹⁹⁸ *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987); *see also id.* ("[I]t seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power."); *Nat'l Wildlife Fed'n v. Interstate Commerce Comm'n*, 850 F.2d 694, 699 n.6 (D.C. Cir. 1988) ("[J]udicial deference must not become a medium for judicial acquiescence in the agency's transgression of the limits Congress has set upon it."). Furthermore, to the extent that one of the provisions on which Free Press relies, Section 230 of the Communications Act, sets forth no explicit role for the FCC at all but instead governs private lawsuits that are adjudicated by the federal and state courts, *see infra* Section IV.B.2.b, it is even more clear that the Commission would receive no deference on review, *see, e.g., Adams Fruit*, 494 U.S. at 650 (explaining that the fact that "Congress . . . envisioned, indeed expressly mandated, a role for [an administrative agency] in administering [a] statute . . . does not empower the [agency] to regulate the scope of the judicial power vested by the statute"); *Ass'n of Civilian Technicians, Wichita Air Capitol Chapter v. Fed. Labor Relations Auth.*, 360 F.3d 195, 197 (D.C. Cir. 2004) ("Because Congress has not delegated any responsibility to the [agency] for administering [the relevant provision], we owe the agency's interpretation of the statute no deference."); *Murphy Exploration & Prod. Co. v. Dep't of the Interior*, 252 F.3d 473, 478-79 (D.C. Cir. 2001) ("Unless the agency is the recipient of congressionally delegated power, there is no reason to defer to its interpretations of the statute that does the delegating.").

standard.¹⁹⁹ As the D.C. Circuit has explained, however, “each and every assertion of jurisdiction” to regulate in a particular manner “must be independently justified as reasonably ancillary to” a specified statutorily mandated responsibility.²⁰⁰ Whether the agency could exercise ancillary authority in a rulemaking to adopt a particular proposed rule is something that would have to be carefully considered in measuring that rule against the legal test for ancillary authority. Thus, while the Commission might be able to establish that it has ancillary authority with respect to a specific proposed rule in a developed analysis supported by a rulemaking record, Free Press’ general arguments for the exercise of ancillary authority in support of action on the Complaint and Petition are unpersuasive.

With respect to the first prong of the ancillary authority test, Comcast’s position is, and always has been, *that the FCC has “subject matter jurisdiction” over the Internet and services that provide access to it*, because the Communications Act gives the agency authority over “communication by wire and radio.”²⁰¹ Even where such jurisdiction exists, the Commission must still show that a proposed action is reasonably (not just loosely) related to the effective performance of a statutory duty. That is the issue here.

Free Press, however, has failed to show that adoption of the norms that it seeks in its Complaint and Petition would be reasonably ancillary to any of the FCC’s statutorily mandated responsibilities. As shown below, Title I is not a self-contained source of both jurisdiction and substantive regulatory power. Most of the items on the laundry list of other items that Free Press puts forth impose no mandatory responsibilities on the agency, and certainly none can bear the weight that a grant of Free Press’ desired relief would place on them. Thus, Free Press has done nothing to dispel the grave questions surrounding the Commission’s ability to exercise ancillary authority in response to its filings.²⁰²

¹⁹⁹ See *supra* notes 114-116, 134-136 and accompanying text.

²⁰⁰ *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976) (“*NARUC II*”).

²⁰¹ See Comcast Comments at 52; see also, e.g., Comments of Comcast Corporation, WC Docket No. 05-271, at 9-12 (filed Jan. 17, 2006); Reply Comments of Comcast Corporation, WC Docket No. 05-271, at 7-9 (filed Mar. 1, 2006).

²⁰² Contrary to Free Press’ assertions, see, e.g., Free Press Memo 1 at 39-40, Comcast’s position here and that which it espoused in related class action litigation are entirely consistent. In the litigation, just as here, Comcast took the position that “[a]ny inquiry into whether Comcast’s P2P management is unlawful falls squarely within the FCC’s *subject matter jurisdiction*.” Defendant’s Notice and Motion for Judgment on the Pleadings at 10, *Hart v. Comcast of Alameda, Inc.*, No. C-07-06350 (N.D. Cal. Mar. 14, 2008) (emphasis added). Comcast did *not* say that the Commission has statutory authority to take action on the Free Press Complaint or Petition; the test for ancillary authority has *two* prongs, and it is satisfaction of the second prong that is at issue here. Free Press also attempts to make much of Comcast’s simple citation to paragraph four of the *Broadband Industry Practices NOI* in the litigation. See Free Press Memo 1 at 40. While the agency stated in that paragraph that it believes it can “adopt and enforce” the *Policy Statement*, Comcast cited the *Broadband Industry Practices NOI* only as support for the proposition that the FCC has subject matter jurisdiction over the issue of broadband network management; that, again, was no concession of statutory authority to grant the relief that Free Press seeks. Further, the *Broadband Industry Practices NOI* seeks comment on *whether* the Commission has power to act in this area, asking if it has “the legal authority to enforce the *Policy Statement* in the face of particular market failures or other specific problems,” making clear that the agency’s statutory authority is an open question. *Broadband Industry Practices NOI*, 22 FCC Rcd at 7898 (¶ 11).

1. Section 1 of the Communications Act Standing Alone Cannot Support the Exercise of Ancillary Authority in Connection With the Complaint and Petition.

While Free Press advances many legally deficient arguments, its contention that the agency can rely on Section 1 of the Communications Act²⁰³ to support a finding that it is not only acting within the scope of its subject matter jurisdiction, but also that it is acting in furtherance of its affirmative statutory duties,²⁰⁴ is particularly weak. Contrary to Free Press' assertion, it is not enough that an action might somehow be found to "further" Section 1's "goals."²⁰⁵ As noted above, in order to support the exercise of ancillary authority, Section 1 would have to impose "statutorily mandated responsibilities" on the Commission.²⁰⁶ Section 1 is not even an "independent source of regulatory authority,"²⁰⁷ and as such cannot impose mandatory obligations. Rather, Title I's provisions, including Section 1, "merely supply the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute."²⁰⁸ As the D.C. Circuit has explained, Title I simply has "not . . . been read as a general grant of power to take any action necessary and proper" to the fulfillment of the goals set forth in Title I.²⁰⁹

As a result, the federal courts, including the Supreme Court, have repeatedly struck down attempts by the Commission to rely on ancillary authority where the agency has been unable to point to a substantive statutory command outside of Title I to which its actions were "reasonably ancillary."²¹⁰ As the Supreme Court explained in *Midwest Video II*, for example, the FCC's

²⁰³ 47 U.S.C. § 151.

²⁰⁴ Free Press Memo 1 at 24-25. In its discussion of statutory jurisdiction – which as discussed above Comcast acknowledges exists here – Free Press mentions other provisions of Title I of the Communications Act, including Section 2(a), 47 U.S.C. § 152(a), and Section 4(i), *id.* § 154(i). See Free Press Memo 1 at 9-11. As will be shown below, however, the Commission's assertion of authority would suffer the same fate if it relied on Section 1 and these other provisions collectively instead of on Section 1 standing alone.

²⁰⁵ *Id.* at 24.

²⁰⁶ *Am. Library Ass'n*, 406 F.3d at 700.

²⁰⁷ *California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) (emphasis added).

²⁰⁸ *Iowa Util. Bd.*, 120 F.3d at 795.

²⁰⁹ *NARUC II*, 533 F.2d at 614 n.77 (emphasis added); see *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1479 (D.C. Cir. 1994) (explaining that Title I general jurisdiction "is restricted to that reasonably ancillary to the effective performance of [the FCC's] various responsibilities under titles II and III of the Act" (citation and quotation marks omitted)).

²¹⁰ See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979) ("*Midwest Video II*") (finding that the agency's access rules exceeded the "outer limits" of its regulatory authority in the "broadcast area"); *MPAA*, 309 F.3d at 805 (explaining that the "FCC must look beyond § 1 to find authority for regulations that significantly implicate program content"); *Am. Library Ass'n*, 406 F.3d at 702 (finding the broadcast flag rules, which the Commission promulgated in reliance solely on its ancillary authority under Title I, to be lacking any "statutory foundation" and "consequently . . . ancillary to nothing," and, accordingly, vacating the rules); *Home Box Office v. FCC*, 567 F.2d 9, 28 (D.C. Cir. 1977) ("Insofar as the Commission places reliance on such conclusory phrases as 'enhance the integrity of broadcast signals,' we think it has crossed the line from the tolerably terse to the intolerably mute." (citation and quotation omitted)); *NARUC II*, 533 F.2d at 615-17 (invalidating FCC attempt to preempt state regulation of certain two-way cable communications as not ancillary to any specifically delegated powers).

authority under Title I “would be unbounded” absent “reference to the provisions of the Act directly governing broadcasting.”²¹¹ “Though afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority.”²¹² In *Southwestern Cable*, on which Free Press heavily relies,²¹³ the Court also made clear that ancillary authority under Title I “is restricted to that reasonably ancillary to the effective performance of the Commission’s various responsibilities.”²¹⁴ Other cases interpreting the scope of the agency’s ancillary authority have, moreover, explained that “a very cautious approach” is in order even where, as here, the activity at issue “‘easily falls within’ Title I’s general jurisdictional grant.”²¹⁵ Even when agency action involves matters *expressly* falling within the scope of one of the other substantive titles of the Communications Act, the courts have made clear that “Section 151 does not give the FCC unlimited authority to act as it sees fit with respect to all aspects of [the relevant service], without regard to the scope of the proposed” action.²¹⁶

If the Commission could use the provisions of Title I as a self-sufficient source of both general subject-matter jurisdiction and substantive authority, the Act’s remaining provisions would be rendered mere surplusage.²¹⁷ With nothing more than the broad jurisdictional language of Section 1 to constrain it, the agency could take far-reaching action without regard to its specified responsibilities found elsewhere in the Act. At bottom, Free Press’ contentions boil down “‘to the bare suggestion that [the FCC] possesses plenary authority to act within a given

²¹¹ 440 U.S. at 706.

²¹² *Id.* By contrast, the instances in which the courts have upheld the FCC’s reliance on ancillary authority under Title I provisions are limited to situations where the agency was also able to point to a substantive mandate elsewhere in the Communications Act. *See, e.g., Sw. Cable*, 392 U.S. at 178 (“[T]he authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.”); *Mobile Commc’ns Corp. Am. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996) (approving exercise of ancillary authority pursuant to the agency’s statutory responsibility under 47 U.S.C. § 309(a) to grant licenses in the public interest); *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1107-08 (D.C. Cir. 1987) (approving ancillary authority to impose prospective rate reductions that were “absolutely necessary” given the mandates of 47 U.S.C. §§ 204-05). Contrary to Free Press’ contention, *see, e.g.,* Free Press Memo 1 at 1-12, the Supreme Court’s decision in *United States v. Midwest Video*, 406 U.S. 649 (1972) (“*Midwest Video I*”), does not stand for a different proposition. In that case, the Supreme Court held that the FCC’s assertion of ancillary authority was appropriate because it was founded upon its substantive regulatory obligation to “facilitate the more effective performance of [its] duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities” in granting station licenses pursuant to Section 307(b), 47 U.S.C. § 307(b). *Midwest Video I*, 406 U.S. at 669-670.

²¹³ *See, e.g.,* Free Press Memo 1 at 10-11.

²¹⁴ *Sw. Cable*, 392 U.S. at 178; *see NARUC II*, 533 F.2d at 612 (“[T]he Court’s reasoning in both *Southwestern* and *Midwest* compels the conclusion that the cable jurisdiction, which they have located primarily in § 152(a), is really incidental to, and contingent upon, specifically delegated powers under the Act.”).

²¹⁵ *Am. Library Ass’n*, 406 F.3d at 702 (quoting *Ill. Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972)).

²¹⁶ *MPAA*, 309 F.3d at 798.

²¹⁷ *See, e.g., AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 381 n.8 (1999) (“The Commission could not, for example, regulate any aspect of intrastate communication *not* governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission’s primary jurisdiction.”).

area simply because Congress has endowed it with some authority to act in that area.”²¹⁸ The D.C. Circuit, however, has “‘categorically reject[ed] that suggestion,’” because “[a]gencies owe their capacity to act to the delegation of authority’ from Congress.”²¹⁹ An attempt by the Commission to increase its own authority far beyond that which Congress delegated to it by adopting the norms sought in the Complaint and Petition based on nothing more than Section 1 (or even Title I) is foreclosed by statute and precedent, and would not survive judicial review.²²⁰

2. The Laundry List of Statutory Provisions and “Analogies” Cited by Free Press Cannot Support the Exercise of Ancillary Authority in Connection With the Complaint and Petition.

a. Section 706.

Free Press’ argument that Section 706(a) of the 1996 Act could support the agency’s exercise of ancillary authority to promulgate its proposed norms²²¹ is unpersuasive. Free Press fails to explain how this subsection could be construed to set out a statutorily mandated responsibility of the Commission’s or how, even if such a responsibility could be found, adoption of the norms advanced in the Complaint and Petition would be reasonably ancillary to the effective performance of that responsibility.

As Free Press recognizes, Section 706(a) provides “a general instruction to the FCC”²²² to promote broadband deployment. But this “congressional policy” – as the Supreme Court has described it²²³ – is not an independent grant of substantive power. As the D.C. Circuit has made clear, the exercise of ancillary authority is not appropriate simply because Commission action furthers a “‘valid communications policy’ and [is] in the public interest,” but, rather, the FCC must be able to point to specific delegated authority to support its action.²²⁴ “Were an agency

²¹⁸ *Am. Library Ass’n*, 406 F.3d at 708 (quoting *Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994)).

²¹⁹ *Id.* (quoting same).

²²⁰ *See supra* note 210. While Free Press frames its own argument as being that Title I “confer[s] regulatory authority,” Free Press Memo 1 at 10, or, alternatively, that Section 1 does so, *id.* at 24-25, it also confusingly alludes in passing to Sections 201(b) and 303(r), 47 U.S.C. §§ 201(b), 303(r) – which are contained not in Title I but in Titles II and III, respectively – as possible sources of authority, albeit in its discussion of “jurisdiction” under Title I, *see* Free Press Memo 1 at 10. Reference to these provisions, however, does not support Free Press’ position that the exercise of ancillary authority could be justified here. As an initial matter, Section 201(b) only empowers the Commission to “prescribe . . . rules and regulations,” 47 U.S.C. § 201(b), and as such could not possibly be relied upon to issue an injunction or impose forfeitures. Furthermore, neither Section 201(b) nor 303(r) is self-enabling; both provisions grant authority to take action “to carry out the provisions of the [Communications] Act,” *id.* §§ 201(b), 303(r), and by their plain terms require the FCC to point to *another* provision of the Act in support of any action. Indeed, the D.C. Circuit has clarified that Section 303(r), like Section 1, is not an independent grant of authority, and the same reasoning applies to Section 201(b). *See MPAA*, 309 F.3d at 806 (“The FCC must act pursuant to *delegated authority* before any ‘public interest’ inquiry is made under § 303(r).”).

²²¹ Free Press Memo 1 at 20-24.

²²² *Id.* at 21 (quoting *Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002)).

²²³ *Gulf Power Co.*, 534 U.S. at 339.

²²⁴ *MPAA*, 309 F.3d at 806.

afforded *carte blanche* under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach.”²²⁵ In multiple orders the FCC has rightly confirmed what the plain statutory language of Section 706(a) makes clear: the provision does not itself confer any substantive authority on the Commission but, instead, sets forth guidance to be used in exercising authority that Congress has conferred *elsewhere* in the Communications Act.²²⁶ Thus, contrary to Free Press’ claim, the agency cannot assert ancillary authority simply “to promote the goals of” Section 706(a),²²⁷ because it does not grant any authority or impose any mandatory obligation on the Commission.

Free Press nonetheless suggests that Section 706(a) may provide a basis for the exercise of ancillary authority, arguing that in one of the cited decisions the Commission “found [only] that 706(a) does not provide independent *forbearance* authority.”²²⁸ That mischaracterizes the decision. There, the agency stated:

[S]ection 706(a) does not constitute an independent grant of forbearance authority *or of authority to employ other regulating methods*. Rather, we conclude that section 706(a) directs the Commission to use *the authority granted in other provisions*, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.²²⁹

These statements, contrary to Free Press’ contention, were not limited to a finding that Section 706(a) does not independently authorize “*forbearance*.”²³⁰ Rather, they explicitly hold that Section 706(a) is not a grant of authority at all, whether to utilize *either* forbearance or “other regulating methods,” including the methods that Free Press advocates here.

Free Press also vaguely suggests that Section 706(a) formed the basis for the exercise of ancillary authority in an agency decision relating to the entitlement of wholesale telecommunications carriers to interconnect with incumbent LECs, pursuant to Section 251 of the Act,²³¹ to provide services to other providers, including VoIP-based providers.²³² The

²²⁵ *Id.* (quoting *Implementation of Video Description of Video Programming*, Report and Order, 15 FCC Rcd 15230, 15276 (2000) (Powell, Chmn., dissenting)).

²²⁶ *See* Comcast Reply Comments at 43-44 (citing *First Advanced Servs. Order*, 13 FCC Rcd at 24047-48 (¶ 77) (subsequent history omitted); *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, et al.*, Order on Reconsideration, 15 FCC Rcd 17044, 17047 (¶ 5) (2000); and *Implementation of Section 621(a)(1) of the Cable Commc’n Policy Act of 1984 as amended by the Cable Television Consumer Prot. and Competition Act of 1992*, Report and Order & FNPRM, 22 FCC Rcd 5101, 5132-33 (¶ 62) (2007)).

²²⁷ Free Press Memo 1 at 20.

²²⁸ *Id.* at 24 n.118 (citing *First Advanced Servs. Order*, 13 FCC Rcd 24011).

²²⁹ *First Advanced Servs. Order*, 13 FCC Rcd at 24044 (¶ 69) (emphases added).

²³⁰ Free Press Memo 1 at 24 n.118.

²³¹ 47 U.S.C. § 251.

²³² Free Press Memo 1 at 22 (quoting *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Commc’ns Act of 1934*, as

relevant decision – issued by the Wireline Competition Bureau and not the Commission – did no such thing. In fact, it did not even *address* the question of ancillary authority. Instead, the Bureau construed the statutory definition of “telecommunications carrier,” “confirm[ed] that providers of wholesale telecommunications services [including VoIP] enjoy the same rights as any ‘telecommunications carrier’” under Sections 251(a) and 251(b) of the Act,²³³ and elsewhere referred to Section 251(d).²³⁴ Thus, the decision did not rely on Section 706(a) in connection with the exercise of ancillary authority, as Free Press suggests; rather, the decision construed and directly applied the substantive provisions of Title II in a manner that was simply “consistent with . . . the . . . goals of” Section 706.²³⁵ Mischaracterizing yet another FCC decision, Free Press asserts that the agency cited Section 706(a) as a source of authority in the *Cable Internet Declaratory Ruling and NPRM*.²³⁶ In fact, all the Commission did in that matter was to request comment on *whether* Section 706 could be relied upon in support of prospective rulemaking.²³⁷ That proceeding remains pending, and thus the question remains open.

In any case, adoption of the norms that Free Press desires would not even arguably be “reasonably ancillary” to the effective performance of any obligations that Section 706(a) might be construed to impose. The actions that Free Press requests the FCC to take here are either unrelated to or would impede, rather than further, the goals set forth in Section 706(a). As a whole, the provision relates to the *deployment* and *availability* of broadband facilities.²³⁸ Free Press’ Complaint and Petition have nothing at all to do with such deployment or availability, and thus any action taken in relation to its filings could not be “reasonably ancillary” to any possible Commission duties under Section 706.

Furthermore, it is the Commission’s existing and consistently *deregulatory policy* – which the agency has repeatedly recognized is consonant with and compelled by Section 706(a) – that has prompted broadband providers to invest billions of dollars in deploying and upgrading facilities.²³⁹ This deregulatory policy has “encouraged the deployment on a reasonable and

Amended, to Provide Wholesale Telecomms. Servs. to VoIP Providers, Mem. Op. & Order, 22 FCC Rcd 3513, 3519 (¶ 13) (2007) (“*Time Warner Cable Request for Declaratory Ruling*”).

²³³ *Time Warner Cable Request for Declaratory Ruling*, 22 FCC Rcd at 3517 (¶ 9).

²³⁴ *Id.* at 3517-18 (¶¶ 8-12); *see also id.* at 3523 (¶ 18) (characterizing order as involving “issues addressed by section 251”).

²³⁵ *Id.* at 3519 (¶ 13).

²³⁶ Free Press Memo 1 at 24 n.118 (citing *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4855 (¶ 115) (2002) (“*Cable Internet Declaratory Ruling and NPRM*”), *aff’d in part, vacated in part by Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev’d sub nom. Nat’l Cable Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)).

²³⁷ *See Cable Internet Declaratory Ruling and NPRM*, 17 FCC Rcd at 4842 (¶ 79) (“We seek comment on any explicit statutory provisions, including expressions of congressional goals, that would be furthered by the Commission’s exercise of ancillary jurisdiction over cable modem service. . . . Other statutory grounds might include . . . section 706 of the 1996 Act. We request comment on the use of these or other statutory provisions as the basis of our exercise of Title I jurisdiction.”).

²³⁸ 1996 Act § 706(b) (referring to “availability” and “deploy[ment]” of “advanced telecommunications capability”); *id.* § 706(c)(1) (defining such capability as “broadband *telecommunications capability*”).

²³⁹ *See, e.g.*, Comcast Comments at 5-11; Comcast Reply Comments at 2-14, 38-39.

timely basis of advanced telecommunications capability to all Americans,”²⁴⁰ but reversing course would do the exact opposite.²⁴¹ With respect to the other goals that Section 706(a) sets forth, the same is true. It is that very free market policy that has encouraged the investments that permit “users to originate and receive” a variety of content using a broad range of technologies.²⁴² And prohibiting broadband providers from using minimally intrusive means to manage bandwidth-intensive applications used by a small minority of their customers would degrade the Internet experience – and thus impede the ability – of all of the *rest* of the provider’s customers from “originat[ing]” and/or “receiv[ing]” content.²⁴³ As such, adopting the desired standards would *contravene* Section 706(a), and would not possibly be “reasonably ancillary” to the performance of any functions that the statute might be construed to require. As Section 4(i) of the Communications Act makes clear²⁴⁴ and the D.C. Circuit has confirmed, the Commission’s exercise of its ancillary authority “cannot be ‘inconsistent’ with other provisions of the Act.”²⁴⁵ Free Press itself recognizes this limitation on the FCC’s authority,²⁴⁶ yet goes on to ignore it. But the Commission cannot ignore it.

Although Free Press does not expressly rely on Section 706(b), Comcast notes that this subsection merely requires the agency to produce reports regarding the status of broadband deployment, and, if it finds that deployment is not occurring on a “reasonable and timely basis,” to take deregulatory action to enhance the state of affairs.²⁴⁷ It is settled that statutory provisions that “order[] the Commission to produce a report” do “nothing more, nothing less” and that “[o]nce the Commission complete[s] the task of preparing the report . . . its delegated authority on the subject end[s].”²⁴⁸ This provision, like Section 706(a), is deregulatory, in that it requires action to “remov[e] barriers” to investment “promot[e] competition.”²⁴⁹ And, before the FCC could possibly find any duty to take action to accelerate broadband deployment based on this subsection, it would have to find that deployment is not occurring on a reasonable and timely basis. But the agency has instead recently and repeatedly found just the opposite.²⁵⁰ These findings would preclude reliance on Section 706(b) as a source of ancillary authority here.²⁵¹

²⁴⁰ 1996 Act § 706(a).

²⁴¹ *See, e.g., Cable Internet Declaratory Ruling and NPRM*, 17 FCC Rcd at 4826 (¶ 47).

²⁴² 1996 Act § 706(c)(1).

²⁴³ *See* Comcast Comments at 11-24; Comcast Reply Comments at 14-16.

²⁴⁴ 47 U.S.C. § 154(i) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this Act*, as may be necessary in the execution of its functions.” (emphasis added)); *see* Free Press Memo 1 at 6 (quoting same).

²⁴⁵ *MPAA*, 309 F.3d at 806 (quoting *Implementation of Video Description of Video Programming*, 15 FCC Rcd at 15276 (Powell, Chmn., dissenting)).

²⁴⁶ Free Press Memo 1 at 9.

²⁴⁷ 1996 Act § 706(b).

²⁴⁸ *MPAA*, 309 F.3d at 807.

²⁴⁹ 1996 Act § 706(b).

²⁵⁰ *See, e.g., Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the*

b. Section 230.

Free Press’ argument that the agency can rely on various subsections of Section 230(b) of the Communications Act to support the exercise of ancillary authority regarding its Complaint or Petition²⁵² is also legally deficient. Section 230(b) declares a decidedly *deregulatory* “policy of the United States” with respect to the Internet and interactive computer services (which, as discussed below definitively *does* apply to Comcast’s broadband Internet service).²⁵³ The provision, however, neither delegates authority to, nor requires action by, the FCC. Instead, it simply sets forth general policies. To the extent that other portions of Section 230 impose substantive obligations, their main thrust is to provide for exemptions from civil liability in lawsuits, and those immunity provisions are applied and administered by federal and state courts; the Commission has no role in implementing them.²⁵⁴ As such, the statute fails to impose any statutorily mandated responsibility, as the exercise of ancillary authority would require.²⁵⁵

Even if Section 230(b) could be construed to impose a mandatory responsibility on the agency, adoption of Free Press’ desired norms would not be “reasonably ancillary” to the effective performance of that responsibility. While Section 230(b)(3) recognizes an interest in “maximiz[ing] user control over what information is received by users,” Congress chose a specific tool for implementing this interest – civil immunity from damages for service providers and users that restrict access to certain content, in this case objectionable material.²⁵⁶ Thus, read as a coherent whole,²⁵⁷ the statute is aimed at maximizing the ability of users and network operators to employ mechanisms designed to *restrict* access to, or the availability of, certain content. Properly construed, then, it expressly recognizes providers’ rights to manage their networks by providing for civil immunity for taking actions that restrict access to content.²⁵⁸ The legislative history of the provision confirms this, as the Conference Report explains that it “protects from civil liability those providers and users of interactive computer services for

Telecomms. Act of 1996, Fifth Report, GN Docket No. 07-45, FCC 08-88, ¶ 59 (rel. June 12, 2008) (“[W]e conclude that the deployment of advanced telecommunications capability to all Americans is reasonable and timely.”).

²⁵¹ See, e.g., *MPAA*, 309 F.3d at 802.

²⁵² Free Press Memo 1 at 25-31.

²⁵³ 47 U.S.C. § 230(b).

²⁵⁴ See *id.* § 230(c).

²⁵⁵ As discussed above, the Commission would likely not receive deference regarding the scope of its ancillary authority to take action on the Complaint or Petition under any of the various provisions that Free Press cites, but the absence of any basis for deference is even more clear in the context of this provision than the others, as it provides for no FCC role. See *supra* note 198.

²⁵⁶ 47 U.S.C. § 230(c).

²⁵⁷ See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (explaining that a court must make every attempt to interpret a statute “as a symmetrical and coherent regulatory scheme” and “fit, if possible, all parts into a harmonious whole” (citations omitted)); *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (recognizing the principle that “individual sections of a single statute should be construed together”).

²⁵⁸ 47 U.S.C. § 230(c)(2) (providing protection against civil liability for providers of interactive computer services for blocking and screening of offensive material); see also *id.* § 230(d) (requiring providers of interactive computer services to notify customers of the availability of parental controls).

actions to restrict or to enable restriction of access to objectionable online material,”²⁵⁹ as do decisions of the federal courts discussing its purpose.²⁶⁰ Furthermore, the network management about which Free Press complains here is dramatically less intrusive (and more content-agnostic) than the content-blocking activities that Section 230(b) would authorize. Granting the relief that Free Press seeks thus would not be “reasonably ancillary” to the statute, but instead would actually conflict with it, by expanding the specific, limited obligations that Congress chose and undermining broadband providers’ ability to manage their networks. Action that contravenes a statute, as noted, cannot possibly be “reasonably ancillary” to its effective performance.²⁶¹

Section 230(b)(2), on which Free Press also relies,²⁶² sets forth a policy in favor of “preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”²⁶³ In an attempt to avoid the explicit *deregulatory* purpose of this provision, Free Press contends that the statute does not apply because Comcast’s Internet service is not “the Internet.”²⁶⁴ With this argument, Free Press achieves absurdity.

Under Free Press’ extraordinary theory, only “non-facilities-based information providers” apparently should be deemed to constitute “the Internet,” and only they would be protected by the Congressional admonition against regulation.²⁶⁵ This theory, of course, is utterly at odds with the universal understanding that the Internet is an interconnected series of *networks* – that is, facilities.²⁶⁶ In addition, the statute not only applies to “the Internet,” but *also* to “interactive computer services,”²⁶⁷ a term that Free Press deliberately *omits* from its discussion and that clearly encompasses Comcast’s broadband Internet service. The statute defines “interactive computer services” to include “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet.”²⁶⁸ Comcast’s broadband Internet service falls squarely within this statutory definition, as it has been classified as an

²⁵⁹ H.R. Rep. No. 104-458, at 194 (1996); *see id.* (explaining that the provision was designed to ensure that court decisions did not continue to “create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services”).

²⁶⁰ *See, e.g., Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-331 (4th Cir. 1997).

²⁶¹ *See supra* notes 244-245 and accompanying text.

²⁶² Free Press Memo 1 at 26-29.

²⁶³ 47 U.S.C. § 230(b)(2).

²⁶⁴ Free Press Memo 1 at 27-28.

²⁶⁵ *See id.* at 40-41. Even they would be protected only against “[c]ertain [but unspecified] intrusive regulations.” *See id.*

²⁶⁶ Free Press concedes that the Internet is “the international computer network of both Federal and non-Federal interoperable packet switched data networks,” but without explanation refuses to acknowledge that Comcast’s network is one of those “non-Federal interoperable packet switched data networks.” *Id.* at 27 (quoting 47 U.S.C. § 230(f)(1)).

²⁶⁷ 47 U.S.C. § 230(b)(2).

²⁶⁸ *Id.* § 230(f)(2).

“information service,”²⁶⁹ and it is obviously a “service or system that provides access to the Internet.”²⁷⁰ Accordingly, Free Press’ argument that “Comcast is not the Internet,”²⁷¹ and its related discussion of the statutory definitions of “the Internet”²⁷² are erroneous. Because Section 230(b)(2) provides that both “the Internet” and “interactive computer services” are to be “unfettered by Federal or State regulation,” adopting the standards that Free Press seeks could not possibly be “reasonably ancillary” to the effective implementation of Section 230, as it would contradict Congress’ explicit *deregulatory command*.²⁷³

Free Press’ argument that Congress, through the use of the term “presently” in Section 230(b)(2), intended to freeze in place the then-existing regulatory regime that applied to phone companies or to sanction the extension of that regime to cable companies providing broadband Internet service²⁷⁴ is equally without merit. The statute refers to the “free market” – not government regulation. Further, Free Press grossly misstates the facts about the regulatory status of cable broadband service – it is not now, was not in 1996, and never has been a “common carrier” service. The FCC’s decision to classify cable broadband service as an “information service” did not *reclassify* the service – it merely clarified that cable broadband service was an

²⁶⁹ *Cable Internet Declaratory Ruling and NPRM*, 17 FCC Rcd at 4825, 4828-31 (¶¶ 44, 52-55); *Brand X*, 545 U.S. at 986-1000.

²⁷⁰ As Free Press acknowledges, the Communications Act also separately defines “Internet access service” as “a service that enables users to access content, information, electronic mail, or other services offered over the Internet,” and explicitly excludes “telecommunications services.” Free Press Memo 1 at 28 n.131 (quoting 47 U.S.C. § 231(e)(4)). This category of services is not mentioned in Section 230, the provision on which Free Press actually relies. In any case, the plain language of Section 231(e)(4) makes clear that Comcast’s broadband Internet service would fall within it as well as within Section 230(f)(2). This provision is, however, of limited relevance, as it is a part of the Child Online Protection Act, which the government has been permanently enjoined from enforcing. *See ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007). The Supreme Court had previously affirmed the issuance of preliminary injunctions barring the enforcement of the provision on two occasions. *See Ashcroft v. ACLU*, 535 U.S. 564 (2002); *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

²⁷¹ Free Press Memo 1 at 27.

²⁷² *Id.* at 27-28.

²⁷³ *See supra* notes 244-245 and accompanying text. To be sure, Comcast has argued that the FCC should preempt state regulation of cable broadband Internet service. *See, e.g.*, Comments of Comcast Corporation, CS Docket No. 02-52, at 27-35 (filed June 17, 2002); Reply Comments of Comcast Corporation, CS Docket No. 02-52, at 31-33 (filed Aug. 6, 2002). But Comcast’s argument for preemption cannot, as Free Press suggests, be equated with a concession of FCC statutory authority to grant the relief that Free Press seeks. Free Press Memo 1 at 38 & n.171. Conflict preemption by agency rule requires only a finding by the agency that state action would undermine the achievement of federal policy goals, even where those goals are deregulatory, and that judgment is afforded judicial deference. *See, e.g., Computer & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 214-215 (D.C. Cir. 1982) (“*CCIA*”) (upholding preemption of state tariffing of consumer premises equipment because FCC finding that such state action would “interfere with achievement of a federal regulatory goal” was not “irrational”). Such preemption is squarely supported by Section 230(b)(2). The valid exercise of ancillary authority, by contrast, requires the agency to show, as explained above, that a regulation is reasonably ancillary to the effective performance of an actual statutory duty of the agency’s, and no deference is given on that issue. *See, e.g., Am. Library Ass’n*, 406 F.3d at 699-700. The exercise of ancillary authority that Free Press demands here would run counter to Congress’ express codification in Section 230(b)(2) of a deregulatory policy.

²⁷⁴ Free Press Memo 1 at 28-29.

information service.²⁷⁵ In addition, the Commission has now determined that, as to phone companies, wireless broadband providers, and broadband-over-powerline providers, the regulatory regime in existence at the time Section 230 was enacted should not apply,²⁷⁶ a step that the agency has recognized comports with Section 230(b)(2).²⁷⁷

Free Press' resort to Section 230(b)(1)²⁷⁸ also fails. That provision sets forth a policy of "promot[ing] the continued development of the Internet and other interactive computer services and other interactive media."²⁷⁹ Contrary to Free Press' contention, award of the relief sought – far from being "reasonably ancillary" to the achievement of this policy – would contravene it. As Comcast has shown and the FCC has consistently found, regulation discourages, rather than encourages, development of new technologies.²⁸⁰ Here again, grant of the requested relief could not be found "reasonably ancillary" to the effective performance of any duty the statute might be construed to impose because it would conflict with the express statutory language.²⁸¹

c. Section 601.

Nor could Section 601 of the Communications Act²⁸² serve as a basis for ancillary authority here.²⁸³ Just like Sections 706 and 230, Section 601 does not set forth any statutorily mandated responsibility of the Commission. Rather, it merely sets forth "[t]he purposes of" Title VI.²⁸⁴

Even if Section 601 could be interpreted to impose some substantive regulatory responsibility on the agency, adopting the norms sought by Free Press would not be reasonably ancillary to the implementation of the provisions that Free Press cites. As an initial matter, it is improbable that Section 601 even applies here. While the statute refers to "cable communications," neither "cable communications" nor "communications" are defined terms in

²⁷⁵ *Cable Internet Declaratory Ruling and NPRM*, 17 FCC Rcd at 4825, 4828-31 (¶¶ 44, 52-55).

²⁷⁶ *Wireline Broadband Report and NPRM*, 20 FCC Rcd at 14857, 14862-65, 14875-98 (¶¶ 4, 12-17, 41-85); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5901, 5908-14 (¶¶ 1, 18-34) (2007) ("*Wireless Broadband Declaratory Ruling*"); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Mem. Op. & Order, 21 FCC Rcd 13281, 13281, 13285-89 (¶¶ 1, 7-15) (2006) ("*BPL Classification Order*").

²⁷⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3023 n.9 (¶ 5 n.9) (2002); *see id.* at 3037 n.69 (¶ 35 n.69); *see also Wireless Broadband Declaratory Ruling*, 22 FCC Rcd at 5911 (¶ 27); *BPL Classification Order*, 21 FCC Rcd at 13287 (¶ 10).

²⁷⁸ Free Press Memo 1 at 29-31.

²⁷⁹ 47 U.S.C. § 230(b)(1).

²⁸⁰ *See supra* note 239-241 and accompanying text.

²⁸¹ *See supra* notes 244-245 and accompanying text.

²⁸² 47 U.S.C. § 521. Free Press refers to Section 601 of the Communications Act by its United States Code section – 521.

²⁸³ Free Press Memo 1 at 31-32.

²⁸⁴ 47 U.S.C. § 521.

Section 3 of the Communications Act,²⁸⁵ contrary to Free Press’ suggestion.²⁸⁶ The ensuing provisions of Title VI, and the definitional provisions thereof, make clear that Title VI concerns cable *television* programming, which itself solely involves video programming and associated signaling.²⁸⁷ As a result, the purposes of Title VI can only reasonably be understood as relating to the provision of such programming, not to the provision of broadband Internet service. Accordingly, Free Press’ citation to Section 601(4), which states that one purpose of the Cable Act is to “assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public,”²⁸⁸ is irrelevant. Moreover, there has been no suggestion – and there is certainly no record evidence – that the need to ensure diversity in *cable television programming* would be the driver behind any action taken in response to the Free Press Complaint or Petition.

Section 601(6), also cited by Free Press, provides that another purpose of Title VI is to “promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.”²⁸⁹ Even if this provision applied in this context, which it does not, regulatory restraint is actually what “promote[s] competition.”²⁹⁰ Moreover, to the extent it might be relevant, the statute sets forth an explicit deregulatory policy of “minimiz[ing] unnecessary regulation.”²⁹¹ Free Press’ additional contention that awarding it relief here would not impose an “undue economic burden” is disingenuous.²⁹² Free Press is seeking literally tens of millions of dollars per day in fines against Comcast,²⁹³ fines that, if imposed, would clearly result in an “undue economic burden.” Further, the costs of complying with Free Press’ demands, which would appear essentially to require continual and unlimited investments in network capacity²⁹⁴ at a cost that some estimate could be in the hundreds of billions of dollars,²⁹⁵ would clearly constitute an additional “undue economic burden.” In all

²⁸⁵ See *id.* § 153.

²⁸⁶ See Free Press Memo 1 at 31 & n.142.

²⁸⁷ See, e.g., 47 U.S.C. § 522(6) (defining “cable service” as “the one-way transmission to subscribers of (i) video programming, or (ii) other programming service” and “subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service); see also *id.* § 522(20) (defining “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station”).

²⁸⁸ *Id.* § 521(4).

²⁸⁹ *Id.* § 521(6).

²⁹⁰ See *supra* note 239-241 and accompanying text.

²⁹¹ 47 U.S.C. § 521(6).

²⁹² Free Press Memo 1 at 32.

²⁹³ Free Press Memo 3 at 15-16.

²⁹⁴ Free Press Comments at 38, 49; Free Press Petition at 26-27.

²⁹⁵ See Comcast Reply Comments at 19 (citing Comments of Telecommunications Industry Association, WC Docket No. 07-52 (filed Feb. 13, 2008), at 12 (noting that “increased network usage cannot economically be addressed through increased network deployment alone” and that “[t]he deployment necessary to meet current network needs in the absence of management tools would be exorbitantly expensive [[\$9.3 billion annually according to one recent estimate)], and the associated costs would fall on end users, making broadband usage uneconomic for many”); Comments of National Telecommunications Cooperative Association, WC Docket No. 07-

events, then, adoption of Free Press' desired standards would be inconsistent with, rather than "reasonably ancillary" to, the effective performance of any FCC regulatory responsibility contained in Section 601(6).²⁹⁶ And, just as with the diversity goal of Section 601(4), there can be no credible suggestion, nor is there any evidence, that the actual motivation for the grant of the requested relief would be based on the indirect effects of such action on competition in the market for *cable television programming*.

d. Section 256.

Free Press also erroneously asserts that Section 256 of the Communications Act could support the exercise of ancillary authority in connection with its Complaint or Petition.²⁹⁷ As a threshold matter, Section 256(c) by its terms precludes such a result, stating that "[n]othing in this section shall be construed as expanding or limiting any authority that the Commission may have under the law in effect before the date of enactment of the Telecommunications Act of 1996."²⁹⁸ Thus, Congress made clear that, when it added Section 256 to the Communications Act, it had no intention of doing anything more, or less, than what Section 256 itself effectuated. Accordingly, Section 256 cannot serve as the foundation for substantive authority any broader than its specific provisions. Like Section 706 of 1996 Act, it directs the agency as to how it may use its existing authority but it is not itself an independent source of authority.

Even if the express language of Section 256 did not preclude the FCC from relying on it as a basis for ancillary authority in this context, Free Press has not shown that the provision provides support for any action here. None of the subsections of Section 256 on which Free Press relies impose any mandatory responsibility on the Commission that could possibly be relevant to the Complaint or Petition. Section 256(a)(2) sets forth a purpose of "ensur[ing] the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks,"²⁹⁹ but imposes no mandatory obligation on the agency. Similarly, Section 256(b)(2), which is the only provision of Section 256 that even pertains to "information services" such as Comcast's broadband Internet service, is permissive, and provides that the FCC "may participate, in a manner consistent with its authority and practice prior to [the date of enactment of Section 256], in the development by appropriate

52 (filed Feb. 13, 2008), at 5-6 ("Increasing the capacity of the rural broadband infrastructure . . . is very costly and cannot be done without extensive government assistance."); Comments of United States Telecom Association, WC Docket No. 07-52 (filed Feb. 13, 2008), 11-12 ("[A] regime that required providers to address increased demand exclusively through massive expansion in broadband capacity [] would impose huge and unnecessary costs on all consumers[, which] would be economically infeasible."); Comments of U.S. Chamber of Commerce, WC Docket No. 07-52 (filed Feb. 13, 2008), at 8-9 (noting that network investment "to handle the increased bandwidth needs of P2P applications and other multimedia content . . . will cost as much as \$400 billion"); Comments of Information Technology and Innovation Foundation, WC Docket No. 07-52 (filed Feb. 13, 2008), at 8 ("[N]etwork expansion and capacity improvements require significant capital investment that ultimately will have to be paid for by price-sensitive consumers."); and Comments of Hands Off the Internet, WC Docket No. 07-52 (filed Feb. 13, 2008), at 10 ("[C]apacity increases are an inefficient use of resources in resolving the problem [of strained capacity].").

²⁹⁶ See *supra* notes 244-245 and accompanying text.

²⁹⁷ See Free Press Memo 1 at 34-38.

²⁹⁸ 47 U.S.C. § 256(c).

²⁹⁹ *Id.* § 256(a)(2).

industry standards-setting organizations of public telecommunications network interconnectivity standards.”³⁰⁰ It is also limited to access to “information services by subscribers of rural telephone companies.”³⁰¹ Comcast is not a “rural telephone company,”³⁰² and the customers who Free Press alleges have been harmed by Comcast’s network management activities are not even among the class of subscribers that Section 256(b)(2) is meant to protect.

Furthermore, even if Sections 256(a)(2) or 256(b)(2) could be construed to impose some mandatory responsibility on the Commission, adoption of Free Press’ desired norms would not be reasonably ancillary to the agency’s effective performance of any duties relevant to these provisions. Section 256 as a whole is concerned with “public telecommunications network interconnectivity,” which the statute defines as “the ability of two or more public telecommunications networks used to provide telecommunications service to communicate and exchange information without degeneration, and to interact in concert with one another.”³⁰³ In addition, Section 256(b)(1) states that the FCC “shall establish procedures for Commission oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications service for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications service.”³⁰⁴ However, there is simply no rational connection between the broadband network management issues raised in Free Press’ Complaint and Petition and the agency’s ability to establish “procedures for oversight of coordinated network planning” (*i.e.*, creation and oversight of the Network Reliability and Interoperability Council).

Adopting the standards that Free Press seeks to impose on Comcast also would not be related in any reasonable way to “interconnectivity” between “two or more public telecommunications networks.” Instead, Free Press’ claims are based on the ability of end users to utilize the services provided by content and application providers over Comcast’s broadband Internet service. It is absurd to suggest that Free Press’ concern is with interconnectivity and interoperability of public telecommunications networks and that the Commission would grant relief to Free Press to remedy such a problem. There is not a shred of record evidence of a problem relating to interconnectivity or interoperability of telecommunications networks. For this reason, the discussion of Section 256 in the *Wireline Broadband Report and NPRM* on which Free Press relies,³⁰⁵ is inapposite. The FCC’s discussion was properly limited to issues relating to “interconnectivity,” “network reliability,” and “interoperability” issues, because those are the only issues to which the statute applies.³⁰⁶

³⁰⁰ *Id.* § 256(b)(2).

³⁰¹ *Id.* § 256(b)(2)(C).

³⁰² *Id.* § 153(37) (defining rural telephone companies to include local exchange carriers under certain circumstances).

³⁰³ *Id.* § 256(d).

³⁰⁴ *Id.* § 256(b)(1).

³⁰⁵ Free Press Memo 1 at 34-35.

³⁰⁶ *Wireline Broadband Report and NPRM*, 20 FCC Rcd at 14853 (¶ 120). While Free Press cites to various instances in which the Commission has extended Title II obligations to providers of information services, *see* Free Press Memo 1 at 36-37, those citations cannot provide an answer to the question presented here: whether the

e. “Analogy” to *Computer Inquiries*

Free Press also incorrectly claims that the assertion of ancillary authority to adopt the norms proposed in its Petition and Complaint would be “analogous to [the Commission’s] assertion of jurisdiction in the *Computer Inquiries*.”³⁰⁷ In the *Computer Inquiries*, the agency explicitly pointed to substantive statutory obligations outside of Title I to support its actions, namely Sections 205, 211(b), 218(a), and 219 of the Communications Act.³⁰⁸ As shown above, Free Press has identified no such obligations. Moreover, the *Computer Inquiries* involved adoption of prospective rules, not adjudicatory action, and were the seminal proceedings in which the FCC established a framework for the *deregulation, not regulation*, of enhanced services (what are now known as information services). Thus, the *Computer Inquiries* are inapt and provide no analogy here.

adoption of the particular norms that Free Press seeks to impose here would be reasonably ancillary to the effective performance of any specific statutorily mandated duty. As shown above, Free Press has not yet shown the necessary connection. In any case, while it is true that the FCC has from time to time extended certain Title II obligations to information services relying on its ancillary authority, it has done so on the theory, as Free Press acknowledges, that the information services were “so integral to the use of telecommunications service,” *id.* at 37 (internal quotation marks omitted), and that extending the pertinent Title II obligation was needed to ensure that the agency could carry out its duties with relation to the possibly affected telecommunications service. Here, by contrast, the information service at issue is not even related to “the use of telecommunications service,” let alone “so integral[ly]” related that the requisite nexus could be shown.

³⁰⁷ *Id.* at 32.

³⁰⁸ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384, 452 (¶ 176) (1980) (“*Computer IF*”) (“The basic power to require this change in current practices by carriers offering interstate communications services inheres, we believe, in Section 205 of the Act.”); *id.* at 494 (¶ 279) (discussing authority under Section 211, 218(a), and 219); *see also id.* at 496 (¶ 286) (citing in the ordering clause, *inter alia*, Sections 201-205, 403, 404, and 410). While the D.C. Circuit’s decision affirming the FCC’s order discussed Sections 2 and 3 of the Communications Act in upholding the agency’s exercise of authority most extensively, *see CCIA*, 693 F.2d at 213, that is beside the point. Foremost, as just shown, the fact of the matter is that in the underlying order the Commission *did* ground the exercise of its authority in substantive provisions of the Communications Act outside of Title I. Second, reliance on these Title I provisions alone would have been inconsistent with the Supreme Court’s decision in *Southwestern Cable*, in which the Court clearly stated that the FCC’s authority under Title I was “restricted to that reasonably ancillary to the effective performance of the Commission’s various responsibilities” delineated in the substantive provisions of the Act. 392 U.S. at 178. Third, the D.C. Circuit not only found that Sections 2 and 3 supported the agency’s general jurisdiction over Customer Premises Equipment (“CPE”), but also went on to reason that exertion of power over CPE was justified because “bundling CPE charges into transmission rates has a direct effect upon rates for interstate transmission services,” *CCIA*, 693 F.2d at 213, bringing the Commission’s actions within the scope of its regulatory authority under Section 205 over “just and reasonable” charges for such services, *id.*; 47 U.S.C. § 205. As indicated above, Section 205 was among the substantive bases for ancillary authority that the FCC cited in the underlying order. Thus, contrary to Free Press’ contention, Free Press Memo 1 at 33-34 & n.151, *CCIA* cannot fairly be construed as upholding the exercise of ancillary authority based on Section 1 (or, indeed, various provisions of Title I together). Finally, the D.C. Circuit has subsequently clarified that in order to exercise ancillary authority properly, the agency must, in fact, point to an affirmative statutory obligation falling outside of Title I. *Sw. Bell Tel. Co.*, 19 F.3d at 1479 (stating that the “Commission’s general jurisdiction over interstate communication and persons engaged in such communication . . . is restricted to that reasonably ancillary to the effective performance of [its] various responsibilities under Titles II and III of the Act” (internal quotations omitted)).

Free Press errs – or misleads – in claiming that “in the *Computer Inquiries*, the Commission imposed obligations on certain information service providers.”³⁰⁹ Quite the contrary, the *Computer Inquiries* did not impose any regulations on enhanced (information) services.³¹⁰ Instead, the agency established a regime in which information services would be free from regulation, and no authority – ancillary or otherwise – was invoked to regulate them. More recently, the FCC confirmed that Congress, in the 1996 Act, approved and codified the regime established in *Computer II*, preserving the dichotomy between common carriage (telecommunications services) and enhanced services (now renamed information services) and preserving the unregulated nature of the latter.³¹¹

Free Press principally relies on SBC Communications’ argument in 2002 that the telecommunications that underlies an information service must be regulated as a common carrier offering (or, in the language of the 1996 Act, as a telecommunication service).³¹² The Commission, however, has *not* accepted that argument. In fact, the argument that Free Press parrots is in direct conflict with the agency’s holding in the *Cable Internet Declaratory Ruling* that cable modem service is an integrated interstate information service and that the underlying *telecommunications* should not be treated as a separate *telecommunications service*, a holding affirmed by the Supreme Court in *Brand X*.³¹³ The FCC has subsequently followed the same logic in deciding that wireline broadband, wireless broadband, and broadband over powerline services should also be treated as integrated, unregulated, information services, without separate (and regulated) underlying telecommunications services.³¹⁴ And to date all of those services, once classified or reclassified as information services, have been subject to no federal or state regulation. While rulemakings and inquiries have been initiated to consider whether the Commission can and should impose any regulation upon providers of broadband information services, no such regulations have been adopted, and the deregulation adopted in the *Computer Inquiries* has endured. Thus, by no stretch of the imagination can any attempted “analogy” to the *Computer Inquiries* strengthen Free Press’ efforts to have the agency adopt norms relating to broadband network management.

³⁰⁹ Free Press Memo 1 at 32.

³¹⁰ The regulations adopted in *Computer II* applied to common carriers, in their capacity as common carriers, and to the relationships between their common carrier operations and their enhanced service offerings.

³¹¹ *Federal-State Joint Bd. on Universal Serv.*, Report to Congress, 13 FCC Rcd 11501, 11507 (¶ 13) (1998) (“*Universal Serv. Report*”).

³¹² Free Press Memo 1 at 33.

³¹³ *Cable Internet Declaratory Ruling and NPRM*, 17 FCC Rcd at 4825, 4828-31 (¶¶ 44, 52-55); *Brand X*, 545 U.S. at 986-1000. In *Brand X*, the Supreme Court explained that the Communications Act “regulates telecommunications carriers,” 545 U.S. at 975, defined in the Act as “any provider of telecommunications services,” 47 U.S.C. § 153(44), “but not information-service providers, as common carriers,” *Brand X*, 545 U.S. at 975; *see also Sw. Bell Tel. Co.*, 19 F.3d at 1480 (“[R]egulation . . . under title II of the Act . . . hinges upon the premise that the regulated entity is a common carrier.”); *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186, 1188 (D.C. Cir. 1985) (“Title II of the Communications Act . . . applies only to common carriers.”). The *Policy Statement* itself states this basic proposition of communications law. *Policy Statement*, 20 FCC Rcd at 14987 (¶ 4).

³¹⁴ *See supra* note 276 and accompanying text.

Even aside from the fact that the FCC has already correctly resolved this issue, under the statutory definitions all “information services” are provided “via telecommunications,”³¹⁵ “telecommunications services” involve the provision of “telecommunications,”³¹⁶ and “telecommunications” itself is defined separately.³¹⁷ Free Press’ reading, which would subject *any* service that “has a telecommunications component” to regulation under Title II, would render these separate and simultaneously adopted statutory definitions superfluous in violation of elementary principles of statutory construction.³¹⁸ It would also mean that Congress, by simply adding these definitions to the Communications Act, overruled decades of precedent under which both the Commission and the federal courts had recognized that many “pure transmission” functions should not be subject to common carrier regulation.³¹⁹ Such dramatic change in regulatory course (and repudiation of prior precedent) is hardly the stuff of *sub silentio* congressional action. As Free Press acknowledges, “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.”³²⁰ The proposition that Congress intended such a change is also directly repudiated by the legislative history of the relevant definitional provision.³²¹ Thus, the *Computer Inquiries* themselves, subsequent relevant FCC decisions, and the statutory definitions contained in the Communications Act all preclude acceptance of Free Press’ argument that the existence of an underlying telecommunications component can be relied upon to impose Title II duties on Comcast.

³¹⁵ 47 U.S.C. § 153(20).

³¹⁶ *Id.* § 153(46).

³¹⁷ *Id.* § 153(43).

³¹⁸ *See, e.g., TRW Inc.*, 534 U.S. at 31.

³¹⁹ *See, e.g., Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 645 (D.C. Cir. 1976) (“*NARUC I*”) (upholding Commission decision to treat certain commercial mobile services as non-common carrier telecommunications); *Licensing Under Title III of the Communications Act of 1934*, Declaratory Ruling, 8 FCC Rcd 1387 (1993) (allowing provision of certain satellite services on private carriage basis); *Application of Loral/Qualcomm Partnership, L.P.*, Order and Authorization, 10 FCC Rcd 2333 (1995) (allowing use of Globalstar system for mobile voice, data, facsimile and other services on a private carriage basis).

³²⁰ Free Press Memo 1 at 14 (quoting *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001)).

³²¹ *See* H.R. Conf. Rep. No. 104-458, at 115 (1996) (explaining that the definition of telecommunications service “recogniz[es] the distinction between common carrier offerings that are provided to the public . . . and private services,” the latter of which constitute “telecommunications,” not “telecommunications service”). In addition, the legislative history of the relevant definitions indicates that Congress at one point had considered a formulation of “telecommunications services” that included “[t]he underlying transport and switching capabilities on which [information] services are based,” S. Rep. No. 104-23, at 18 (1995), and expressly included “the transmission, without change in form or content, of information services,” *id.* at 79 (emphasis added). In the Act as adopted, however, the proposed reference to “transmission of information services” in the definition of “telecommunications services” was omitted. Acceptance of Free Press’ argument that the fact that cable high-speed Internet service contains an underlying transmission component renders the service as a whole to regulation as a “telecommunications service” under Title II would violate one of the most “compelling” principles of statutory construction; it effectively would reinsert language that Congress consciously removed from the definition of “telecommunications service” as enacted. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (“Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.”).

Further, insofar as the agency imposed any regulation at all in the *Computer Inquiries*, it did so only as to common carriers as noted above, and even then based on a record regarding the “bottleneck” power of those providers.³²² Those carriers that “d[id] not have . . . market power,” the Commission found, could not act anticompetitively and therefore did not need to be subject to such regulation.³²³ As Comcast has previously detailed, the FCC and the D.C. Circuit have repeatedly found that the market for broadband Internet services is vibrantly competitive and that no competitor has market power, rendering the underlying rationale for regulation in the *Computer Inquiries* – to the extent that there was any regulation – inapplicable here.³²⁴

Finally, the basis for Free Press’ argument that the Commission should extend Title II obligations to information services is expressly limited to a purported need to ensure competition in the market for “broadband provision” and “reasonably nondiscriminatory access to the Internet.”³²⁵ However, as the agency has found, it is the extension of *deregulatory* policies to broadband services that best creates the incentives for continued investment in and improvement of broadband networks.³²⁶ Free Press essentially asks the FCC to reverse itself, but even Free Press does not suggest that extension of Title II would be necessary to advance competition or address any issues in the market for *the provision of telecommunications services*, which would be the only basis for invoking authority ancillary to Title II responsibilities.

For all these reasons, Free Press has failed to show that the Commission possesses ancillary authority to take action on the Complaint or Petition. Indeed, given the Congressional debate over whether and how to confer substantive power upon the agency to enforce the *Policy Statement*,³²⁷ which must as a matter of law be presumed to have some meaning, there is no doubt whatsoever that the FCC currently lacks authority to act on the Complaint and Petition.

V. CONCLUSION

Free Press’ latest submissions are premised upon a fundamental mischaracterization of its filings, the *Policy Statement*, and the law. Neither the Commission’s discretion to choose whether to proceed by rulemaking or adjudication, nor whatever ancillary authority it might have in this area, excuses it from the basic obligation to put regulated entities on notice of the relevant standards of conduct *before* punitive action is taken. Although Free Press tries mightily to muddy these clear waters, the persistent and inescapable reality is that there is *no* statute, agency rule, or agency order that imposes any binding legal standard regarding the management of broadband networks, nor is there even any process for the filing of a complaint alleging the violation of such a standard. Accordingly, the correct legal response to the Complaint is for the

³²² See *Cable Internet Declaratory Ruling and NPRM*, 17 FCC Rcd at 4860 n.139 (¶ 34 n.139).

³²³ *Computer II*, 77 FCC 2d at 468-69 (¶ 221).

³²⁴ Comcast Comments at 5-11; see, e.g., *Wireline Broadband Report and NPRM*, 20 FCC Rcd at 14880-81 (¶ 50); *U.S. Telecom Ass’n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) (noting that “robust competition” exists in the “broadband market”).

³²⁵ Free Press Memo 1 at 33 (emphasis added).

³²⁶ See *supra* notes 239-241 and accompanying text.

³²⁷ See *supra* notes 44-48 and accompanying text.

FCC to dismiss it for failure to state any cognizable claim, and the correct legal response to the Petition is to explain that there is no law to clarify or any controversy under the law to resolve. If the agency wishes to pursue the issues raised by the Complaint or the Petition, it should consider them instead in the proper procedural vehicles, which include pending rulemaking and notice of inquiry proceedings (the latter of which necessarily would be antecedent to additional rulemakings).

But what the Commission *cannot* do, in response to a Complaint that stated no cognizable claim under any provision of law at the time of its filing or a Petition that did not seek to clarify any existing legal obligation, is to invent a new binding legal norm of network management and simultaneously “enforce” that rule against Comcast as the basis for punitive measures, whether retroactive or prospective, bypassing all procedures required by law and designed to ensure fairness, notice, and mature consideration of the issues. Any effort to take such action would approach the apex of arbitrary and otherwise unlawful agency decisionmaking. The effort by Free Press to portray these blatantly impermissible processes as appropriate cannot and should not be relied upon.