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

July 20, 2008

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

Dear Ms. Dortch,

This letter is to advise you, in accordance with Section 1.1206(b) of the Commission's rules, that on July 18, 2008, the following people met with Commissioner Jonathan Adelstein and his Legal Advisors Rudy Brioche and Scott Bergmann, at the offices of the Federal Communications Commission.

- Ben Scott of Free Press,
- Marvin Ammori of Free Press,
- Harold Feld of Media Access Project, and
- Gigi Sohn of Public Knowledge.

In addition, joining the discussion by conference call were

- Professor David Vladeck of Georgetown University Law Center, a renowned administrative law expert with 30 years experience, who has testified often before Congress and has registered almost a dozen US Supreme Court victories,
- Professor Tim Wu of Columbia Law School, a telecommunications law expert who has authored seminal scholarship on network neutrality, wireless Carterfone, and Internet censorship tools abroad and in the US;
- Professor Amanda Leiter of Catholic University Law School, an administrative law expert and former Supreme Court clerk, and
- Professor John Blevins of South Texas College of Law, a telecommunications law expert with a breadth of knowledge on the case law surrounding Title I of the Communications Act.

We discussed the strongest jurisdictional bases for the Commission to issue a show-cause Order based on violations of open Internet principles. We also discussed several of the meritless arguments that Comcast and its allies have raised in its attempt to delay the Commission's action.

In the process, the professors and lawyers also refuted three main legal objections raised by Comcast and its allies, apparently in meetings with Commissioner Adelstein and in filings. Specifically, all the professors and consumer representatives agreed the Commission had unassailable jurisdiction and authority to adopt a show-cause order here and to ensure open Internet principles through administrative adjudication. Many of our responses are presented in our previous filings, notably in:

- Free Press's June 12 *ex parte* memoranda on Title I (evaluating the strength of eight goals supporting the exercise of Title I jurisdiction previously cited by the Commission) and administrative adjudication;
- Public Interest Spectrum Coalition's July 18 *ex parte* letter (evaluating the strength of the additional statutory goals listed in §§201 and 202 as jurisdictional bases under Title I); and
- Professor John Blevins' July 18 memorandum detailing the strength of Title I jurisdiction to promote goals within Title I itself.

First, apparently Comcast has been arguing that the Commission must adopt rules through notice-and-comment before adjudicating complaints. The professors and advocates all strongly agreed this argument was baseless. If the Commission has jurisdiction for rules covering this conduct, then the Commission has jurisdiction for adjudication covering this conduct. The Supreme Court, since at least *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), has clearly stated that the decision to act by adjudication or rule-making lies within the agency's discretion. The Commission need not choose one or the other; if the agency has jurisdiction, it has direction to choose adjudication *or* a rulemaking. Of course, some agencies proceed through announcing policy almost exclusively through adjudication, such as the NLRB.

We discussed the Commission's use of policy statements plus adjudications in FCC contexts, which are no different from those in other administrative areas. The Commission has used adjudication for indecency and for the entire history of broadcast obligations set forth in renewals, underpinned by policy statements, going back at least to the Federal Radio Commission cases (such as *Pottsville*) and continuing through the 1960 En Banc Policy Statement on License Renewals to this day. Indeed, one famous example of the Commission adopting policy through adjudication is the fairness doctrine, beginning in the adjudication Great Lakes Broadcasting Co., 3 F. R. C. Ann. Rep. 32 (1929) and ending in the policy made in the adjudication Syracuse Peace Council, 2 F.C.C. Rcd. 5043 *aff'd* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989). Another famous example of policy-making by adjudication is the *Carterfone* case. Use of the Carterfone Device in Message Toll Tel. Serv.," 13 F.C.C.2d 420 (1968) (making policy in the case even if that policy was "not compelled by" previous decisions).

Naturally, nothing is special or different in the context of an FCC Title I adjudication. Indeed, the Supreme Court has upheld an FCC decision made pursuant to Title I authority in an adjudication. *See* CBS v. FCC, 453 U.S. 367, n. 14 (1981). In that

adjudication, as here, the Commission had previously issued policy statements and other statements to guide the industry. *Id.* at 383-84.

Similarly, adjudication does not circumvent notice-and-comment requirements. Those rulemaking requirements are themselves minimal, and indeed considered "informal" in the Administrative Procedure Act. One of the rationales for the Act was to ensure rulemaking would provide safeguards to match those generally found in adjudication. Here, the record has been developed by hearings, experts, and countless filings, and the result is merely a show-cause order providing Comcast the exact process it asked for in its July 10 filing. Engaging in a rulemaking before issuing the Order would only serve to delay, not correct any nonexistent defect in process.

One of the professors provided this hypothetical. Comcast has claimed the power to "manage" the Internet however it chooses and that the FCC lacks authority to act to protect consumers; Comcast could require consumers to use their connections only to email or it could block all video applications, as they consume "too much" bandwidth. So, under Comcast's jurisdictional read, the Commission would have to adopt rules first, and could not otherwise act swiftly to protect consumers and affected Internet providers. We argued that, if the FCC would have jurisdiction to protect consumers in those cases, and the Commission does, there is no jurisdictional difference here.

Second, we refuted the notion that an adjudication in this case limits the Commission from a future rule-making on similar matters. As a matter of administrative law, there is nothing about an adjudication here that precludes or limits the Commission from a future rule-making; nor does an adjudication express an unchangeable preference for adjudications rather than rule-makings in the future. The network neutrality principles may be applied through either avenue. Moreover, failing to issue an Order will only set back the push for rules and a statute on this point. Issuing this Order against Comcast will not undermine the argument for rules, because, if an adjudication process turns out *not* to be a failsafe deterrent, the Commission must then adopt rules, learning from its adjudication process. Issuing the Order will not, as an administrative law matter, tie the Commission's hands because the Commission has discretion to proceed by adjudication or rule and can change course merely with a reasoned basis. Courts will defer to the expert agency in adopting adjudication, especially in a dynamic, unpredictable field, and would again defer if experience shows any desirability for rules. And the Commission can, and should, include language in the Order clarifying that the Commission does not (and could not) close the door on rulemaking in the future.

Third, we discussed a class of arguments around Title I authority to act, to ensure the Commission has the strongest and most carefully reasoned Order on appeal and as precedent for protecting consumers from unjust and unreasonable practices by facilities-based Internet providers.

- Regarding Comcast's *ex parte* filings dated July 10, we noted many of us read the filings immediately and responded within a few days. We explained that the filings, put into the record literally at the 11th hour (the evening the Chairman announced he would propose an order) were amateurish rehashes of weak arguments, hollow rhetoric, and citations to misconstrued, irrelevant cases. While Comcast may hope that this filing

would slow down the Commission, we were confident Commission lawyers could quickly dismiss Comcast's (largely repeated, surprisingly weak) last-minute arguments/rhetoric.

- We stated that, while network providers like Comcast appeal any order that displeases their lobbyists and executives, this order is the Commission's best shot on appeal to clarify legal issues going forward in the broadband age. The Commission has a solid record, complete with evidence from the top legal and technical experts in the field, from Tim Wu and Barbara van Schewick to David Reed. Comcast's actions have been particularly egregious, and its defense particularly weak, technically and legally. There is no reason to question a proposed Order based on a litigation concern.

We also discussed sections of the Act that would be furthered by the exercise of Title I authority, in line with our previous filings, including those we found strongest, such as §§230, 151, and 201 of Communications Act and §706 of the Telecommunications Act.

In discussing §230 of the Communications Act, we noted that—not only the Policy in that section—but also the exemptions and obligations in §230 act to support jurisdiction, reflecting a Congressional intent that ISPs not block consumer access to lawful content, applications, or devices. Section 230(c)(1) specifies that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provider by another information content provider." This provision suggests that Congress intended for interactive computer service providers—and Comcast says in its July 10 filing that it is one—not to select and publish (or not publish) users' content. Rather, Congress intended for such providers to be passive carriers, receiving the same immunities a carrier would receive—not the liability that would attach to a newspaper disseminating another's article. If Congress expected ISPs like Comcast to only "publish" some content while blocking or degrading others, Congress would not have provided this immunity. (Or at the very least, based on Comcast's arguments, this carrier immunity must be waived, which Congress has not done.)

Section 230(c)(2)(a) specifies that providers are not civilly liable for taking actions to restrict access to obscene and other material. This suggests that carriers *could be liable*, especially administratively, for restricting access to any other content, in categories beyond those specified in §230(c)(2)(a). That is, Congressional intent assumes that other kinds of restrictions would be (or at least could be) prohibited.

Section 230(d) requires providers to provide notice that parental control tools are available that "may assist the customer in limiting access to material that is harmful to minors." This provision assumes that the provider should help *consumers* determine when those consumers hope to block or avoid content for their families—not that the provider should themselves block any content or software, or limit access to any material. The consumer, not the network, should decide these matters. Congress's intent is evident.

We explained that under §706 the Commission must encourage advanced telecommunications services, which includes the ability to originate and receive high-quality information. Since Comcast is actively reversing and discouraging such services,

the Commission clearly has Title I authority. Comcast's action frustrates the goals of that provision by moving the nation backwards, while the Commission can act even to move the nation forward.

We also discussed the §§201 and 202 arguments presented by Mr. Feld in the Public Interest Spectrum Coalition's July 18 *ex parte*.

Finally, beyond jurisdiction, we agreed with the Commissioner that the Commission's first adjudication on open Internet principles, based on this strong record, should enunciate two strong presumptions—degrading or blocking Internet applications or content cannot be "reasonable" network management and violating Internet standards to "manage" a network should trigger a similar presumption.[1] To overcome that presumption, the network provider must demonstrate that it provided prominent, clear, specific, and understandable disclosure to consumers, the Commission, and the technical community; that the practice is necessary to address a compelling social interest and absolutely no less restrictive means exists. And we reminded the Commissioner that—in one instance where the Commission defined reasonable network management (in a rulemaking, in fact)—it specifically stated that application-based congestion management was not reasonable network management. *See* Service Rules for the 698-746, 747-762, and 777-792 MHz Bands, Second Report & Order, 22 FCC Rcd. 15,289, 15,370-71 (August 10, 2007); Free Press et al. Comments, February 13, 2008, at 23.

We also noted that the network industry's technical arguments continue to be misleading or false, as Free Press demonstrates in July *ex parte* filings.

Thank you.

Sincerely,

Marvin Ammori
Free Press

1 Of course, any "discrimination" built into Internet standards would likely not trigger such scrutiny.