



1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

July 24, 2008

Helgi C. Walker
202.719.7349
hwalker@wileyrein.com

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:

Over the past week, Free Press and the Media Access Project (“MAP”) have submitted a flurry of additional *ex parte* filings¹ in a desperate attempt to stitch together a patchwork of “authority” to support FCC enforcement action on Free Press’ self-styled “Formal Complaint”² (or adjudication of Free Press’ Petition for Declaratory Ruling³) regarding Comcast’s broadband network management practices. This unrelenting drip of last-minute filings still has not salvaged the Complaint. We respectfully submit this letter on behalf of Comcast to redress the most egregious errors in these filings.

¹ 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 (July 20, 2008) (“Free Press July 20 *Ex Parte*”); Letter from Harold Feld, Media Access Project, to Marlene H. Dortch, FCC, WC Docket No. 07-52 (July 17, 2008) (“MAP July 17 *Ex Parte*”); Written *Ex Parte* Comments of Media Access Project on Comcast Waiver of Jurisdictional Arguments Against Commission Authority to Adjudicate Complaint, WC Docket No. 07-52 (filed July 22, 2008) (“MAP July 22 *Ex Parte*”).

² *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”).

³ *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”). Although Free Press continues to focus its advocacy primarily on its “Formal Complaint,” the arguments contained herein apply equally to any adjudicatory action by the Commission in response to Free Press’ Petition.

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 2 of 18

More New Standards of Review.

Free Press now proffers *yet another* standard of review to govern disputes regarding network management. In Comcast's July 10 Response, it addressed Free Press' proposed "strict scrutiny" standard of review that places the "burden of proof" on network operators, which Free Press had suggested for the first time in its June 12 filing.⁴ Now, Free Press insists that the FCC (either in addition to or instead of its previously-requested approach) "enunciate two strong presumptions" that can be overcome only if, *inter alia*, a network operator "provided prominent, clear, specific, and understandable disclosure to consumers, the Commission, and the technical community" (whatever and whoever that may be).⁵ These new demands only highlight Free Press' "constantly shifting position"⁶ and the fatal notice issues that would afflict any agency action on the Complaint.⁷

More New Legal Theories of Statutory Authority and Notice Regarding the Free Press Complaint.

Turning to MAP's filings, its suggestion that the substantive requirements imposed by Sections 201(b) and 202(a) of the Communications Act⁸ provide express authority for agency action on the Free Press Complaint⁹ is meritless. MAP itself acknowledges that "[t]he statutes speak directly to 'common carriers,' a class which excludes broadband access providers," such as Comcast.¹⁰ Comcast has similarly explained that "the Commission left no doubt in the *Cable Modem*

⁴ Response of Comcast Corporation, WC Docket No. 07-52, at 19 (filed July 10, 2008) ("Comcast July 10 Response").

⁵ Free Press July 20 *Ex Parte* at 5.

⁶ Comcast July 10 Response at 18.

⁷ See, e.g., *id.* at 16-19, 23-25; Letter from Kathryn A. Zachem, Comcast, to Marlene H. Dortch, FCC, WC Docket No. 07-52, at 4-8 (July 21, 2008) (eight-page *ex parte* letter addressing legal issues) ("Comcast July 21 Legal *Ex Parte*").

⁸ 47 U.S.C. §§ 201(b), 202(a).

⁹ See MAP July 17 *Ex Parte* at 1-2.

¹⁰ *Id.* at 1.

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 3 of 18

Declaratory Ruling that cable's high-speed Internet service is *not* a common carrier service"¹¹ or, in the language of the Telecommunications Act of 1996,¹² as codified in Section 3 of the Communications Act,¹³ a "telecommunications service." Broadband Internet service is an information service.

Contrary to the assertion by MAP, no "portions of broadband transmission . . . qualify as *telecommunications services*."¹⁴ MAP would have the Commission treat the *telecommunications* that underlie the information service as a separate *telecommunications service* under the Communications Act. As Comcast has shown, this directly conflicts with the approach the FCC has taken (and which has been affirmed by the Supreme Court in *Brand X*¹⁵) in deciding that broadband Internet services, including cable modem, wireline broadband, wireless broadband, and broadband over powerline services "should . . . be treated as integrated, unregulated, information services, without separate (and regulated) underlying telecommunications services."¹⁶ Under the Commission's now well-established regime, the mere fact that broadband Internet service has a "telecommunications component"¹⁷ does not create a regulable "telecommunications service" for purposes of the Communications Act.¹⁸ The FCC's approach, moreover, is the only one consistent with the definitional provisions of the Communications Act and its

¹¹ Letter from David L. Cohen, Comcast, to Kevin J. Martin, FCC, WC Docket No. 07-52, at 1 (Mar. 7, 2008); *see also Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4825, 4828-31 (¶¶ 44, 52-55) (2002), *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).

¹² Telecommunications Act of 1996, Pub. L. No. 104-104, § 3, 110 Stat. 56, 60.

¹³ 47 U.S.C. § 153(46).

¹⁴ MAP July 17 *Ex Parte* at 2 (emphasis added).

¹⁵ 545 U.S. at 986-1000.

¹⁶ Comcast July 10 Response at 43.

¹⁷ MAP July 17 *Ex Parte* at 2.

¹⁸ *See* Comcast July 10 Response at 43-44 & n.321.

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 4 of 18

legislative history.¹⁹ To reverse course now would contravene the Act and Congressional intent and upend numerous prior agency statements. MAP provides no justification for such a departure, and there is none.

Neither *Vonage Holdings Corp. v. FCC*²⁰ nor *American Council on Education v. FCC*²¹ support MAP's novel theory, as they simply do not address the meaning of "telecommunications service" under the Communications Act. In *Vonage*, the D.C. Circuit affirmed the Commission's interpretation of the phrase "provider[] of telecommunications," under Section 254, as referring to something distinct from and broader than a "telecommunications service."²² This makes perfect sense, as the Communications Act defines "telecommunications" and "telecommunications service" separately.²³ In *American Council*, the D.C. Circuit was faced with a different statute entirely – the Communications Assistance for Law Enforcement Act ("CALEA") – and it specifically noted that CALEA did not even refer to a "telecommunications service."²⁴

*Alliance for Community Media v. FCC*²⁵ also does not aid MAP's assertion that the grant of rulemaking power contained in Section 201(b) provides the Commission express authority to take action on Free Press' Complaint. The Sixth Circuit concluded that, under Section 201(b), "the FCC possesses clear jurisdictional authority to formulate *rules and regulations* interpreting the contours of *section 621(a)(1)*."²⁶ The court thus confirms what Comcast has explained: Section 201(b) "empowers the Commission to 'prescribe . . . rules and regulations' .

¹⁹ *See id.*

²⁰ 489 F.3d 1232 (D.C. Cir. 2007).

²¹ 451 F.3d 226 (D.C. Cir. 2006).

²² 489 F.3d at 1239-41.

²³ 47 U.S.C. § 153(43) (defining "telecommunications"); *id.* § 153(46) (separately defining "telecommunications service").

²⁴ 451 F.3d at 233 (internal quotation marks and emphasis omitted).

²⁵ 529 F.3d 763 (6th Cir. 2008).

²⁶ *Id.* at 774 (emphasis added).

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 5 of 18

. . . ‘to carry out the provisions of the [Communications] Act,’” but its “plain terms require the FCC to point to *another* provision of the Act in support of any action.”²⁷

MAP’s alternative suggestion – that the Commission should apply Sections 201(b) and 202(a) pursuant to its ancillary authority in response to the Complaint²⁸ – is no more availing. The lawful exercise of ancillary authority involves agency action that is “‘reasonably ancillary to the . . . effective performance of [a] statutorily mandated responsibilit[y].’”²⁹ Furthermore, “‘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.”³⁰

MAP has confused the elements of the doctrine of ancillary authority. It does *not* advocate that the FCC may regulate broadband network management in order to perform effectively any statutory responsibilities that the Commission has *under Sections 201(b) and 202(a)*. Instead, MAP argues that the agency should “*apply* Section 201(b) and Section 202(a)” to Comcast in furtherance of certain vague “purposes” and “responsibilities” with no specific statutory basis.³¹ MAP has, in this way, turned the doctrine on its head. In other words, MAP has not suggested that taking action on the Complaint is reasonably ancillary to a statutorily-mandated responsibility in Sections 201(b) and 202(a), but rather advocates the ancillary application of those provisions themselves.

In any event, none of the three “rationales” that MAP advances for the application of Sections 201(b) and 202(a) satisfy the requirements for ancillary authority.³² First, MAP baldly asserts that the application of Sections 201(b) and

²⁷ Comcast July 10 Response at 31 n.220 (quoting 47 U.S.C. § 201(b)).

²⁸ MAP July 17 *Ex Parte* at 2-3; *see also* Free Press July 20 *Ex Parte* at 4-5.

²⁹ Comcast July 10 Response at 26 (quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005)).

³⁰ *Id.* at 28 (quoting *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976)).

³¹ MAP July 17 *Ex Parte* at 2 (emphasis added).

³² *Id.*

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 6 of 18

202(a) in response to the Complaint is “necessary” for the Commission to “fulfill its responsibility to administer” the public switched telephone network (“PSTN”). MAP nowhere specifies, however, the statutory basis for the FCC’s alleged (and broad) authority to “administer networks.”³³ Moreover, there has been no suggestion, and certainly there is no record evidence to show, that the “functioning of the PSTN” would be the true driver behind any action taken on the Complaint. Neither MAP, Free Press, nor anyone else has ever suggested, much less made *any* showing, that Comcast’s network management practices have had *any* deleterious effects on the practices of common carriers or the services provided over the PSTN.

Second, MAP’s attempt to tie the ancillary application of Sections 201(b) and 202(a) to “the goals of Title II [and] the Communications Act generally” and to the First Amendment³⁴ clearly fails to further a “statutorily mandated responsibility.”³⁵ MAP argues that Commission action on the Complaint would further the “polic[ies]” contained in Sections 218 and 257(b),³⁶ but statutory statements of policy are “not an operative part of the statute and [do] not enlarge or confer powers on administrative agencies or officers.”³⁷ The First Amendment, of course, is not even “statutory” in nature, and MAP offers no explanation whatsoever as to how a constitutional restriction on the government’s power could be construed as a source of legislative or judicial power that supports the exercise of ancillary authority.

Third, MAP contends that Sections 201(b) and 202(a) may be applied to “ensure a nationwide system of wire communication at reasonable prices.”³⁸ There is no basis, however, for the notion that concern over the Commission’s ability to “ensure a nationwide system of wire communication at reasonable prices” would be

³³ *Id.*

³⁴ *Id.* at 3.

³⁵ *Am. Library Ass’n*, 406 F.3d at 700.

³⁶ MAP July 17 *Ex Parte* at 3.

³⁷ Comcast July 21 Legal *Ex Parte* at 2 (quoting *Ass’n of Am. R.R.s v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)).

³⁸ MAP July 17 *Ex Parte* at 3.

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 7 of 18

the genuine motivation for FCC action on the Complaint. MAP's reliance on *Computer and Communications Industry Association v. FCC* ("CCIA")³⁹ is misplaced. Unlike the present circumstances, in *CCIA* there was an obvious nexus between the agency action at issue – unbundling Customer Premises Equipment from tariffs – and the prices charged for telecommunications services otherwise subject to regulation under Title II.⁴⁰ Moreover, as Comcast has explained, the Commission took its action there in furtherance of several specific substantive statutory obligations.⁴¹ MAP has cited no such obligations that would be furthered here. Beyond all these issues, the Supreme Court has held that ancillary authority may not be used to impose common carrier regulation – such as Sections 201(b) and 202(a) – on entities that, like Comcast, are not common carriers.⁴²

MAP further alludes in confusing fashion to the Commission's obligation to "foster competitive video services,"⁴³ but Comcast has already demonstrated that its network management activities do not impinge on any duty the FCC might have to do so. Comcast's practices are "entirely content- and identity-neutral."⁴⁴ The

³⁹ 693 F.2d 198 (D.C. Cir. 1982).

⁴⁰ *Id.* at 213.

⁴¹ See Comcast July 10 Response at 42 & n.308.

⁴² See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979) (noting that "[t]he Commission is directed explicitly by § 3(h) of the Act not to treat persons engaged in broadcasting as common carriers," and concluding that the FCC may not use ancillary authority to "regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters"). Indeed, Congress has limited the Commission's ability to regulate even common carriers to those circumstances where they provide common carrier services. See 47 U.S.C. § 153(44) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . .").

⁴³ MAP July 17 *Ex Parte* at 4.

⁴⁴ Letter from Kathryn A. Zachem, Comcast, to Marlene H. Dortch, FCC, WC Docket No. 07-52, at 5 (July 21, 2008) (six-page *ex parte* letter, with fifteen-page declaration, addressing factual issues).

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 8 of 18

record already refutes allegations that Comcast targets applications that provide access to video programming,⁴⁵ and MAP offers no new evidence to the contrary.

New Legal Theory of “Waiver” Regarding the Free Press Complaint.

Revealing a telling lack of confidence in all of its arguments regarding statutory authority, MAP now resorts simply to contending that Comcast has “waived” the right to challenge the FCC’s authority to take enforcement action in response to the Complaint.⁴⁶ MAP points to certain statements in the Commission’s *Adelphia Order*⁴⁷ regarding the agency’s intentions for the future, and it contends that Comcast’s failure to petition for review of those statements bars any contrary argument here.⁴⁸ This last-ditch defense is utterly meritless.

MAP’s argument rests on a fundamentally flawed premise: that Comcast *could have* petitioned for review of the statements that MAP cites. As MAP admits,⁴⁹ and Comcast has previously noted,⁵⁰ the Commission *approved* the merger in the *Adelphia Order* without imposing *any condition* regarding network management.⁵¹ Thus, every statement regarding the agency’s future intentions

⁴⁵ Reply Comments of Comcast Corporation, WC Docket No. 07-52, at 28-32 (filed Feb. 28, 2008).

⁴⁶ See MAP July 22 *Ex Parte*.

⁴⁷ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Commc’ns Corp., to Time Warner Cable Inc., and Comcast Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) (“*Adelphia Order*”).

⁴⁸ See MAP July 22 *Ex Parte* at 4-8.

⁴⁹ *Id.* at 5; see also Press Release, Media Access Project (July 13, 2006), <http://www.mediaaccess.org/press/Adelphia%20Statement.pdf> (complaining that the FCC failed to adopt conditions in the *Adelphia Order* “to assure network neutrality”).

⁵⁰ Comcast July 10 Response at 6 n.39.

⁵¹ See *Adelphia Order*, 21 FCC Rcd at 8368 (Copps, Comm’r, dissenting) (expressing “disappoint[ment]” that the Commission was “too timid to even apply [the principles of the *Internet Policy Statement*] in an enforceable fashion to the transaction at hand”); *id.* at 8372 (Adelstein, Comm’r, approving in part and dissenting in part) (dissenting from the Order because “the Commission fails to adopt explicit, enforceable provisions to preserve and promote the open and interconnected nature of the Internet”).

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 9 of 18

about what it might do with regard to network management, including those quoted by MAP, is dicta and did not constitute final agency action with any sufficiently immediate adverse effect on Comcast.⁵² Comcast was not “bound” by those generalized statements,⁵³ nor did it have the right, or the ability, to petition for review of the statements. Again, the Commission (correctly) *declined* to condition the merger on any network management grounds, and to suggest that Comcast could have appealed from such *favorable* agency action, and that its failure to do so somehow precludes it from asserting its legal rights against the contemplated enforcement action here, reveals a total lack of understanding of appellate procedure.

MAP’s somewhat bewildering citations to *Tribune Co. v. FCC*⁵⁴ and *Comcast Corporation v. FCC*⁵⁵ do not help its cause, as neither decision is remotely

⁵² See 28 U.S.C. § 2344 (authorizing petitions for review of by “[a]ny party aggrieved by a final order”); *AT&T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001) (stating that an agency does not inflict actual injury by “merely express[ing] its view of what the law requires of a party, even if that view is adverse to the party”) (citing *DRG Funding Corp. v. HUD*, 76 F.3d 1212, 1214 (D.C. Cir. 1996)); *AirTouch Paging v. FCC*, 234 F.3d 815, 818 (2d Cir. 2000) (“A party’s ‘mere disagreement with an agency’s rationale for a substantively favorable decision, even where such disagreement focuses on an interpretation of law to which a party objects, does not constitute the sort of injury necessary for purposes of Article III standing.” (quoting *Shell Oil v. FERC*, 47 F.3d 1186, 1202 (D.C. Cir. 1995)); *id.* (“Even if the Commission were to view footnote 700 as binding in future proceedings, we would have no jurisdiction to consider the issue unless and until such future proceedings result in a cognizable injury to [petitioner].”); *Shell Oil*, 47 F.3d at 1201-02 (finding the “risk of injury that [plaintiff] now alleges . . . flows from the legal rationale employed by the Commission in its Order, not from the denial of relief actually sought by [plaintiff] before the agency,” and concluding that plaintiff thus lacked standing to seek review of the Order); *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 674 (D.C. Cir. 1994) (“[F]or purposes of Article III standing: a litigant’s ‘interest in [an agency’s] legal reasoning and its potential precedential effect does not by itself confer standing where, as here, it is uncoupled from any injury in fact caused by the substance of the [agency’s] adjudicatory action.’”) (quoting *Telecomms. Research & Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990)); *AT&T v. FCC*, 602 F.2d 401, 407 (D.C. Cir. 1979) (“In essence, then, [petitioner] asks this court selectively to excise from the order’s foundation certain portions it finds objectionable. . . . We do not think that Sections 402(a) and 2342 authorize this court to embark on architectural revisions of this sort.”).

⁵³ MAP July 22 *Ex Parte* at 8.

⁵⁴ 133 F.3d 61 (D.C. Cir. 1998).

⁵⁵ 526 F.3d 763 (D.C. Cir. 2008).

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 10 of 18

relevant here. In *Tribune*, the issue was whether the petitioner had satisfied “the Commission’s administrative exhaustion requirement” before petitioning a court for review, and the court observed that a merger applicant unhappy with a condition generally must seek rehearing before the agency prior to challenging the condition in court.⁵⁶ This case thus concerned the question of exhaustion in an appeal from an agency order – *i.e.*, whether the petitioner was barred from judicial review of the order because it did not seek reconsideration of certain issues at the agency level; *Tribune* is *not* about any preclusion in subsequent litigation over a new and different final order. *Tribune* might have had some relevance in any appeal from the *Adelphia Order*, but it has none in this case. In *Comcast*, the court addressed the question whether decisions by the Commission’s Media Bureau constituted FCC precedent such that they could be considered in the context of a claim that the Commission acted arbitrarily and capriciously by reaching inconsistent results in applying a waiver standard. The D.C. Circuit held that “unchallenged staff decisions are not Commission precedent,”⁵⁷ but that conclusion is inapposite here.

While it may be true that Comcast, in the proceeding related to the *Adelphia Order*, did not contest the FCC’s general statutory authority to impose merger conditions, the authority to impose a condition in that context (*i.e.*, a license transfer proceeding under Sections 241 and 310(d) of the Communications Act and the attendant statutory “public interest” standard⁵⁸) is entirely different from the authority required to take the enforcement action contemplated here. The Commission has never before attempted to enforce the *Internet Policy Statement*⁵⁹ standing alone or adopt a new rule in the context of enforcing that statement independently, or to apply such action to Comcast. Free Press’ Complaint accordingly presents the first opportunity for Comcast to challenge such authority. In any event, as Comcast has explained time and again, “[t]he FCC . . . ‘literally has

⁵⁶ 133 F.3d at 67.

⁵⁷ *Comcast*, 526 F.3d at 770.

⁵⁸ See *Adelphia Order*, 21 FCC Rcd at 8207 (¶ 4) (“To obtain Commission approval, the Applicants must demonstrate that the proposed transactions will serve the public interest, convenience, and necessity pursuant to sections 214 and 310(d) of the Communications Act.”); *id.* at 8207 n.15 (¶ 4 n.15).

⁵⁹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) (“*Policy Statement*”).

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 11 of 18

no power to act . . . unless and until Congress confers power upon it.”⁶⁰ A “waiver” by a regulated entity cannot confer authority on the Commission.

The *Adelphia Order* also does not provide – contrary to MAP’s latest contention⁶¹ – notice of any binding legal norm regarding broadband network management. Rather, the Commission did not impose any network management conditions on Comcast, and the order expressly noted the *absence* of any rules in the area.⁶² MAP relies solely on the FCC’s statements of future intent, but, as Comcast has explained, mere statements do not amount to the valid promulgation of binding legal norms.⁶³ Relatedly, the simple fact that the *Adelphia Order* cited *Madison River*⁶⁴ does not make the latter valid legal support for the action contemplated in this case.⁶⁵

New Legal Theories Unrelated Even to the Free Press Complaint.

In its July 17 filing, MAP interjects entirely new requests for relief *independent* of Commission action on Free Press’ Complaint.⁶⁶ These requests clearly come far too late and are without merit.⁶⁷ MAP’s new theory – that the

⁶⁰ *Am. Library Ass’n*, 406 F.3d at 698 (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)).

⁶¹ MAP July 22 *Ex Parte* at 8.

⁶² *Adelphia Order*, 21 FCC Rcd at 8299 (¶ 223) (“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)).

⁶³ Comcast July 21 *Legal Ex Parte* at 5.

⁶⁴ *Madison River Communications, LLC*, 20 FCC Rcd 4295 (Enforcement Bureau 2005).

⁶⁵ See Comments of Comcast Corporation, WC Docket No. 07-52, at 48 & n.137 (filed Feb. 12, 2008).

⁶⁶ MAP July 17 *Ex Parte* at 4 (suggesting that the Commission “consider, independent of any complaint filed, whether to suspend Comcast’s CARS licenses”).

⁶⁷ See, e.g., Comcast July 10 Response at 10.

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 12 of 18

Commission could institute proceedings to suspend Comcast's CARS licenses under the guise of addressing "interfere[nce] with any radio communications or signals"⁶⁸ – smacks of desperation, as the statutory provision it cites is plainly inapposite. First, the provision allows for suspension of the "license of any operator."⁶⁹ Based on this plain statutory language, the FCC has found that the provision applies to "radio operators rather than station licensees."⁷⁰ "Radio operators" are licensed pursuant to Parts 13 and 97 of the Commission's rules, governing "commercial radio operators" and "amateur radio operators," respectively.⁷¹ By contrast, Comcast's CARS licenses are issued pursuant to Part 78, governing the Cable Television Relay Service.⁷² Second, the provision cited by MAP applies to "*interference*," which is commonly understood among communications professionals to refer to *technical interference* with communications or signals. Nothing of the sort has been alleged by Free Press, MAP, or anyone else. Third, the P2P applications that MAP and Free Press have alleged Comcast's network management activities impede are not "radio communications or signals."

Some Welcome Admissions.

All of these failings aside, the recently submitted *ex parte* filings do include several commendable acknowledgments on the part of Free Press and MAP. Both Free Press and MAP now admit – as Comcast has explained⁷³ – that any attempt to impose a cease-and-desist order in response to the Complaint would have to be preceded, under Section 312(c), by a show cause order,⁷⁴ and thus that Free Press'

⁶⁸ MAP July 17 *Ex Parte* at 4; *see also* 47 U.S.C. § 303(m)(1)(E).

⁶⁹ 47 U.S.C. § 303(m)(1) (emphasis added).

⁷⁰ *Am. Television & Telecomms. Corp.*, 44 Rad. Reg. (P&F) 2d 923, 927 n.9 (1978).

⁷¹ 47 C.F.R. pt. 13.

⁷² *Id.* pt. 78.

⁷³ Comcast July 10 Response at 22.

⁷⁴ MAP July 17 *Ex Parte* at 3-4 ("[T]he Commission's next step [is] . . . to issue a show cause order . . . under Section 312(c)."); Free Press July 20 *Ex Parte* at 3 ("Here . . . the result is merely a show-cause order . . .").

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 13 of 18

theory in its legal memoranda of immediate enforcement action would exceed the Commission's statutory authority.⁷⁵ MAP also appears to recognize that the factual record is currently insufficient to show any "violation" of even the desired norms and standards of review, and expressly acknowledges that the burden of proof under Section 312 lies with the Commission.⁷⁶ MAP's caution regarding the Supreme Court's "skepticism" regarding Section 312(c) as a limit on FCC authority to issue injunctive relief should also be commended, as that "skepticism" is entirely dicta.⁷⁷ In making these comments, the Court made very clear that it was not faced with a cease-and-desist order arising under Section 312(c).⁷⁸

Of course, it follows from these admissions that no relief can be granted based on the Free Press Complaint. As Comcast has shown, it is clear under Section 312(b) that no standard of conduct newly promulgated in an adjudicatory proceeding could *ever* serve as the basis for a cease-and-desist order.⁷⁹ Adjudication is the "agency process for the formulation of an order,"⁸⁰ and Section 312(b) does not grant the FCC authority to act upon a violation of any *order* but, rather, only upon violations of statutes, rules, and treaties.⁸¹

⁷⁵ Compliance with the procedural requirements of Section 312 would not solve the myriad other problems with the contemplated action in response to the Free Press Complaint, such as the Commission's inability to make rules in an adjudication or the lack of statutory authority to adopt Free Press' desired legal norms in such a context. *See generally* Comcast July 10 Response at 12-17, 26-45.

⁷⁶ MAP July 17 *Ex Parte* at 4.

⁷⁷ *Id.* (citing *United States v. Sw. Cable Co.*, 392 U.S. 157, 179 n.46 (1968)).

⁷⁸ *Sw. Cable*, 392 U.S. at 180 ("The Commission's order was . . . not, in form or function, a cease-and-desist order that must issue under §§ 312(b), (c).").

⁷⁹ Comcast July 10 Response at 23.

⁸⁰ 5 U.S.C. § 551(7).

⁸¹ *See* 47 U.S.C. § 312(b).

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 14 of 18

The Third Circuit's CBS Decision.

Finally, we note the recent judicial decision in *CBS v. FCC*⁸² regarding the Commission's enforcement power in the context of broadcast indecency. The United States Court of Appeals for the Third Circuit vacated a Commission enforcement order as arbitrary and capricious. *CBS* is instructive here for three reasons.

First, the case provides yet another illustration of the fundamental difference between the use of adjudications in an enforcement proceeding to elaborate on a preexisting legal standard, and the situation presented here. In *CBS*, the FCC took enforcement action pursuant to a statute authorizing the agency to regulate indecent broadcast content and a corresponding administrative rule.⁸³ The policy statement at issue in *CBS* interpreted and provided guidance as to the Commission's enforcement policy under the statute, as the name of the statement itself made clear.⁸⁴ In the present case, there is no extant federal law, and the *Internet Policy Statement* was not a statement of intent regarding enforcement of any such law, as Comcast has repeatedly shown.⁸⁵

The two examples that Free Press cited most recently – the fairness doctrine and the *Carterfone* case⁸⁶ – do not contradict *CBS* on this point. In both circumstances, the agency action was founded on a preexisting statutory standard.

⁸² No. 06-3575 (3d Cir. July 21, 2008).

⁸³ See *CBS*, slip op. at 5 (“In this petition for review, CBS appeals orders of the Federal Communications Commission imposing a monetary forfeiture . . . for the broadcast of ‘indecent’ material in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999); see also *id.* at 36 n. 13 (describing 18 U.S.C. § 1464 as “the source of [the FCC’s] authority to regulate broadcast content); *id.* at 77 (noting that “broadcast licensees’ duties with respect to the content of broadcast material are defined by statute under 18 U.S.C. § 1464 and by the corresponding agency rule, 47 C.F.R. § 73.3999(b)).

⁸⁴ See *id.* at 9 (citing *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)).

⁸⁵ See Comcast July 10 Response at 5-12, 13 & n.91, 31-41; Comcast July 21 Legal *Ex Parte* at 1-2.

⁸⁶ See Free Press July 20 *Ex Parte* at 2.

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 15 of 18

The Supreme Court has recognized that the fairness doctrine derives from the FCC's statutory duty to "consider the demands of the public interest in the course of granting licenses, renewing them, and modifying them" pursuant to Sections 307 and 309 of the Communications Act, which expressly give the agency substantive "public interest" authority over the grant of radio licenses.⁸⁷ The Federal Radio Commission, which first applied the fairness doctrine in 1929,⁸⁸ was subject to a similar statutory duty under sections 9 and 11 of the Radio Act of 1927.⁸⁹ Indeed, in the *Great Lakes Broadcasting* decision that Free Press cites,⁹⁰ the Federal Radio Commission was exercising its substantive authority to grant a license in "the public interest."⁹¹ In any case, a court or agency decision that predates the enactment of the Administrative Procedure Act⁹² in 1946 is not remotely relevant to the question whether the FCC has discretion, under the APA, to proceed by either adjudication or rulemaking in the instant matter. As for the *Carterfone* case, the "policy-making" referenced by Free Press⁹³ was a decision regarding whether a tariff was unreasonable and unlawful under Sections 201(b) and 202(a) of the Act.⁹⁴ The same is true of the Commission's *Character Policy Statement*, vaguely referenced

⁸⁷ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 379-80 (1969) (citing 47 U.S.C. §§ 307, 309(a)).

⁸⁸ *See id.* at 377.

⁸⁹ Radio Act of 1927, Pub. L. No. 69-632, §§ 9, 11, 44 Stat. 1163.

⁹⁰ Free Press July 20 *Ex Parte* at 2.

⁹¹ *Great Lakes Broad. Co.*, 3 F.R.C. Ann. Rep. 32, 32 (1929) (explaining that, in making a licensing decision among three broadcasting stations, the Commission must consider the public interest), *rev'd on other grounds sub. nom Great Lakes Broad. Co. v. Fed. Radio Comm'n*, 37 F.2d 993 (D.C. Cir. 1930).

⁹² Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237.

⁹³ Free Press July 20 *Ex Parte* at 2.

⁹⁴ *See Use of the Carterfone Device in Message Toll Tel. Serv.*, Decision, 13 FCC 2d 420, 426 (1968).

Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 16 of 18

in MAP's recent filing,⁹⁵ as that document set forth guidance regarding Sections 308(b), 319(a), and 310(d) of the Communications Act.⁹⁶

Second, *CBS* makes clear that even when the agency is operating pursuant to a preexisting legal standard (which it is not here), it still cannot depart from a prior policy of regulatory "restraint"⁹⁷ without acknowledging the departure, supplying notice of the departure, and giving an adequate explanation for the departure.⁹⁸ As Comcast has explained, the FCC has long held the view, consistent with governing Congressional policy, that the Internet should be unregulated, and any departure from that practice here must similarly be acknowledged and explained.⁹⁹

Finally, *CBS* emphasizes that any effort by the Commission to apply a new policy to conduct that predates such a policy creates problems under the Due Process Clause.¹⁰⁰ Here, even if the Commission now attempted to create a new binding legal norm governing broadband network management, that norm could not lawfully be applied to the conduct at issue in the Complaint, as Comcast has

⁹⁵ MAP July 22 *Ex Parte* at 7.

⁹⁶ *Policy Regarding Character Qualifications In Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179, 1180 (¶ 2) (1986).

⁹⁷ See *CBS*, slip op. at 13 (observing that "[t]he FCC possesses authority to regulate indecent broadcast content, but it had long practiced restraint in exercising this authority").

⁹⁸ See *id.* at 14 (reasoning that "[the FCC] cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure" and invalidating the enforcement order "[b]ecause the FCC failed to satisfy this requirement").

⁹⁹ See Comcast July 21 Legal *Ex Parte* at 4 & n.26.

¹⁰⁰ See *CBS*, slip op. at 28 (noting that application of the new policy announced in March 2004 to the broadcasting of the material at issue in February 2004 "would amount to a retroactive application . . . , which would raise due process concerns") (citing *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000)); see also *id.* at 21 (observing that "the Commission made it clear" that "it would be 'inappropriate' to sanction licensees for conduct prior to notice of policy change"); *id.* at 28 (observing that "the policy in effect when the incident . . . occurred" is the legally relevant policy).



Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 17 of 18

noted;¹⁰¹ indeed, the allegations in the Complaint concern, at most, the time period from February 2007 to October 2007, almost a full year ago.¹⁰²

* * *

The simple fact of the matter is that there is no plausible legal theory that could support any action by the FCC on Free Press' Complaint (or Petition), other than dismissal. The last-minute attempts by Free Press and others to demonstrate otherwise are based on distortions of the relevant law and thus unavailing, and serve only to highlight the numerous procedural and substantive deficiencies in Free Press' request for relief.

Please let us know if you have any questions.

Sincerely,

/s/ Helgi C. Walker

Helgi C. Walker
Eve Klindera Reed
Elbert Lin
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006

Attorneys for Comcast Corporation

¹⁰¹ See Comcast July 10 Response at 18, 22-23.

¹⁰² See Complaint at 39 (Declaration of Robert M. Topolski) (alleging problems with Comcast broadband service “[i]n March 2007” and “May 2007”); *id* at 42 (Declaration of Adam Lynn) (alleging problems “[o]n October 19, 2007”); *id.* at 44 (Declaration of Jeffrey Pearlman) (alleging problems “[f]rom February 1, 2007 to October 15, 2007”).



Ms. Marlene H. Dortch
Secretary, FCC
July 24, 2008
Page 18 of 18

cc: Amy Bender
Scott Bergmann
Matthew Berry
Amy Blankenship
Catherine Bohigian
Scott M. Deutchman
Angela Giancarlo
Daniel Gonzalez
Nick Alexander
Christopher Killion
Greg Orlando
Ajit Pai
Dana Shaffer