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January 30, 2009

VIA ELECTRONIC MAIL AND ECFS

Ms. Dana Shaffer
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Matthew Berry
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **In the Matter of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, File No. EB-08-IH-1518**

In the Matter of Broadband Industry Practices; 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

Dear Ms. Shaffer and Mr. Berry:

We are in receipt of your letter of Sunday, January 18, 2009. In this response, we try to clear up any misunderstanding you may have about our September 19, 2008 filing on our congestion management practices.

As you know, we fully complied with the Commission's August 20, 2008 Order[1] by submitting the mandated filings on September 19, 2008,[2] and transitioning from our old congestion management practices by December 31, 2008.[3] As our letter of January 5, 2009 made clear, our new congestion management techniques have been instituted throughout Comcast's High-Speed Internet ("HSI") network.[4] We are pleased that the response to our

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1 *In re Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling That Degrading an Internet Application Violates the FCC's Internet Policy Statement & Does Not Meet an Exception for "Reasonable Network Management*," Mem. Op. and Order, 23 FCC Rcd. 13028 (2008) ("*August 20 Order*").

2 *See* Ex Parte Letter from Kathryn A. Zachem, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52, File No. EB-08-IH-1518 (Sept. 19, 2008) ("*September 19 Disclosures*").

3 *See* Ex Parte Letter from Kathryn A. Zachem, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52, File No. EB-08-IH-1518 (Jan. 5, 2009).

4 *Id.*

September 19 Disclosures has been overwhelmingly positive, and that the transition to our new protocol-agnostic congestion management practices was completed successfully and on time. Throughout this transition, during which we also upgraded over 20% of our network to wideband DOCSIS 3.0 technology, our highest priority has been to continue to offer the best possible high-speed Internet service for our customers, and we have done so. American consumers continue to choose Comcast HSI in ever-greater numbers.

Your letter asks about an "apparent discrepancy" between the September 19 Disclosures and one of the answers to the Frequently Asked Questions ("FAQs") published on the Comcast.net website.[5] There is, in fact, no discrepancy. The network management techniques at issue in this proceeding affected solely traffic that is delivered to and from our subscribers as part of our HSI service. Our response to the Enforcement Bureau's informal inquiry on January 25, 2008, and every filing we have made in the "Network Management" proceeding from February 12, 2008 to January 5, 2009, reflects this common understanding. The August 20 Order, which focused exclusively on Comcast in its role as "a provider of *broadband Internet access* over cable lines," also reflected this understanding.[6]

The language from the September 19 Disclosures that you have quoted in your letter clearly disclosed the experience that certain subscribers potentially could have when using their Voice-over-Internet-Protocol ("VoIP") applications with Comcast's HSI service. This might occur during the limited times when the HSI network in a given area is experiencing congestion, and would in all likelihood affect only a subscriber who has temporarily triggered congestion management thresholds due to his or her own bandwidth consumption.

In contrast, the language you have quoted from our FAQs webpage refers to our Comcast Digital Voice ("CDV") service. CDV is a service separate from Comcast's HSI service; it does not run over Comcast's HSI service. Because it is a separate service, it was not implicated in any way by Free Press's original "Complaint" or Petition for Declaratory Ruling, by the Commission's August 20 Order, or by Comcast's September 19 Disclosures. CDV, like Vonage or Skype, is an *IP-enabled* voice service (i.e., it uses Voice-over-Internet-Protocol to deliver the service). However, unlike Vonage, Skype, or several other VoIP services, CDV is *not* an application that is used "over-the-top" of a high-speed Internet access service purchased by a consumer. Significantly, CDV customers do not need to subscribe to Comcast HSI service, and Comcast does not route those CDV customers' traffic over the public Internet. Rather, as the Commission is aware, our CDV service is based on PacketCable™ specifications that "mandate[] the use of a managed IP network, in that services are not delivered over the Internet."[7] Many companies offer IP-enabled services over their networks, including voice and video services that are distinct from their high-speed Internet access service.

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[5] *See* Letter from Dana R. Shaffer & Matthew Berry, FCC, to Kathryn A. Zachem, Comcast Corp., WC Docket No. 07-52, File No. EB-08-IH-1518, at 1 (Jan. 18, 2009) ("*January 18 Letter*").

[6] *August 20 Order* ¶ 1 (emphasis added).

[7] *See IP Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 ¶ 11 & n.42 (2004) ("*IP Enabled Services NPRM*"). PacketCable™ is a suite of Technical Reports and Specifications that have been

With the express encouragement of Congress and the Commission, Comcast and other cable companies have invested tens of billions of dollars of private risk capital over the past decade to develop and deploy the broadband networks that make a full range of IP-enabled services possible. CDV, competing directly against the dominant local Bell telephone companies, has been a great consumer success.[8] And by rolling out Comcast HSI service over a decade ago, we proved the skeptics wrong by demonstrating that there is strong demand for cable modem broadband Internet service. We built a platform for innovation that empowers huge numbers of Internet-based applications and services, from VoIP to video to cloud computing and beyond.[9] The economic and societal return on this investment in innovation has accrued not just to Comcast, but to tens of millions of American consumers, businesses, and entrepreneurs. We are now proceeding rapidly with the deployment of DOCSIS 3.0, making world-class Internet speeds available to millions of households and ushering in a new era of innovation.

To succeed in a competitive marketplace, our HSI service must provide a hospitable environment for the full range of Internet-based applications and services, including over-the-top VoIP and video. We devote enormous resources to that end. To the extent our HSI service becomes congested at times of very high demand, our new congestion management practices *treat all Internet-based applications and services the same*, whether they are affiliated with Comcast (e.g., Fancast) or not (e.g., Hulu, YouTube).

As we painstakingly developed our new congestion management techniques, we consulted with many Internet engineering experts, Internet applications providers, and Internet advisory bodies. We were particularly mindful of latency-sensitive applications. For example, last July, Comcast and Vonage agreed to collaborate to ensure that, on an ongoing basis, congestion management techniques are chosen that effectively balance the need to avoid network congestion with the need to ensure that over-the-top VoIP applications work well for consumers.[10]

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accepted as standards by several North American and International standards organizations, including the Society of Cable Telecommunications Engineers, the American National Standards Institute, and the International Telecommunications Union. *See, e.g.*, Press Release, CableLabs, *ITU Standardizes on PacketCable™ 1.5 Suite* (Jan. 26, 2006), *available at* http://www.cablelabs.com/news/pr/2006/06_pr_itu_pc15_012606.html.

[8] An economic report by MiCRA calculated that the consumer benefits directly from cable voice competition would amount to over $17.2 billion over the course of 5 years from 2008 to 2012, and over $111 billion in consumer benefits over the same period after factoring in the likely ILEC competitive response. *See* Dr. Michael D. Pelcovits & Daniel E. Haar, MiCRA, *Consumer Benefits from Cable-Telco Competition*, at iii-iv (Nov. 2007) *available at* http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf.

[9] The term "Internet-based applications and services" refers to applications and services that send or receive traffic over the public Internet.

[10] *See* Ex Parte Letter from Kathryn A. Zachem, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52, at 2 (July 10, 2008) (noting that "Comcast and Vonage announced a collaborative effort to ensure that any network management technique Comcast chooses to deploy effectively balances the need to avoid network congestion with the need to ensure that VoIP services like Vonage work well for consumers").

Finally, your letter poses several questions that are completely outside the scope of the Network Management proceeding, and your discussion of these matters contains numerous factual and legal flaws. For example, any analogy of CDV service to the AT&T service at issue in the *IP-In-The-Middle* proceeding is inapt.[11] In contrast to the service the Commission examined in that proceeding, CDV is an "interconnected VoIP service" as that term is defined in the Commission's rules,[12] and, as we have explained in other proceedings where these questions are relevant, CDV is properly classified as an information service.[13] Your suggestion that services that use "telecommunications" are necessarily "telecommunications services" because "the 'heart of "telecommunications" . . . is transmission'" is directly contrary to multiple Commission rulings (and one Supreme Court decision), all of which emphatically refute that notion.[14] For example, the Commission said in the *Cable Modem Ruling* that, "[a]lthough the transmission of information . . . may constitute 'telecommunications,' that transmission is not necessarily a separate 'telecommunications service,'"[15] and no Bureau or Office has delegated authority to countermand a Commission decision.

In other words, simply because an information service such as CDV uses transmission does not make it a "telecommunications service." Instead, the Commission must engage in an analysis of the services provided to determine the applicable regulatory classification.[16] In that regard, as you know, there are several industry-wide rulemaking proceedings awaiting Commission action that are relevant here. For example, many of the issues raised by your questions have been fully briefed in the *IP-Enabled Services* proceeding, in which the Commission issued a Notice of Proposed Rulemaking ("NPRM") and has heard from numerous parties about the vast panoply of services that can be provided using the Internet Protocol.[17]

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[11] See *January 18 Letter* at 2. As we explained in our comments in the *IP-Enabled Services* docket, "one can readily identify numerous distinctions" between CDV and the AT&T services at issue in that proceeding. *See* Comments of Comcast Corp., WC Docket No. 04-36, at 13-14 (May 28, 2004) (highlighting at least seven differences between VoIP services such as Comcast's CDV and the AT&T services at issue in that proceeding).

[12] *See* 47 C.F.R. § 9.3.

[13] *See, e.g.*, Comments of Comcast Corp., WC Docket No. 05-337, at 17-21 (Nov. 26, 2008).

[14] *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), *aff'g In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Internet over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) ("*Cable Modem Ruling*").

[15] *Cable Modem Ruling* ¶ 40 (internal citations omitted). Notably, your suggestion that CDV is not an information service is directly contrary to one of the proposals put forward by the Commission less than three months ago to reform the Universal Service Fund and the intercarrier compensation regime. *See High-Cost Universal Service Support; Universal Service Contribution Methodology; Developing a Unified Intercarrier Compensation Regime; et al*, Order on Remand and Report & Order and Further Notice of Proposed Rulemaking, FCC-08-262, app. C ¶ 204 (2008) ("*USF/ICC Reform NPRM*") (proposing to classify as an information service "those services that originate calls on IP networks and terminate them on circuit-switched networks, or conversely that originate calls on circuit switched networks and terminate them on IP networks").

[16] *Cable Modem Ruling* ¶ 35 ("None of the [relevant] statutory definitions rests on the particular types of facilities used. Rather, each rests on the function that is made available.").

[17] *See IP Enabled Services NPRM* ¶ 1 ("In this [NPRM], we examine issues relating to services and applications making use of Internet Protocol (IP), including but not limited to voice over IP (VoIP) services….").

Moreover, there is a separate proceeding on intercarrier compensation that has been fully briefed and which is awaiting Commission action.[18] Those would be the appropriate proceedings, on issues of general applicability to providers of IP-enabled services, in which to address your closing questions, and it would be inappropriate and in excess of delegated authority for any Bureau or Office to decide the answers to those questions before the full Commission has done so.

We hope this letter clarifies the "apparent discrepancy" you perceived, as well as the related questions in your letter.

Sincerely,

/s/ Kathryn A. Zachem
Kathryn A. Zachem
Vice President,
Regulatory and State Legislative Affairs
Comcast Corporation

cc: Acting Chairman Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell
Rick Chessen
Scott Bergmann
Nick Alexander
Kris Monteith
Scott Deutchman

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[18] *See USF/ICC Reform NPRM* ¶¶ 38-41.