ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 08-1291

COMCAST CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

CHRISTINE A. VARNEY
ASSISTANT ATTORNEY GENERAL

PHILIP J. WEISER
DEPUTY ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

AUSTIN C. SCHLICK
GENERAL COUNSEL

JOSEPH R. PALMORE
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

JOEL MARCUS
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici:

All parties and amici are listed in the brief of Petitioners.

B. Ruling Under Review:

In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation 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 and Does Not Meet an Exception for "Reasonable Network Management," Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008) (JA).

C. Related Cases:

Petitions for review of the ruling under review were filed in the Second, Third, and Ninth Circuits, transferred to this Court, and consolidated with this case. By Order of April 1, 2009, the Court subsequently dismissed all of the transferred cases for lack of jurisdiction. No. 08-1302 No. 08-1318; No. 08-1320.

Private party litigation was filed against Comcast in six federal district courts under the following case names and numbers seeking state law relief arising out of the same conduct and practices that are at issue in this case:

Hart v. Comcast, No. 07-6350 (N.D. Cal.)
Leigh v. Comcast, No. 08-4601 (C.D. Cal.)
Lis v. Comcast, No. 08-3984 (N.D. Ill.)
Libonati v. Comcast, No. 08-3518 (D.N.J.)
Topolski v. Comcast, No. 08-852 (D. Ore.)
Tan v. Comcast, No. 08-2735 (E.D. Pa.)

By order of the United States Judicial Panel on Multidistrict Litigation, (MDL No. 1992, Order of Dec. 5, 2008), those cases have been transferred to the Eastern District of Pennsylvania and consolidated under the name *In Re: Comcast Peer-to Peer Transmission Contract Litigation*, No. 08-md-01992. The matter remains pending before that court.

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GLOSSARY

AP	Associated Press. A newspaper wire service that helped discovery Comcast's blocking of peer-to-peer applications.
DSL	Digital Subscriber Line Service. A type of broadband Internet connection over telephone lines.
EFF	Electronic Freedom Forum. An advocacy group that helped discover Comcast's efforts to block usage of peer-to-peer applications.
ISP	Internet Service Provider. A company that provides its customers with access to the Internet.
P2P	Peer-to-peer. A type of Internet application that allows the sharing of files and enables Internet-based services such as video distribution. Comcast interfered with peer-to-peer applications.
RST	A packet of information used in the transfer control protocol that instructs a computer to terminate a connection. Comcast sent bogus RST packets to its Internet access customers in order to interfere with their use of peer-to-peer applications.
TCP	Transfer Control Protocol. An Internet protocol that governs the transfer of data over the Internet.
VOIP	Voice over Internet Protocol. Voice service, equivalent to traditional telephone service, but conducted over the Internet.

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

Petitioner, Comcast Corporation, covertly interfered with the ability of its cable modem service subscribers to use an important technology known as "peer-to-peer" networking, which supports a broad range of Internet capabilities, including distribution of audio and video programming. Peer-to-peer technology poses a competitive threat to lines of business engaged in by cable providers such as Comcast, including video-on-demand. In the order on review, *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation*, 23

FCC Rcd 13028 (2008) (*Comcast Order*) (JA), the Federal Communications Commission ruled that Comcast's clandestine traffic-blocking violated federal policies Congress established in the Communications Act.

During the course of the agency proceeding, Comcast informed the agency that it had decided to discontinue the contested practice. In fashioning a remedy, the Commission therefore merely directed Comcast to verify that it had stopped the practice, to disclose the details of the former practice, to submit a compliance plan for a transition to a new network management regime, and to disclose any other network management practices that it intended to deploy that would limit customer access to Internet content.

The questions presented are:

1. Whether the FCC had the authority to require verification that Comcast had discontinued its practice of secretly blocking the use of Internet applications and to require Comcast to disclose any other practices that prevent customer access to Internet applications; and

2. Whether the FCC permissibly considered Comcast's actions in an adjudication rather than a rulemaking.

JURISDICTION

Final orders of the FCC are reviewable pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes are attached hereto.

COUNTERSTATEMENT

The Internet has rapidly become the dominant means of nationwide and worldwide information exchange. An array of technological progress and new services available over the Internet – from telephone voice service, to music and video distribution, to unprecedented access to entertainment, research, news, and governmental resources – have changed the way Americans communicate and do business.

Internet users in the United States gain access to the Internet through FCC-regulated communications facilities, including telephone lines, cable television lines, wireless devices, and satellites. At first, most Internet users subscribed to a dial-up Internet service provider (ISP), which provided access over ordinary voice service lines. In recent years, dial-up access has been largely supplanted by high speed "broadband" access, such as cable modem and telephone-based digital subscriber line (DSL) service, both of which are also carried on wire-based communications facilities regulated by the FCC. The number of residential high speed lines grew from about 3 million in 2000 to almost 66 million in 2007. *Deployment of Advanced Telecommunications Capability*, 23 FCC Rcd 9615, 9664

Table 3 (2008). As of 2007, cable modem service accounted for about half of the residential high speed market. *Id.* Chart 6.

1. Regulation of cable modem service is rooted in an historical distinction that the FCC drew in the days of the Bell System monopoly. "Basic service" referred to the transmission of information without computer processing, as in telephone voice service, and was regulated as common carriage. "Enhanced service" involved computer processing applications, such as data storage and the ability to communicate between networks. *See NCTA v. Brand X Internet Services*, 545 U.S. 967, 976-977 (2005) (*Brand X*), citing *Second Computer Inquiry*, 77 FCC 2d 384, 417-423 (1980) (*Computer II*), *aff'd Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA*). The Commission determined in the 1980s not to subject enhanced services to the full panoply of common carrier regulation, but it retained regulatory power over enhanced services. Pursuant to that "ancillary" authority, the agency imposed a number of regulatory restrictions, such as structural separation and non-discrimination requirements, on certain enhanced services providers. *Computer II*, 77 FCC 2d at 474. This Court affirmed those regulations. *CCIA*, 693 F.2d at 213, 214.

The Telecommunications Act of 1996 subsequently codified the distinction between a carrier's offering of basic and enhanced service. Congress drew upon the existing service categories to create two analogous categories called

"telecommunications service" and "information service." 47 U.S.C. §§ 153(20) & (46); *see Brand X*, 545 U.S. at 992 ("Congress passed the definitions in the Communications Act against the background of this regulatory history, and we may assume that the parallel terms 'telecommunications service' and 'information service' substantially incorporated their meaning, as the Commission has held."). Telecommunications service, the analog to the common carrier offering of basic service, includes voice telephone service and is subject to regulation under Title II of the Communications Act. *Brand X*, 545 U.S. at 977. Information service, the analog to enhanced service, is "not subject to mandatory Title II common-carrier regulation," *id*. at 978, but "the Commission has jurisdiction to impose additional regulatory obligations" as necessary on providers of information service under the agency's general authority, *id*. at 976.

2. In 2002, the FCC determined that cable modem service is an information service rather than a telecommunications service subject to mandatory common carrier regulation. *High-Speed Access to the Internet Over Cable*, 17 FCC Rcd 4798 (2002), *aff'd Brand X*, 545 U.S. 967. In reviewing that determination, the Supreme Court noted that the court of appeals in the case had held that the "best" reading of the statute was that cable modem service was a "telecommunications service." *Brand X*, 545 U.S. at 984. The Supreme Court did not disagree, but held that the lower court had applied the wrong standard: the only question was

whether the Commission's classification decision was based on a reasonable (even if not the "best") interpretation of the statute. *Id*. at 984-985. The Court held that the Commission's construction was reasonable. *Id*. at 997-1000.

As a result of the Commission's classification decision, cable modem providers are not common carriers subject to mandatory Title II regulation. But the Commission nonetheless retained the traditional ancillary authority it had long exercised over enhanced services. The Supreme Court recognized in *Brand X* that because the Act's definitions of "telecommunications service" and "information service" "parallel the definitions of enhanced and basic service … the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction." 545 U.S. at 996.

The Commission made the same point in 2005 when it classified high speed DSL service – broadband Internet access provided over telephone lines – as an information service. Although Title II obligations "have never *generally* applied to information services," the Commission found, the agency sometimes "has deemed it necessary to impose regulatory requirements on information services … pursuant to its Title I ancillary jurisdiction." *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, 14913 ¶108 (2005) (*DSL Order*) (emphasis added). Thus, classifying DSL, which had long been subject to regulation under Title II, as an information service did not "deny [the

FCC] the ability to oversee broadband interconnectivity," and the agency has "authority to continue overseeing broadband … regardless of the legal classification." *Id*. at 14919 ¶120. *See also Implementation of Sections 255 and 251(a)(2)*, 16 FCC Rcd 6417, 6455-6457 (1999) (ancillary jurisdiction covers information service).

On the same day that it classified DSL service as an information service, the FCC announced a set of principles to inform its oversight of all types of broadband Internet access. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Policy Statement*, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*). The principles were intended to effectuate the "national Internet policy" set forth in section 230(b) of the Communications Act, 47 U.S.C. § 230(b). In section 230(b), Congress declared it "the policy of the United States" to "promote the continued development of the Internet," "to preserve the vibrant and competitive free market that presently exists for the Internet," and to "maximize user control over what information is received by individuals, families, and schools who use the Internet." 47 U.S.C. §§ 230(b)(1)–(3). Relatedly, in Section 706(a) of the Telecommunications Act of 1996, Congress charged the FCC with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability [i.e., broadband access] to all Americans." 47 U.S.C. § 1302(a), formerly codified at 47 U.S.C. § 157 nt.

In keeping with the statutory policies, when it reclassified wireline broadband Internet access, the Commission announced its principles of Internet access to ensure that "broadband networks are widely deployed, open, affordable, and accessible to all consumers" and that Internet access services "are operated in a neutral manner." *Internet Policy Statement*, 20 FCC Rcd at 14988 ¶4. The specific principles most relevant here are that "consumers are entitled to access the lawful Internet content of their choice" and "to run applications and use services of their choice" – "subject to reasonable network management" requirements. *Ibid*. & n.15 (JA). Those principles carry out Congress's directives in sections 230(b) and 706(a) "to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet." *Id*. ¶4 (JA). Although the Commission did not amend its codified rules to incorporate the *Internet Policy Statement*, the agency indicated that it would incorporate the articulated principles "into its ongoing policymaking activities" in this rapidly changing field. Id. ¶5.

3. In mid-2007, customers of petitioner Comcast, a major broadband provider serving more than 14 million customers, started to have trouble using an Internet application known as BitTorrent. BitTorrent is a "peer-to-peer" application that enables the efficient sharing of data among Internet users. Peer-to-peer networking supports the Internet-based distribution of video programming. *Comcast Order* ¶4 (JA). Peer-to-peer technology can also support other

applications, including the provision of voice service. Skype, for example, uses peer-to-peer applications in its Internet-based voice communications business. Comments of the Open Internet Coalition filed Feb. 13, 2008 at 6 (JA). BitTorrent and other peer-to-peer technologies therefore pose a competitive threat to lines of business engaged in by cable television operators such as Comcast. *Comcast Order* ¶5 (JA). To comprehend Comcast's unlawful response to that threat in this case, it is necessary to understand the nature of connections on the Internet.

a. The Internet uses "packet switched" communications in which information exchanged between two computers is broken into multiple packets of data, which are transmitted individually – but not necessarily by the same route – to their destination. At the destination, the data packets are reassembled into their original order. There is no need for an exclusive path between the two endpoints. *See IP-Enabled Services*, 19 FCC Rcd 4863, 4869-4870 (2004).

The creation and transmission of data packets are governed by standardized rules, called protocols, the most common of which is the Transmission Control Protocol or TCP, which continuously monitors the user's connection to ensure that packets are delivered without error and in the correct sequence. Under TCP, if the computer at either end of the communications link detects a problem in the connection, it sends a reset or RST packet, which signals that the current

connection should be terminated and a new one established. *Comcast Order* ¶3 (JA).

BitTorrent, like many other peer-to-peer applications, works by allowing large information files, such those containing a movie, to be accessed in pieces from multiple computers. For example, an end user who seeks to download a movie through BitTorrent may receive different parts of the movie simultaneously from various other consumers who have that movie (or parts of it) stored on their computers and who use the same BitTorrent-based application. Dispersed storage eliminates the need for a central data repository that must hold large amounts of information and must have the capability to accommodate numerous requests for data. It also compensates for the disparity between upload and download speeds offered by most Internet access providers in the United States. Internet access services typically allow users to download information *from* the Internet many times faster than they can upload information *to* the Internet. Uploading from many different sources at once helps to compensate for the disparity between upload and download speeds and to eliminate the upload chokepoint that would occur if one user attempted to send a large file to another user. *See Comcast Order* ¶4 (JA); Vuze Petition filed Nov. 14, 2007 at 6-9 (JA -); Formal Complaint of Free Press filed Nov. 1, 2007 at 15-16 (JA -).

b. Comcast first claimed that it bore no responsibility for its customers' problems using BitTorrent. In August 2007, Comcast's spokesperson stated that Comcast is not "blocking any access to any application, and we don't throttle any traffic." *See Comcast Order* ¶6 & n.15 (JA -).

In October 2007, however, Associated Press announced that its nationwide investigation showed that Comcast "actively interferes with attempts by some of its high-speed Internet subscribers to share files online," making the use of BitTorrent "difficult or impossible." *Comcast Order* ¶7 & n.17 (JA). AP's analysis showed that Comcast was using a technology called "deep packet inspection" to examine individual packets and determine if they were using BitTorrent technology. As the Commission put it later, it was as though Comcast was reading its customers' mail. *Id*. ¶41 (JA). When one BitTorrent user attempted to upload data for receipt by another user, Comcast would send both users' computers bogus RST packets that terminated the connection, seemingly at the request of the other user. *Id*. ¶8 (JA). A month later, the Electronic Frontier Foundation (EFF) published the results of its own study similarly showing that Comcast interfered with BitTorrent uploads by delivering spurious RST packets. *Ibid*.

When an Internet user seeking a file through BitTorrent receives a fraudulent RST packet generated by Comcast, that user's computer must locate another source of the particular piece of the file it was expecting to receive. In some cases,

particularly involving material that is not popular (and thus not located on many users' computers), the information may not be available elsewhere, in which case the requesting user – who could be a customer of Comcast or another service provider – is effectively disabled from downloading the information. In other cases, the material may be available on another computer using a service provider that does not block uploads. The latter outcome can both delay the customer's receipt of the data and shift traffic from Comcast's network to the non-blocking service provider's network. *See Comcast Order* n.201 (JA); Reply Comments of Free Press at 12 (JA).

In November 2007, in the wake of the AP's and EFF's investigations, Intervenor Free Press and others filed with the Commission a number of requests for action: a formal complaint against Comcast asking the Commission to enjoin Comcast from interfering with access to peer-to-peer services and to impose substantial fines on Comcast for its past interference; a petition for a declaratory ruling asking the agency to find that Comcast had unlawfully interfered with peer-to-peer traffic; and a petition for a rulemaking asking the Commission to adopt rules governing Internet network management. *Comcast Order* ¶¶10-11 (JA -). The Commission gave Comcast the opportunity to file responses to the complaint and the petitions. *See id*. ¶10 & n.36 (JA ,).

In its initial response to the Free Press petition, Comcast admitted that it had targeted peer-to-peer applications for interference by issuing sham RST packets, but claimed that it did so only to relieve network congestion during peak usage periods. *Comcast Order* ¶9 (JA -), citing Comcast Comments of February 12, 2008 at 27-28 (JA -). Other evidence submitted in the record proved that claim untrue. *Id*. ¶9 (JA), citing Comments of Robert M. Topolski, filed Feb. 25, 2008 at 3-4 (JA -).

In a July 2008 filing with the Commission, Comcast admitted that it was interfering with peer-to-peer traffic "regardless of the level of overall network congestion at the time, and regardless of the time of day." *Comcast Order* ¶9 (JA), quoting Letter of July 10, 2008 from Kathryn A. Zachem to Marlene H. Dortch, FCC Secretary (JA). The Commission later found that Comcast's denial of its practice in its initial filings with the Commission "raise[d] troubling questions about Comcast's candor" toward the agency. *Comcast Order* n.31 (JA). Comcast, moreover, had not informed its customers of its practice of restricting their access to peer-to-peer applications. *Id*. ¶53 (JA).

4. In the *Comcast Order*, the Commission determined that Comcast had violated federal Internet policy established by Congress in the Communications Act. As events unfolded, however, the agency found it necessary to take only very limited remedial steps.

The Commission found that it had jurisdiction over Comcast's blocking practice pursuant to Congress's broad grant of authority over "all interstate and foreign communication by wire or radio," 47 U.S.C. § 152(a), and the legislature's concomitant grants of power to "execute and enforce the provisions of" the Communications Act, 47 U.S.C. § 151, and to "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," 47 U.S.C. § 154(i).

The Commission found further that exercising authority over Comcast's cable modem practices was reasonably ancillary to the Commission's execution of its responsibilities under sections 230(b) and 706(a). *Comcast Order* ¶¶15-16 (JA -). In addition to those two provisions, which address the Internet directly, the Commission also found that jurisdiction in this case was reasonably ancillary to other sections of the Communications Act that govern services, including telephone voice service and television service, that are affected by Comcast's interference with broadband access. *Id*. ¶¶17, 19-21 (JA , -).

The Commission found in particular that Comcast's practices present both a "risk to the open nature of the Internet" – in violation of federal Internet policies that favor maximum customer choice of Internet content and applications – and a "danger of network management practices being used to further anticompetitive ends." *Comcast Order* ¶50 (JA). For example, peer-to-peer applications present

"a source of video programming … that could rapidly become an alternative to cable television. The competition provided by this alternative should result in downward pressure on cable television prices, which have increased rapidly in recent years." *Id*. ¶16 (JA). Thus, Comcast's blocking of peer-to-peer traffic triggered the Commission's ancillary authority to safeguard the purposes of 47 U.S.C. § 543, which addresses cable rates.

The Commission found it best to act against Comcast by adjudication rather than by rulemaking. The Commission identified a need to "proceed cautiously because the Internet is a new medium, and traffic management questions like the one presented here are relatively novel." *Comcast Order* ¶30 (JA). The FCC thus declined, on the record before it, to codify a hard and fast rule "at this time," leaving the door open to conducting a rule-making as it developed more experience with the issues. *Ibid*.

The Commission then found that Comcast had violated federal Internet policy by blocking peer-to-peer traffic over its network. "The record leaves no doubt that Comcast's network management practices discriminate among applications and protocols rather than treating all equally." *Comcast Order* ¶41 (JA). Moreover, the practices were "invasive and outright discriminatory," affecting between forty and seventy-five percent of all peer-to-peer connections entered into by Comcast customers. *Id*. ¶42 (JA). Such a practice violated the

policies of allowing customers to "run applications … of their choice" and being able to "access the lawful Internet content of their choice." *Comcast Order* ¶43 (JA). And by targeting cutting-edge peer-to-peer technologies, Comcast's practice discouraged the "development of technologies that maximize user control over what information is received" and thus interfered with the "continued development of the Internet" in general. *Ibid.*

The Commission rejected Comcast's claim that its practice of sending counterfeit RST packets was a reasonable network management practice. Comcast's practice, the Commission stated, "contravenes the established expectations of users and software developers," *Comcast Order* ¶45 (JA), and amounts to a "form of censorship and filtering rather than management," *id.* ¶46 (JA). Moreover, by selectively blocking and impeding file sharing applications that are used by competing video distribution services, Comcast's practice "poses significant risks of anticompetitive abuse." *Id.* ¶47 (JA).

Nor was Comcast's traffic-blocking tailored to managing network congestion. Comcast engaged in the practice at all times of the day, not only when the network was congested, and it interfered with customers' use of disfavored applications and services without regard to their bandwidth consumption. *Comcast Order* ¶48 (JA). Indeed, Comcast did not interfere with applications other than peer-to-peer applications that consume greater bandwidth. *Ibid.* Comcast could

have employed alternative network management practices that did not disfavor particular applications and content, such as charging Internet access customers a fee for excess bandwidth usage. *Id*. ¶49 (JA).

That left the question of remedy. In an enforcement case, the Commission ordinarily directs a violator to stop engaging in the unlawful practice. Such action was not necessary here, however, because during the course of the proceeding Comcast had informed the Commission that it had determined to end its practice voluntarily by December 31, 2008, and "instead to institute a protocol-agnostic network management technique." *Comcast Order* ¶54 (JA -), citing Letter of July 10, 2008 from Kathryn A. Zachem to Marlene Dortch at 2 (JA); Letter of March 28, 2008 from David L. Cohen to Kevin J. Martin at 2 (JA). Adoption of that new technique required Comcast to "reconfigure [its] network management systems" but resulted in what Comcast's Chief Technology Officer called "a traffic management technique that is more appropriate for today's emerging Internet trends." Letter of March 27, 2008 from David L. Cohen to all FCC Commissioners, att. at 1 (JA).

Nor did the Commission impose a fine. The Commission instead took steps merely to ensure that Comcast in fact followed through on its commitment to cease the contested practice. It retained jurisdiction over the matter and directed that Comcast, within 30 days, disclose the precise contours of its former network

practices, submit a compliance plan describing the transition to a new network management practice, and disclose the details of the new practices. *Comcast Order* ¶¶54, 56 (JA ,).

In its required post-order filings, Comcast confirmed that by the end of 2008, it would cease targeting traffic from particular peer-to-peer applications. Instead of blocking a particular type of communication at all times of day, it would install new hardware and software that would, during periods of peak network congestion, change the "priority status" of traffic associated with high-bandwidth customers so that their intensive use of the network would not adversely affect other users. Letter of Sept. 19, 2009 from Kathryn A. Zachem to Marlene Dortch, att. B at 2, 4, 8 (JA , ,). Comcast reported that in trials fewer than one-third of one percent of users had their traffic's "priority status" changed and that "managed users whose traffic is delayed during those congested periods perceive little, if any, effect." *Id*. at 8, 10 (JA ,). Comcast also pledged to take specified steps "to inform our customers of the new … management practices." *Id*. att. C at 2 (JA).

SUMMARY OF ARGUMENT

Comcast, the provider of cable modem Internet access service to 14 million subscribers, surreptitiously blocked its customers from using peer-to-peer technology that enables video distribution (among other applications) and poses a potential competitive threat to Comcast's core cable business. The Commission

determined that Comcast's furtive actions violated federal policy governing the Internet, as set forth by Congress and interpreted by the FCC. The Commission adopted modest minor remedial steps that acknowledged Comcast's voluntary cessation of its unlawful practice. The Commission's determinations were lawful and reasonable.

Congress created the FCC for cases such as this one. Congress gave the agency broad and adaptable jurisdiction so that it can keep pace with rapidly evolving communications technologies. The Internet is such a technology. It has changed the way Americans communicate and supports applications and services that are intertwined with virtually all of the communications media traditionally regulated by the FCC. Yet Comcast argues that the FCC had *no* power to take *any* action in this case, even the modest steps it took to ensure that Comcast lived up to its promise to stop a practice that threatened the open nature of the Internet.

1. The threshold question in this case is whether the FCC had authority to address Comcast's secret blocking of a popular and important Internet application. Comcast should be estopped from challenging the FCC's authority, however, because the company successfully argued to a district court in California that the FCC does have jurisdiction to regulate the very practices at issue in this case.

In any event, the Supreme Court has already decided the jurisdictional question here. In *Brand X*, the Supreme Court concluded that although

information service providers are not subject to mandatory regulation by the Commission, the FCC has authority over them under its Title I ancillary jurisdiction. *Brand X*'s conclusion followed directly from prior holdings of this Court and the Supreme Court upholding Commission ancillary jurisdiction over "enhanced services" (the regulatory precursor to "information services") and cable television (at the time a new technology that posed competitive and regulatory challenges to broadcast television).

As those cases recognize, the FCC has general jurisdiction over all interstate communications by radio and by wire, which includes Comcast's cable modem service. It is settled law that the agency may exercise that jurisdiction over matters not directly addressed by the Communications Act – ancillary authority – where doing so furthers regulatory goals that are based in the provisions of the Act. The modest regulatory steps taken here fall comfortably within the FCC's ancillary authority. If allowed, clandestine network-blocking practices such as Comcast's could undermine the Commission's regulatory goals for virtually every sector of communications media, from the Internet, to cable and broadcast television, to voice communications.

Exercise of ancillary jurisdiction in this case furthers numerous regulatory goals based in the Communications Act. For example, the Commission's actions are ancillary to section 230(b) of the Act. There, Congress set forth various

"polic[ies] of the United States" regarding the Internet, including a policy of maximizing user control over the receipt of Internet content. The Commission found that Comcast's practice of blocking customer use of peer-to-peer file sharing applications frustrated those express congressional policies. Rather than maximizing user control, Comcast surreptitiously and selectively undermined it, thus threatening the open nature of the Internet.

Section 706(a) of the Telecommunications Act of 1996, 47 U.S.C. § 1302(a), likewise places on the FCC a duty to "encourage the deployment on a reasonable and timely basis of advanced communications capability." Comcast's clandestine blocking practices interfered with that regulatory responsibility because, if left unchecked, they would reduce consumer demand for, and thus deployment of, high speed communications services and facilities. The FCC's limited exercise of authority over those practices thus was ancillary to section 706(a).

The FCC also has ancillary authority over Comcast's cable modem blocking practices by virtue of its regulatory authority over broadcast radio and television, cable services, and telephony. The economics of broadcasting and the local origination of programming, matters of longstanding FCC regulation, are directly affected by Internet network practices in much the same as they were by the advent of cable television. Likewise, as a potential competitor to cable television service,

video distribution via the Internet may exert downward pressure on cable prices, a matter the Commission has long regulated. And as a competitor to traditional telephone service, Internet-based voice service can affect policies related to the regulation of telephony, from prices and practices to interconnection and technological advancement. The viability of competition in the FCC-regulated communications markets cannot be left to the discretion of cable modem providers who compete in those markets. Finally, the FCC has ancillary jurisdiction by virtue of a duty imposed by Title I itself, which places on the agency a responsibility to ensure a communications system with reasonable prices.

2. The FCC properly proceeded in this case by adjudication rather than by rulemaking. The choice is left to the agency's discretion, and Comcast has failed to show an abuse of discretion. The Commission gave substantial reasons for preferring a cautions and fact-specific adjudication to a broadly applicable rulemaking in this case, and Comcast does not challenge any of them. Instead, Comcast argues that adjudication was impermissible because the Commission had no pre-existing legal norm to enforce. That claim overlooks the legal norms set forth by Congress in section 230(b). It also ignores the Commission's explication of the statutory standards in the *Internet Policy Statement*, which announced the principles the agency would use in future adjudications.

The Commission did not impose a penalty on Comcast without notice. There was no legally cognizable penalty in this case; rather, Comcast voluntarily ceased its blocking practice, and the Commission declined to impose a monetary forfeiture. In any event, Comcast was given notice years ago that the Commission would police Comcast's network access practices. When it approved Comcast's acquisition of another cable system, the Commission warned that any interference by Comcast with its customers' access to Internet content and applications would be assessed under the standards of the *Internet Policy Statement*. Comcast ignored that crystal clear warning. It cannot seriously claim to be surprised by the consequences.

ARGUMENT

I. STANDARD OF REVIEW

1. Review of the Commission's interpretation of the Communications Act is governed by *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984). If the intent of Congress is clear from the statutory language, "that is the end of the matter." *Id*. at 842-843. But if the statutory language does not reveal the "unambiguously expressed intent of Congress" on the "precise question" at issue, the Court must accept the agency's interpretation as long as it is reasonable and "is not in conflict with the plain language of the statute." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

An agency's "interpretation of the scope of its jurisdiction is entitled to Chevron deference." *Maine Public Utilities Comm'n v. FERC*, 520 F.3d 464, 479 (D.C. Cir. 2008), *citing Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-1284 (D.C. Cir. 1994) (citing numerous cases).

Comcast claims otherwise, relying on *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), but that case is inapplicable here. There, the Court explicitly "appl[ied] the familiar standards of review enunciated … in Chevron." *Id*. at 698. Although the Court ultimately declined to defer to the FCC's interpretation of its jurisdictional statute, it did so not because jurisdictional statutes are subject to a different standard of review, but because in the circumstances of that case the plain meaning of the statute did not apply to the conduct at issue. Specifically, the Court held that the Commission had attempted to regulate matters that did not constitute radio or wire transmission and thus did not "fall within the scope of the Commission's general jurisdictional grant." *Id*. at 700. The agency therefore had not "acted pursuant to delegated authority" and accordingly was due no interpretive deference. *Id*. at 699.

2. To the degree that Comcast is arguing that the FCC had to proceed in this matter by rulemaking rather than adjudication, that is a matter committed to the agency's discretion. *LaRouche v. Federal Election Comm'n*, 28 F.3d 137, 142 (D.C. Cir. 1994). To prevail on that claim, Comcast must show that the FCC

abused its discretion. Moreover, the "agency's interpretation of its own precedent is entitled to deference." *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998).

3. Comcast's contentions that the Commission acted arbitrarily and capriciously in violation of the APA are reviewed under the familiar highly deferential standard under which the Court "presume[s] the validity of the Commission's action and will not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment." *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003).

II. THE COMMISSION MAY ENFORCE FEDERAL INTERNET POLICY AGAINST COMCAST.

The threshold question in this case is whether the FCC has authority to examine Comcast's Internet-blocking practices and to require disclosure of those practices and verification of their cessation. Logically, the Court must answer the question whether the agency had authority before it addresses whether the agency wielded such authority lawfully, which is Comcast's lead argument. *See, e.g.*, *Motion Picture Ass'n of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (considering authority before APA challenge).

Congress created the FCC "to serve as the single Government agency" with "unified jurisdiction" and "regulatory power over all forms of electrical communication" by wire or radio. *United States v. Southwestern Cable Co.*, 392

U.S. 157, 168 (1968) (internal quotation marks omitted). The Communications Act vests the FCC with broad authority over "all interstate and foreign communication by wire or radio," 47 U.S.C. § 152(a), and charges the agency with making available "to all the people of the United States … a rapid, efficient, Nation-wide, and world-wide wire and radio communication service … at reasonable charges," 47 U.S.C. § 151. The FCC's statutory responsibilities and authority amount to "a unified and comprehensive regulatory system" for the communications industry that allows a single agency to "maintain, through appropriate administrative control, a grip on the dynamic aspects" of that ever-changing industry. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137, 138 (1940). There is no dispute here that the Commission's general jurisdiction over wire communication covers cable modem service. Br. 42 ("Comcast does not dispute the Commission's subject matter jurisdiction over Internet services."). As a cable system operator, telephone service provider, and holder of numerous FCC-issued licenses, moreover, Comcast is already heavily regulated by the Commission. *See, e.g.*, *Adelphia/Time Warner/Comcast Order*, 21 FCC Rcd 8203, 8220 ¶28 (2006) (*Adelphia Order*).

Congress specified further that the FCC "shall execute and enforce the provisions" of the Communications Act. 47 U.S.C. § 151. Congress thus delegated to the agency the authority to "perform any and all acts, make such rules

and regulations, and issue such orders … as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Under that broad grant of jurisdiction, the Commission had authority to enforce federal Internet policy on the facts presented here. Comcast elsewhere has admitted as much.

A. Comcast Is Estopped From Challenging The Commission's Authority Over Its Blocking Practices.

The Court should decline even to hear Comcast's argument that the Commission lacked authority to investigate Comcast's practice of blocking peer-to-peer applications and ensure its cessation. The argument is barred by the rule of judicial estoppel, which provides that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), *quoting Davis v. Wakelee*, 156 U.S. 680, 689 (1895). *See* 18 Moore's Federal Practice § 134.30, p. 134-64 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p.553 (2002) ("a party should not be allowed to gain an

advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").[1]

A class action lawsuit against Comcast in the Northern District of California alleged that Comcast's practice of interfering with peer-to-peer applications violated California law. *See* Defendants' Memorandum of Law in Support of Motion for Judgment on the Pleadings in *Hart v. Comcast*, No. 07-06350 (N.D. Cal.) filed March 14, 2008 at 1 (attached hereto as Exhibit 1). Comcast asked the district court to "stay its hand under the primary jurisdiction doctrine," because "the very allegations that fuel this lawsuit" were before the FCC (in the proceeding now before this Court) and "are within the subject matter jurisdiction of the FCC." *Id*. at 1-2. The FCC "possesse[s] … both expertise and authority delegated by Congress [to] pass on issues within [its] regulatory authority," Comcast assured the district court. *Id*. at 10, quoting *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362, 1365 (9th Cir. 1987). The agency "is actively reviewing the conduct that [plaintiff] complains about," and "that conduct *falls squarely within the FCC's subject matter jurisdiction.*" Motion at 12 (emphasis added). Comcast thus asked the Court to stay the class action pending FCC disposition of the matter.

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[1] Although this Court formerly disapproved of the doctrine of judicial estoppel, *see Southern Pacific Transp. Co. v. ICC*, 69 F.3d 583, 591 n.3 (D.C. Cir. 1995), the Supreme Court's decision in *New Hampshire v. Maine* now establishes the controlling law.

The district judge agreed with Comcast that the blocking issue had "been firmly placed within the jurisdiction of" the FCC, "an administrative agency whose authority to regulate internet broadband access companies' services is well-established." Order of June 25, 2008 at 2-3 (attached hereto as Exhibit 2). Over the plaintiffs' objections, the court accordingly granted Comcast's request to stay the case. Id. at 4. *See Comcast Order* ¶23 & nn.109-111 (JA).

In an effort to avoid, or at least delay, potential liability to its cable modem customers, Comcast thus told a district court judge that the FCC had jurisdiction over Comcast's practice of interfering with peer-to-peer applications – and Comcast was successful in its stay request. A year later, Comcast tells this Court that the FCC is powerless to take any action against Comcast's interference with peer-to-peer access. This case presents a textbook circumstance for the application of judicial estoppel.

It is insufficient to argue, as Comcast does in footnote 21 of its brief, that before the district court Comcast never conceded that the FCC could actually *exercise* its "subject matter jurisdiction." The unmistakable import of Comcast's argument to the trial court was that the FCC had the power to regulate Comcast's conduct. That is certainly how the district judge understood the matter; the court's stay order relied on the FCC's "authority to regulate Internet broadband access companies' services." Order at 3. The order leaves little question about the

court's understanding that Comcast agreed the FCC could actually do something about the matter. Because Comcast prevailed before another court on the theory that the FCC has authority to regulate cable modem blocking practices, it should be estopped from arguing the opposite here.

B. The Commission Has Ancillary Authority In This Case.

Even if Comcast's jurisdictional objection were properly before the Court, which it is not, it would fail. Cable modem service constitutes "interstate … communication by wire" and thus falls squarely within Congress's grant of jurisdiction to the FCC. 47 U.S.C. § 152(a). Comcast nevertheless claims that the Commission is powerless to exercise its jurisdiction to protect the Internet, which is arguably the most important innovation in communications in a generation. In fact, as we explain below, Congress created an agency with expertise in communications policy matters precisely to enable the government to maintain regulatory authority in a dynamically changing technological marketplace. The modest regulatory action taken in this case falls comfortably within the Commission's assigned role.

1. *Brand X And Its Antecedents.*

The question presented here is whether the Commission had the authority to take minimal regulatory steps to protect against network management practices that impinge on congressional policies favoring an open Internet, undermine the

ability of broadband subscribers to use innovative Internet applications, and threaten competition in FCC-regulated programming distribution markets.

The answer to that question is yes, as the Supreme Court expressly stated in *Brand X*. There, the Court considered whether the Commission had reasonably classified cable modem service as an information service rather than a telecommunications service. One party argued that deeming cable modem service an information service would disable the agency from regulating this important Internet access technology, and the Court rejected that claim. Drawing on the historical distinction between basic and enhanced services, see pp.4-5, *supra*, the Court answered that whereas "[i]nformation-service providers … are not subject to *mandatory* common-carrier regulation under Title II" of the Communications Act, "the Commission remains free to impose special regulatory duties on facilities-based [Internet service providers] under its Title I ancillary jurisdiction," as it had done for decades with enhanced services. 545 U.S. at 976, 996 (emphasis added); *accord id*. at 976 ("the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction").

Brand X broke no new ground in recognizing the Commission's Title I jurisdiction over enhanced and information services. Two decades earlier in *CCIA*, this Court confronted the same general question of the Commission's authority to impose regulatory requirements on providers of enhanced services, which (like

information services) are not subject to direct regulation under Title II. The Court held it to be "beyond peradventure" that the Commission could regulate enhanced services even though they are "not within the reach of Title II." 693 F.2d at 213. As with the Internet today, enhanced services then represented the cutting edge of communications technology, and the Court accordingly emphasized that "[i]n designing the Communications Act, Congress sought to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications." *Ibid*. (quotation marks and citation omitted).

CCIA rested in turn on a Supreme Court decision upholding the Commission's exercise of ancillary jurisdiction in a situation directly parallel to the advent of the Internet. In the early 1960s, cable television systems began to compete with over-the-air broadcast stations; today, peer-to-peer applications pose a competitive threat to traditional telephone and video distribution services. In the 1960s, cable television was not directly subject to any provision of the Communications Act. The FCC nevertheless asserted regulatory power over cable under its ancillary authority. In *Southwestern Cable*, the Supreme Court affirmed that exercise of authority, holding that because cable was a wire communications technology that implicated the Commission's regulatory goals for broadcast television and presented a threat of unfair competition, 392 U.S. at 175,

Commission regulation of cable was reasonably ancillary to the agency's "various responsibilities for the regulation of television broadcasting," *id*. at 178.

The Supreme Court reached a similar conclusion in *United States v. Midwest Video Corp.*, 406 U.S. 649, 662 (1972) (*Midwest Video I*), finding that ancillary regulation of cable was "plainly within the Commission's mandate for the regulation of television broadcasting." 406 U.S. at 668. The Court found that the FCC had ancillary jurisdiction by virtue of the Commission's protection and promotion of "objectives for which the Commission had been assigned jurisdiction." 406 U.S. at 667. The Court clarified that "the critical question … is whether the Commission has reasonably determined that its [regulatory action] will further the achievement of long established regulatory goals" in those areas. 406 U.S. at 667-668 (quotation marks omitted).

Brand X, *CCIA*, *Southwestern Cable* and *Midwest Video I* are controlling here. If allowed, clandestine network-blocking practices such as Comcast's could adversely affect virtually every sector of traditional communications media. For example, the Commission explicitly found that BitTorrent and similar peer-to-peer technologies enable "a source of video programming … that could rapidly become an alternative to cable television. The competition provided by this alternative should result in downward pressure on cable television prices, which have increased rapidly in recent years." *Comcast Order* ¶16 (JA). Conversely, secret

blocking of such alternative services would retard their development and ultimatey allow cable operators like Comcast to maintain higher prices. Similarly, a cable modem service provider's blocking of Internet voice applications would disable one of the key sources of emerging competition in telephone markets.

2. *Ancillary Authority.*

The Supreme Court warned nearly 70 years ago against "stereotyp[ing] the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding." *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 219-220 (1943). The FCC has ancillary authority precisely to enable the agency to supervise the most important, fastest changing, and furthest reaching communications developments. "In the context of the developing problems to which it was directed, the Act gave the Commission … expansive powers … [and] a comprehensive mandate." *Ibid.*

The ancillary jurisdiction doctrine arises from the Communications Act's grant of jurisdiction over "*all* interstate and foreign communication by wire." 47 U.S.C. § 152(a) (emphasis added). "Nothing in the language of § 152(a) … limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions." *Southwestern Cable*, 392 U.S. at 172. Rather, the Commission has ancillary jurisdiction over wireline communications matters not directly addressed elsewhere in the statute, when the

assertion of such authority will "promote the objectives for which the Commission has been [specifically] assigned jurisdiction" or "further the achievement of … [legitimate] regulatory goals." *Midwest Video I*, 406 U.S. at 667. The Commission therefore may regulate in areas not specifically addressed by Congress so long as the subject matter falls within the agency's general grant of jurisdiction and the regulation is "reasonably ancillary to the effective performance of the Commission's various responsibilities." *Southwestern Cable*, 392 U.S. at 172-173.

Here, the Commission's exercise of ancillary jurisdiction was extremely modest. The Commission examined Comcast's practices and determined that discriminating against a lawful application that customers chose to use and that competitively threatened Comcast's own cable service violated federal Internet policy. Because Comcast had voluntarily abandoned the contested practice in the course of the administrative proceeding, the Commission required only that Comcast disclose what it had been doing and verify that it had discontinued the practice. The Court should reject the efforts of Comcast's intervenors and amici to inflate this case far beyond its actual boundaries. Amicus Br. 29; Intervenor Br. 14-22.

The Commission reasonably decided that both prongs of the ancillary jurisdiction test are met in this case. First, cable modem service falls within the

Commission's general grant of jurisdiction over wire communications (as Comcast agrees, Br. 42). Second, as explained below, requiring Comcast to disclose its network management practices and to verify the cessation of its practice of interfering with peer-to-peer applications is "reasonably ancillary" to the Commission's specific responsibilities under the Communications Act.

a. Section 230(b).

FCC regulation of cable modem service is "reasonably ancillary" to section 230(b) of the Communications Act. There, Congress set forth the "policy of the United States" to "promote the continued development of the Internet," "to preserve the vibrant and competitive free market that presently exists for the Internet," and to "encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet." 47 U.S.C. §§ 230(b)(1)–(3). The Commission found that Comcast's practice of blocking customer use of peer-to-peer file sharing applications frustrated all of those policies. The practice "impedes consumers from running applications of their choice," "discourage[s] the development of technologies – such as peer-to-peer technologies – that maximize user control,"

and thus retards rather than promotes the continued development of the Internet. *Comcast Order* ¶43 (JA) (quotation marks omitted).[2]

Moreover, the Commission found that Comcast could have, but did not, develop and deploy technological improvements that would have allowed it to manage its network without discriminating against certain applications. *Comcast Order* ¶49 (JA). After the Commission began the proceeding, Comcast announced it would adopt a "protocol-agnostic" network management system that would be "more appropriate for today's emerging Internet trends." Letter of March 27, 2008 from David L. Cohen to all Commissioners att. at 1 (JA). Comcast later said it would accomplish this through upgrades to its hardware and software. Letter of Sept. 19, 2008 from Kathryn A. Zachem to Marlene Dortch, att. B at 4 (JA). In other words, in the wake of the proceeding on review, Comcast "develop[ed] . . . technologies" that better "maximize[d] user control over what information is received." 47 U.S.C. § 230(b)(3).

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[2] Comcast asserts in passing that the Commission was required "to give meaningful consideration to the need for ISPs to employ reasonable network management practices in order to prevent the transmission of copyright-infringing audio and video content." Br. 55-56. Even if that aside were sufficient to present the copyright issue to the Court, *but see Ry. Labor Executives' Ass'n v. United States R.R. Ret. Bd.*, 749 F.2d 856, 859 n.6 (D.C. Cir. 1984), the Commission stated, consistent with Comcast's position here, that Internet providers could "block transmissions … that violate copyright law." *Comcast Order* ¶50 (JA). In this case, moreover, the agency had before it a network practice that was preventing *lawful* user access to content, *see id.* ¶5 (JA), in a manner that could not possibly be justified by copyright concerns.

Given Congress's charge that the Commission "shall execute and enforce" the provisions of the Act, 47 U.S.C. § 151, and its grant of power to "perform any and all acts" and "issue such orders" as may be "necessary in the execution of its functions," 47 U.S.C. § 154(i), the FCC reasonably interpreted the Communications Act as granting authority over cable modem service where necessary to effectuate the policies of section 230(b).

Comcast belittles section 230(b) as "not an operative part of the statute" because it is a statement of federal policy rather than a command for the agency to take defined action. Br. 47. In the California class action litigation, Comcast argued that sections 230(b) and 706(a) preempted the application of state law to Internet access service, thus recognizing that the statutes are not empty congressional rhetoric, as Comcast now suggests. *See* Comcast Memorandum of Law at 13-15 (Exhibit 1 hereto).

Comcast, moreover, now relies on *Association of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977), which does not support its proposition. *American Railroads* addressed, in a context that did not involve the Communications Act and its broad grant of authority to the FCC, whether an agency could rely on a statutory *preamble* to override the plain meaning of another part of the same statute. A very different situation is presented here. Section 230(b) is not a preamble but a formal declaration of national policy – indeed, the

statute contains separate "findings" that are equivalent to a preamble. 47 U.S.C. § 230(a). *American Railroads* recognized that "[t]he operative provisions of statutes are those which … *declare the legislative will*." 562 F.2d at 1316 (emphasis added). Here, the "legislative will" has been declared by Congress in the form of a policy, along with an express grant of authority to the FCC to perform all actions necessary to "execute and enforce" all of the "provisions" of the Communications Act. 47 U.S.C. §§ 151, 154(i). The Commission order upheld in *Midwest Video I* described the agency's ancillary authority "to further *statutory policies*," 406 U.S. at 653 (emphasis added), and Comcast offers no reason why Section 230(b), a codified declaration of the "policy of the United States" placed in the Communications Act, should fall outside the scope of that authority. Indeed, the breadth and pace of change in Internet technology make it particularly understandable that Congress delegated authority to the FCC in the form of broad policy outlines rather than a set of easily outdated commands.

Comcast wrongly argues that the Commission failed to respect the "deregulatory bent of section 230(b)." Br. 53 n.30. Section 230(b) states several potentially conflicting policies, which the Commission assessed and balanced. *Comcast Order* ¶¶24-26 (JA -). Its discussion was reasonable under the controlling principle that "only the Commission may decide how much precedence

particular policies will be granted when several are implicated in a single decision." *MobileTel, Inc. v. FCC*, 107 F.3d 888, 895 (D.C. Cir. 1997).[3]

b. Section 706(a).

Section 706(a) of the Telecommunications Act of 1996, 47 U.S.C. § 1302(a), states that the FCC "shall encourage the deployment on a reasonable and timely basis of advanced communications capability." The Commission found that Comcast's practice of "degrading consumer ability to share or access video content effectively results in the limiting of 'deployment' of an 'advanced telecommunications capability." *Comcast Order* ¶18 (JA). The agency predicted that protecting against the secret blocking of peer-to-peer video distribution – as opposed to allowing such practices – would increase "consumer demand for high-speed Internet access" and thus increase deployment of high-speed facilities and promote the availability of innovative applications. *Ibid.* (JA -).

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[3] Comcast's intervenors argue (Br. 35) that various unenacted bills "make[] clear that the FCC has not been granted … authority" over the Internet. Failed legislative proposals, however, are "a particularly dangerous ground on which to rest an interpretation of a prior statute." *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650 (1990); *see Southwestern Cable*, 392 U.S. at 169-171. "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *LTV*, 496 U.S. at 650 (internal quotation marks omitted). Intervenors' reliance on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), is misplaced because that case involved a congressional enactment, not unenacted bills.

Section 706(a) commands the FCC to use its regulatory authority to fulfill the stated goals. As this Court held recently, the "general and generous phrasing of § 706 means that the FCC possesses significant … authority and discretion to settle on the best regulatory or deregulatory approach to broadband." *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903, 906-907 (D.C. Cir. 2009). The action taken by the Commission in this case therefore is ancillary to its responsibilities under section 706(a).

Comcast notes a prior Commission statement that section 706(a) "does not constitute an independent grant of authority." Br. 28, citing *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, 24047 (1998). In the cited decision, however, the Commission was referring to whether section 706(a) supported *forbearance* authority, which is governed by 47 U.S.C. § 160, and was not opining more generally on the effect of section 706 on ancillary authority. *Deployment of Wireline Services*, 13 FCC Rcd at 24047 ("We are not persuaded … that Congress provided independent forbearance authority in section 706(a).").

Comcast argues in passing that any FCC authority over the Internet contravenes sections of the Act that allegedly prohibit the Commission from treating non-common carriers as common carriers. Br. 52. Comcast may not raise the argument here because it failed to make the claim to the Commission. It is a

condition precedent to judicial review of a particular claim that the FCC has been given a fair opportunity to address it. 47 U.S.C. § 405(a); *see Sprint Nextel Corp. v. FCC*, 524 F.3d 257, 256-257 (D.C. Cir. 2008); *Globalstar Inc. v. FCC*, 564 F.3d 476, 483-484 (D.C. Cir. 2009).[4]

In any event, Comcast's argument overlooks the fact that the Commission required only that Comcast verify its voluntary discontinuation of its interference with peer-to-peer applications and disclose the exact contours of that practice. The *Comcast Order* does not come close to treating Comcast as a common carrier. Moreover, even if the Commission had imposed on Comcast some of the duties of a common carrier, Comcast has identified no provision in the Communications Act that categorically prohibits such treatment with respect to information service providers. Section 3(44) of the Act, 47 U.S.C. § 153(44), on which Comcast relies (Br. 52), applies by its plain terms only to telecommunications carriers, but Comcast in its role as a broadband Internet access provider is an information service provider, not a telecommunications carrier.

[4] Comcast cites no pleading in which it claimed to have raised the issue, and we have not found any. Even if Comcast made the claim somewhere in passing, "the Commission need not sift pleadings and documents to identify arguments that are not stated with clarity by a petitioner." *New Eng. Pub. Communications Council, Inc. v. FCC*, 334 F.3d 69, 79 (D.C. Cir. 2003) (quotation marks omitted).

c. Titles II, III, and VI of the Communications Act.

Services provided over the Internet affect nearly all aspects of federally regulated communications. Directly at issue here, for example, peer-to-peer applications make possible video distribution and voice services that pose a competitive threat to the services offered by broadcasters, cable television operators, and telephone companies. *Comcast Order* ¶17 (JA). The Commission accordingly has ancillary authority to regulate cable modem service by virtue of its regulatory authority over telephony (Title II of the Act), broadcast radio and television (Title III), and cable services (Title VI).

The situation is directly analogous to the one in *Southwestern Cable*. Video distribution over the Internet has the potential to affect the broadcast industry in much the same way that cable television did. Video programming distributed over the Internet is akin to out-of-market programming carried by cable. Both potentially alter the economics of the television marketplace and affect local origination of programming, diversity of viewpoints, and the desirability of providing service in certain markets. 392 U.S. at 173-176. It would significantly interfere with the Commission's ability to effectuate its policies concerning such matters if the agency were powerless to prevent cable modem service providers from denying Internet users the benefits of additional avenues of video

distribution. FCC authority over Internet access therefore is reasonably related to the agency's responsibilities under Title III of the Communications Act.

Authority over cable modem service is likewise ancillary to the Commission's oversight of cable television services under Title VI of the Act. Congress historically has been concerned about unreasonable cable rates. *See* 47 U.S.C. § 521 nt ("[t]he average monthly cable rate has increased almost 3 times as much as the Consumer Price Index"). That concern persists. *Comcast Order* ¶16 (JA). The Commission recognized that Internet video distribution could become an alternative to cable television and thus a potential check on future cable rates. *Ibid*. Because Congress has given the FCC authority over certain cable service rates, 47 U.S.C. § 543, and cable providers have the incentive to squelch competing distribution media and thereby reduce price pressure on their services, enforcement of federal Internet policy is directly related to section 543 on these facts.

The Commission found as well that Comcast's ability to block access to Internet applications could impair its implementation of Title II. *Comcast Order* ¶¶17 (section 201), 19 (section 256), 20 (section 257) (JA , ,). Voice over Internet Protocol (VOIP) service, which has grown substantially, enables customers to place Internet-based voice calls to "traditional land-line telephone[s] connected to the public switched telephone network." *Comcast Order* ¶¶19, 30

(JA ,). VOIP can affect prices and practices (addressed by 47 U.S.C. §§ 201(b) and 205) as well as network interconnections and the ability of telephone subscribers to reach one another ubiquitously (addressed by 47 U.S.C. § 256). *See Comcast Order* ¶19 (JA). VOIP can affect the "national policy" of "vigorous economic competition [and] technological advancement" and the removal of barriers to market entry that are the subject of 47 U.S.C. § 257.

Such concerns are not merely theoretical. In 2005, the FCC's Enforcement Bureau entered into a consent decree with a traditional telephone company that was also an ISP to end its practice of preventing customers from using VOIP applications. *Comcast Order* ¶39 (JA). As with competition in video markets, the viability of competition in voice communications cannot be left to the unregulated power of cable modem providers, which in many cases offer telephone service. *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 24 FCC Rcd 259, 293 (2009).

The Commission need not stand on the sidelines until harms have come to pass. The Supreme Court recognized in *Southwestern Cable* that even if the Commission cannot "predict with certainty" the future course of a regulated market, it may exercise ancillary jurisdiction to "plan in advance of foreseeable events, instead of waiting to react to them." 392 U.S. at 176-177.

d. Title I.

Finally, in the circumstances of this case, Title I of the Communications Act serves as a stand-alone source of ancillary authority. Section 1 of the Act sets forth Congress's basic goal of "mak[ing] available, so far as possible, to all the people of the United States … a rapid, efficient, Nation-wide and world-wide wire … communication service … with adequate facilities at reasonable charges." 47 U.S.C. § 151. The Supreme Court recognized in *Southwestern Cable* that section 1 imposes "responsibilities" on the FCC that the agency is "required" to pursue. 392 U.S. at 167.

Directly relevant here, in CCIA, this Court upheld the Commission's assertion of Title I authority over enhanced services, which are effectively interchangeable with information services. The agency had found in that case that enhanced services were not subject to common carriage regulation under Title II. *CCIA*, 693 F.2d 198. Given the inapplicability of Title II, no other provision of the Act applied specifically to enhanced services. The Court nevertheless upheld the Commission's assertion of ancillary authority on the basis of section 1 because one of the agency's "responsibilities is to assure a nationwide system of wire communications services at reasonable prices." *Id*. at 213 (citing Section 2 of the Act, 47 U.S.C. § 152). Given the Commission's reasonable finding that Internet-

based services directly affect price competition in other markets regulated by the Commission, *Comcast Order* ¶17 (JA), *CCIA* is directly relevant here.

Similarly, in *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988), the Court upheld rules establishing a universal service fund in the absence of specific statutory authority. The Court determined that the action was ancillary to the FCC's responsibility under section 1 of the Communications Act to make service available to all Americans at reasonable prices.

So too, the Second Circuit, reviewing a precursor to *Computer II*, upheld on the authority of Title I a structural separation requirement for telephone companies' provision of data processing services on the ground that "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area … intimately related to the communications industry … where such activities may substantially affect the efficient provision of reasonably priced communications service." *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1973).

Comcast is wrong in saying that Title I places no "substantive regulatory responsibility" on the agency. Br. 43. The Supreme Court recognized that section 1 of the Act imposes "responsibilities" on the FCC that the agency is "required" to pursue. *Southwestern Cable*, 392 U.S. at 167. Consistent with that determination,

this Court in *Rural Tel. Coalition*, 838 F.2d at 1315, relied on section 1 as the source of FCC ancillary authority to establish a universal service fund. It held similarly in *CCIA* that one of FCC's "various responsibilities" that would support ancillary authority is the Title I command that the FCC "assure a nationwide system of wire communications services at reasonable prices." 693 F.2d at 213. The Second Circuit held likewise in *GTE Serv. Corp.*, 474 F.2d at 731. Comcast seeks to downplay the significance of those decisions on the ground that the FCC orders on review had relied on Title II of the Act, Br. 43-44, but the court decisions rely only on Title I. Indeed, in *CCIA*, the Commission had determined that Title II did not apply to the enhanced services at issue. 693 F.2d 198.

Comcast relies on two cases that it claims rejected ancillary jurisdiction based on Title I, but the cases address the matter only in dicta. In *NARUC v. FCC*, 533 F.2d 601, 613 n.77 (D.C. Cir. 1976), the Court stated that it was "dubious" about ancillary jurisdiction based on Title I; it did not rule on the matter, but instead held that the Commission's jurisdiction did not extend to a purely intrastate communication. *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1479 (D.C. Cir. 1994), contains no holding about the scope of Title I power. The case was decided on standard APA grounds.

Comcast is similarly wrong that *American Library* "clarified that ancillary authority cannot rest solely upon Title I provisions." Br. 44-45. The Court did not

address whether the provisions of Title I can alone support ancillary jurisdiction. It held only that the conduct subject to the regulation under review did not amount to communication by wire or radio within the reach of Title I. 406 F.3d at 703. The Court therefore had no occasion to reach the question of whether Title I is sufficient to sustain ancillary jurisdiction.

If Comcast were correct that the precedents establish that the Commission lacks ancillary jurisdiction pursuant to Title I, the Court presumably would have said so when it directly confronted that issue a few years ago in *MPAA*. There, the Court reviewed an FCC order that asserted ancillary jurisdiction based solely on Title I. The Court did not determine that Title I is insufficient ever to support jurisdiction, but found only that Title I did not authorize the agency to take the specific action at issue. 309 F.3d at 804.

Finally, Comcast reads dictum in *American Library* as saying that ancillary jurisdiction may rest only on specific action mandated by statute – and thus excludes ancillary jurisdiction necessary to fulfill statutory policy goals. Br. 46. Comcast's construction contradicts the precedents on which *American Library* rests. *Midwest Video I* held that ancillary jurisdiction was based on the Commission's protection and promotion of "objectives" and "regulatory goals." 406 U.S. at 667-668. The Commission order upheld in *Midwest Video I* described the agency's ancillary authority "to further *statutory policies*." 406 U.S. at 653

(emphasis added). This Court upheld ancillary authority where FCC action was taken to further "a valid communications *policy goal*." *United Video Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989) (emphasis added). There is no "mandated responsibilities" limitation of the sort Comcast suggests.

III. THE COMMISSION PROPERLY PROCEEDED BY ADJUDICATION RATHER THAN RULEMAKING.

A. The Commission Had Discretion To Choose Between The Two Modes Of Regulation.

An administrative agency has "very broad discretion whether to proceed by way of adjudication or rulemaking." *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001); *accord NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). Here, the FCC properly exercised its discretion.

The burden is on Comcast to prove an abuse of discretion, not upon the agency to justify its exercise of procedural discretion. *See, e.g., Qwest Services Corp. v. FCC*, 509 F.3d 531, 536-537 (D.C. Cir. 2007) (petitioner "identifies nothing … that requires use of rulemaking"). The Commission, moreover, explained in the *Comcast Order* why it decided to proceed by adjudication in this instance.

First, the Commission expressed a desire to "proceed cautiously because the Internet is a new medium, and traffic management questions like the one presented here are relatively novel" and not ripe for a "hard and fast rule." *Comcast Order*

¶30 (JA). Second, the Commission found that "the Internet [is] new and dynamic," and that "Internet access networks are complex and variegated." *Id*. ¶31 (JA). "[T]he network management practices of the various providers of broadband Internet access services may be so specialized and varying in nature" that they are difficult to address "within the boundaries of a general rule." *Ibid*. (quotation marks omitted). Third, "[d]eciding to establish policy through adjudicating particular disputes rather than imposing broad, prophylactic rules comports with our policy of proceeding with restraint." *Id*. ¶32 (JA).

Those reasons are sound and sufficient. The Supreme Court recognized long ago that "[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule." *Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (*Chenery II*). The Court acknowledged further that "problems may arise … which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." *Id*. 202-203. As this Court has put it, "[i]nherent in an agency's ability to choose adjudication rather than rulemaking … is the option to make policy choices

in small steps, and only as a case obliges it to." *SBC Communications Inc. v. FCC*, 138 F.3d 410, 421 (D.C. Cir. 1998) (citation omitted).[5]

Comcast does not dispute the validity of the Commission's stated reasons for proceeding by adjudication. Instead, it argues that the adjudication was unlawful from the start because there was "no pre-existing legal norm to interpret, enforce, or otherwise apply to Comcast" in an adjudicatory proceeding. Br. 30. That claim ignores section 230(b), which declared among other things a federal Internet policy to "maximize user control over what information is received by individuals … who use the Internet." 47 U.S.C. § 230(b)(3). Comcast violated that statutory norm by secretly preempting user control when its customers used peer-to-peer applications.

Comcast's denial that its blocking violated any existing norm further ignores the *Internet Policy Statement*, which the Commission had announced would guide its interpretation of section 230(b). *Internet Policy Statement* ¶¶ 3, 5. "A general

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[5] Most of Comcast's intervenors' arguments center on complaints that the Commission failed to address with adequate specificity a range of difficult issues involving regulation of cable modem service. Comcast itself, however, has made no such argument, so its intervenors may not do so. *Illinois Bell Telephone Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990). Moreover, because the bulk of intervenors' arguments concern only the implications of the *Comcast Order* for future cases, the intervenors lack standing to raise those issues. The "mere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation." *Sea-Land Service, Inc. v. Department of Transportation*, 137 F.3d 640, 648 (D.C. Cir. 1998). Should information service providers desire additional guidance from the Commission, they can seek a declaratory ruling or petition for a rulemaking. *See* 47 C.F.R. §§ 1.1, 1.2, 1.41, 1.401.

statement of policy … presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications." *Pacific Gas and Electric Co. v. Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (emphasis added); *see also* United States Department of Justice, Attorney General's Manual on the APA 30 n.3 (1947) (statements of policy are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power").

Contrary to Comcast's assertion, Br. 31, neither *Chenery II* nor any other case cited by Comcast suggests that agency adjudications cannot properly be based upon a statutory "policy of the United States" adopted by Congress, codified in the agency's organic statute, and explicated in a policy statement.[6] Nor does Comcast cite any other case that rejected an agency's use of adjudication in similar circumstances. Indeed, the Commission has in the past used adjudication to impose significant constraints on regulated entities under statutory provisions that are less specific than section 230(b). In the adjudicatory *Carterfone Order*, 13

[6] *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80 (1942) (*Chenery I*), did not hold that a policy statement will not support an adjudication. There, the Court reversed the agency's decision not because it was based only on a policy statement but because it was not supported by the reasoning provided by the agency. *See Chenery II*, 332 U.S. at 200 (in *Chenery I*, "we held no more and no less than that the Commission's first order was unsupportable for the reasons supplied by that agency"). *Chenery II* makes clear that an agency may conduct an adjudication "regardless of whether [the proper] standards had been spelled out in a general rule or regulation." 332 U.S. at 201.

FCC 2d 420 (1968), for example, the FCC for the first time forbade AT&T from prohibiting the attachment of devices to the telephone network on the ground that the prohibition was an "unjust and unreasonable practice" under 47 U.S.C. § 201. *See Comcast Order* ¶40 (JA). Similarly, the Commission has taken enforcement action in the area of broadcast indecency based in part on a policy statement giving general guidelines. *See FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1807 (2009).

Comcast is similarly wrong in suggesting that an agency may not conduct an adjudication while rulemaking proceedings involving similar issues are pending. Br. 35-36. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), does not establish that rule. There, the Supreme Court held only that an agency could not in an adjudication announce a new generally applicable rule that it did not apply in that adjudicatory proceeding. No such situation is present here. The Ninth Circuit stated cursorily in *Union Flights, Inc. v. FAA*, 957 F.2d 685, 689 (9th Cir. 1992), that an agency could not "bypass … pending rulemaking[s]," but Comcast's reading of that dictum to mean that the Commission's discretion to choose between rulemaking and adjudication is nullified by the pendency of rulemaking proceedings makes no sense. Such an approach would insulate regulated entities from enforcement action whenever the agency is considering whether to make or revise rules in the same area, an absurd result.

There is no basis, moreover, to conclude that the Commission was animated here by an improper motive to avoid announcing its decision in a rulemaking proceeding. Unlike a rulemaking order, the *Comcast Order* is "tailor[ed] … to the particulars of the dispute at issue and do[es] not adopt broad, prophylactic rules." *Comcast Order* ¶36 (JA). Nor does the record suggest that the Commission was trying to deprive Comcast of procedural opportunities of a rulemaking. To the contrary, the Commission received more than 6,500 comments in the docket of this matter (plus tens of thousands of informal requests for the FCC to take action) and conducted two public hearings, at one of which a Comcast official testified. *Id.* ¶¶10, 11 (JA ,). Comcast also submitted almost 20 pleadings in the record in five months. The Commission thus was "forthright in seeking public comment on Comcast's network management practices" and Comcast "had ample opportunity to refute Free Press's allegations and ample opportunity to make its case." *Id.* ¶36 (JA). *See Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976) (where parties to adjudication had opportunity to submit comments, it is "difficult to see how requiring the Commission to go through the motions of notice and comment rulemaking … would in any way improve the quality of the information available to the Commission").

Finally, Comcast's reliance (Br. 35) on *Marseilles Land & Water Co. v. FERC*, 345 F.3d 916 (D.C. Cir. 2003), is misplaced and misleading. Comcast has

deleted from the quotation on which it relies critical language stating that an agency may not skip rulemaking requirements "needed to amend a rule." 345 F.2d at 920. A rule promulgated through notice-and-comment procedures may be amended only through a notice-and-comment rulemaking, but the Commission did not amend a rule in this case.

Comcast's complaint that the order is unlawfully retroactive (Br. 36-37) is odd. Given Comcast's voluntary abandonment of its network management practice, the *Comcast Order* has no retroactive effect; the only effects are future reporting requirements and the possibility of future enforcement. Furthermore, "[r]etroactivity is the norm in agency adjudications," *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006), so it is hardly a valid criticism of the use of an adjudication that it examined past behavior.

B. The Adjudication Comported With Principles Of Due Process.

Comcast contends that it violated due process to penalize Comcast without having provided prior notice of the governing rules. Br. 37-38. The claim fails at the outset because the Commission did not penalize Comcast in any legally cognizable way. Because Comcast voluntarily ceased its blocking and the Commission declined to impose a forfeiture, the cases relied on by Comcast, which involve punishment, are inapplicable. A "fair notice" or "ascertainable certainty"

doctrine has been applied in cases where, for example, an agency levies a fine,[7] orders a product recall,[8] or dismisses or denies an application.[9] But the Court has refrained from applying such a doctrine "in a non-penal context." *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986).

In any event, Comcast was given direct, company-specific notice in a prior proceeding that *its* interference with customers' ability to access content of their choice in the absence of a reasonable network management need would violate federal policy. When Comcast sought the FCC's approval to acquire another company's cable systems, intervenor Free Press asked the FCC to reject the transaction on the ground that it would result in anticompetitive conduct or interference with subscriber access to Internet content or applications. *See Comcast Order* ¶35 (JA), citing *Adelphia Order*, 21 FCC Rcd at 8298 ¶220. The Commission warned Comcast that "[i]f in the future evidence arises that [Comcast] is willfully blocking or degrading Internet content, affected parties may file a complaint with the Commission." *Adelphia Order* ¶220; *see Comcast Order* ¶35

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[7] *See Fabi Construction Co. v. Secretary of Labor*, 508 F.3d 1077 (D.C. Cir. 2007); *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995).

[8] *See United States v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998).

[9] *See Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000); *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987).

(JA). The Commission specified further that any such behavior would be assessed under the Internet Policy Statement, which both "reflects the Commission's view that it has the jurisdiction necessary to ensure that providers of telecommunications for Internet access … services are operated in a neutral manner," and "contains principles against which the conduct of Comcast … and other broadband service providers can be measured." *Adelphia Order*, 21 FCC Rcd at 8299 ¶223.

Comcast thus had company-specific notice that the standards of the *Internet Policy Statement* would be applied to it in the precise circumstances at issue here. Comcast likewise received industry-wide notice in 2005, when the Commission classified DSL service as an information service and stated that "[s]hould we see evidence that providers of telecommunications for Internet access … are violating these principles [of the *Internet Policy Statement*], we will not hesitate to take action to address that conduct." *DSL Order*, 20 FCC Rcd at 14904 ¶96.[10]

Moreover, as the *Adelphia Order* proceedings make clear, legal norms for Internet access are found in section 230(b) of the Act and the *Internet Policy Statement*. The standards expressed therein are at least as clear as the "unjust and unreasonable" standard of section 201(b), which has been the touchstone of

[10] The *Adelphia Order* and the *DSL Order* make it absurd for Comcast to claim that the enforcement order here "marked an abrupt departure" from the Commission's prior regulatory framework for Internet services. Br. 55.

common carrier regulation for decades, or the "reasonable person" standard of traditional tort law. The *Internet Policy Statement* served its function precisely, by "public[ly] disseminat[ing] … the agency's policies prior to their actual application in particular situations." *Pacific Gas*, 506 F.2d at 38. The agency's approach was "disclosed well in advance of [its] actual application." *Ibid*.

Pointing out that the *Internet Policy Statement* gave Comcast notice of the Commission's approach to Section 230(b) does not imply that the Commission directly "enforced" the statement in this case. Br. 21-27. It did not. The *Internet Policy Statement* provided guidelines for FCC implementation of a *statutory* national policy. In the *Comcast Order*, the Commission stated that it was enforcing "federal Internet policy" as stated in section 230(b). *See Comcast Order* ¶¶41 ("We now turn to whether Comcast's conduct runs afoul of federal Internet policy.") (JA); 12 (in section 230(b), Congress set forth "federal policies" governing the Internet) (JA); 14 (addressing FCC authority to "vindicate these federal policies") (JA); *see also id*. ¶¶15 (referring to "the national Internet policy enshrined in section 230(b) of the Act") (JA); 13 (in the policy statement the FCC "recognized its responsibility for overseeing and enforcing the 'national Internet policy" of section 230(b)) (JA). The Commission likewise indicated in the policy statement itself that section 230(b) "describes [Congress's] national Internet policy" and that the policy statement was intended to "offer [] guidance

and insight into its approach to the Internet" consistent with that national policy. *Internet Policy Statement*, 20 FCC Rcd at 14987 ¶¶2, 3. As this Court has held, that agency "guidance" need not be directly enforceable in order to provide notice to regulated entities. *Pacific Gas*, 506 F.2d at 38.

Comcast argues that despite the Commission's own description of its action, it in fact enforced the *Internet Policy Statement* because the complaint that initiated this case and various pleadings filed pursuant to it were "framed in terms of an alleged violation of the *Policy Statement*." Br. 24. It may be true that the complainants cited primarily the policy statement in setting forth the facts and the harm in their initial pleadings, but as described above, that is not how the Commission decided the case. Moreover, the Commission expressly found that the complaint "is reasonably interpreted to rest on the statutory provisions interpreted in and cited by the *Internet Policy Statement*." *Comcast Order* n.177 (JA).[11]

To be sure, the *Comcast Order* (as well as the parties' pleadings) discusses and quotes from the policy statement and assesses Comcast's conduct with

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[11] Comcast claims that the Commission arbitrarily interpreted the initial complaint "as alleging something other than a violation of the *Policy Statement*." Br. 54, citing *Comcast Order* n.177 (JA). Even if that were true – although the complaint is broad enough to be interpreted as the Commission stated – Comcast has not attempted to explain why it would be a basis for reversing the *Comcast Order*. The Commission resolved this matter not only on the allegations of the complaint itself, but also on subsequently filed pleadings in which the complainant raised other theories (to which Comcast had full opportunity to respond). *Cf.* Fed. R. Civ. P. 15(b) (allowing amendment of pleadings "when doing so will aid in presenting the merits").

reference to the standards analyzed in that statement. That simply reflects that the policy statement fulfilled its role as an indicator of the course the agency intended to follow in enforcement proceedings. Comcast can hardly complain that the Commission acted in this proceeding consistent with the guidance it earlier gave the entire industry.

CONCLUSION

For the reasons set forth above, the Court should deny the petition for review.

Respectfully submitted,

CHRISTINE A. VARNEY
ASSISTANT ATTORNEY GENERAL

PHILIP J. WEISER
DEPUTY ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

AUSTIN C. SCHLICK
GENERAL COUNSEL

JOSEPH R. PALMORE
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY DEPUTY ASSOCIATE GENERAL COUNSEL

/S/ JOEL MARCUS

JOEL MARCUS
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

September 21, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMCAST CORPORATION, PETITIONER, V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS.	)	NO. 08-1291

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13880 words.

/s/ Joel Marcus

Joel Marcus
Counsel
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

September 21, 2009

STATUES

Contents:

47 U.S.C.A. § 151

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5 -- WIRE OR RADIO COMMUNICATION
SUBCHAPTER I -- GENERAL PROVISIONS

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the “Federal Communications Commission”, which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5 -- WIRE OR RADIO COMMUNICATION
SUBCHAPTER I -- GENERAL PROVISIONS

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

. . . . .

47 U.S.C.A. § 153

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5 -- WIRE OR RADIO COMMUNICATION
SUBCHAPTER I -- GENERAL PROVISIONS

§ 153. Definitions

. . . . .

(20) Information service

The term “information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

. . . . .

(44) Telecommunications carrier

The term “telecommunications carrier” means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). 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, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

. . . . .

(46) Telecommunications service

The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

47 U.S.C.A. § 154(i)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER I--GENERAL PROVISIONS

§ 154. Federal Communications Commission

. . . . .

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

. . . . .

47 U.S.C.A. § 230

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II -- COMMON CARRIERS
PART I -- COMMON CARRIER REGULATION

§ 230. Protection for private blocking and screening of offensive material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

47 U.S.C.A. § 543

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHATPER V-A -- CABLE COMMUNICATIONS
PART III -- FRANCHISING AND REGULATION

§ 543. Regulation of rates

(a) Competition preference; local and Federal regulation

(1) In general

No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section. No Federal agency, State, or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction.

(2) Preference for competition

If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section. If the Commission finds that a cable system is not subject to effective competition--

(A) the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6), in accordance with the regulations prescribed by the Commission under subsection (b) of this section; and

(B) the rates for cable programming services shall be subject to regulation by the Commission under subsection (c) of this section.

(3) Qualification of franchising authority

A franchising authority that seeks to exercise the regulatory jurisdiction permitted under paragraph (2)(A) shall file with the Commission a written certification that--

(A) the franchising authority will adopt and administer regulations with respect to the rates subject to regulation under this section that are consistent with the regulations prescribed by the Commission under subsection (b) of this section;

(B) the franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and

(C) procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties.

(4) Approval by Commission

A certification filed by a franchising authority under paragraph (3) shall be effective 30 days after the date on which it is filed unless the Commission finds, after notice to the authority and a reasonable opportunity for the authority to comment, that--

(A) the franchising authority has adopted or is administering regulations with respect to the rates subject to regulation under this section that are not consistent with the regulations prescribed by the Commission under subsection (b) of this section;

(B) the franchising authority does not have the legal authority to adopt, or the personnel to administer, such regulations; or

(C) procedural laws and regulations applicable to rate regulation proceedings by such authority do not provide a reasonable opportunity for consideration of the views of interested parties.

If the Commission disapproves a franchising authority's certification, the Commission shall notify the franchising authority of any revisions or modifications necessary to obtain approval.

(5) Revocation of jurisdiction

Upon petition by a cable operator or other interested party, the Commission shall review the regulation of cable system rates by a franchising authority under this subsection. A copy of the petition shall be provided to the franchising authority by the person filing the petition. If the Commission finds that the franchising authority has acted inconsistently with the requirements of this subsection, the Commission shall grant appropriate relief. If the Commission, after the franchising authority has had a reasonable opportunity to comment, determines that the State and local laws and regulations are not in conformance with the regulations prescribed by the Commission under subsection (b) of this section, the Commission shall revoke the jurisdiction of such authority.

(6) Exercise of jurisdiction by Commission

If the Commission disapproves a franchising authority's certification under paragraph (4), or revokes such authority's jurisdiction under paragraph (5), the Commission shall exercise the franchising authority's regulatory jurisdiction under paragraph (2)(A) until the franchising authority has qualified to exercise that jurisdiction by filing a new certification that meets the requirements of paragraph

(3). Such new certification shall be effective upon approval by the Commission. The Commission shall act to approve or disapprove any such new certification within 90 days after the date it is filed.

(7) Aggregation of equipment costs

(A) In general

The Commission shall allow cable operators, pursuant to any rules promulgated under subsection (b)(3) of this section, to aggregate, on a franchise, system, regional, or company level, their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category. Such

aggregation shall not be permitted with respect to equipment used by subscribers who receive only a rate regulated basic service tier.

(B) Revision to Commission rules; forms

Within 120 days of February 8, 1996, the Commission shall issue revisions to the appropriate rules and forms necessary to implement subparagraph (A).

(b) Establishment of basic service tier rate regulations

(1) Commission obligation to subscribers

The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.

(2) Commission regulations

Within 180 days after October 5, 1992, the Commission shall prescribe, and periodically thereafter revise, regulations to carry out its obligations under paragraph (1). In prescribing such regulations, the Commission--

(A) shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission;

(B) may adopt formulas or other mechanisms and procedures in complying with the requirements of subparagraph (A); and

(C) shall take into account the following factors:

(i) the rates for cable systems, if any, that are subject to effective competition;

(ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to paragraph (7)(B), and changes in such costs;

(iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;

(iv) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;

(v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

(vi) any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

(vii) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).

(3) Equipment

The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for--

(A) installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit and, if requested by the subscriber, such addressable converter box or other equipment as is required to access programming described in paragraph (8); and

(B) installation and monthly use of connections for additional television receivers.

(4) Costs of franchise requirements

The regulations prescribed by the Commission under this subsection shall include standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise.

(5) Implementation and enforcement

The regulations prescribed by the Commission under this subsection shall include additional standards, guidelines, and procedures concerning the implementation and enforcement of such regulations, which shall include--

(A) procedures by which cable operators may implement and franchising authorities may enforce the regulations prescribed by the Commission under this subsection;

(B) procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations;

(C) standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment subject to regulation under this section, which standards shall require that charges for changing the service tier selected shall be based on the cost of such change and shall not exceed nominal amounts when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method; and

(D) standards and procedures to assure that subscribers receive notice of the availability of the basic service tier required under this section.

(6) Notice

The procedures prescribed by the Commission pursuant to paragraph (5)(A) shall require a cable operator to provide 30 days' advance notice to a franchising authority of any increase proposed in the price to be charged for the basic service tier.

(7) Components of basic tier subject to rate regulation

(A) Minimum contents

Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:

(i) All signals carried in fulfillment of the requirements of sections 534 and 535 of this title.

(ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.

(iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

(B) Permitted additions to basic tier

A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic service tier shall be provided to subscribers at rates determined under the regulations prescribed by the Commission under this subsection.

(8) Buy-through of other tiers prohibited

(A) Prohibition

A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.

(B) Exception; limitation

The prohibition in subparagraph (A) shall not apply to a cable system that, by reason of the lack of addressable converter boxes or other technological limitations, does not permit the operator to offer programming on a per channel or per program basis in the same manner required by subparagraph (A). This subparagraph shall not be available to any cable operator after--

(i) the technology utilized by the cable system is modified or improved in a way that eliminates such technological limitation; or

(ii) 10 years after October 5, 1992, subject to subparagraph (C).

(C) Waiver

If, in any proceeding initiated at the request of any cable operator, the Commission determines that compliance with the requirements of subparagraph (A) would require the cable operator to increase its rates, the Commission may, to the extent consistent with the public interest, grant such cable operator a waiver from such requirements for such specified period as the Commission determines reasonable and appropriate.

(c) Regulation of unreasonable rates

(1) Commission regulations

Within 180 days after October 5, 1992, the Commission shall, by regulation, establish the following:

(A) criteria prescribed in accordance with paragraph (2) for identifying, in individual cases, rates for cable programming services that are unreasonable;

(B) fair and expeditious procedures for the receipt, consideration, and resolution of complaints from any franchising authority (in accordance with paragraph (3)) alleging that a rate for cable programming services charged by a cable operator violates the criteria prescribed under subparagraph (A), which procedures shall include the minimum showing that shall be required for a complaint to obtain Commission consideration and resolution of whether the rate in question is unreasonable; and

(C) the procedures to be used to reduce rates for cable programming services that are determined by the Commission to be unreasonable and to refund such portion of the rates or charges that were paid by subscribers after the filing of the first complaint filed with the franchising authority under paragraph (3) and that are determined to be unreasonable.

(2) Factors to be considered

In establishing the criteria for determining in individual cases whether rates for cable programming services are unreasonable under paragraph (1)(A), the Commission shall consider, among other factors--

(A) the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors;

(B) the rates for cable systems, if any, that are subject to effective competition;

(C) the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices;

(D) the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than programming provided on a per channel or per program basis;

(E) capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and

(F) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned.

(3) Review of rate changes

The Commission shall review any complaint submitted by a franchising authority after February 8, 1996, concerning an increase in rates for cable programming services and issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review. A

franchising authority may not file a complaint under this paragraph unless, within 90 days after such increase becomes effective it receives subscriber complaints.

(4) Sunset of upper tier rate regulation

This subsection shall not apply to cable programming services provided after March 31, 1999.

(d) Uniform rate structure required

A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system. This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

(e) Discrimination; services for the hearing impaired

Nothing in this subchapter shall be construed as prohibiting any Federal agency, State, or a franchising authority from--

(1) prohibiting discrimination among subscribers and potential subscribers to cable service, except that no Federal agency, State, or franchising authority may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts; or

(2) requiring and regulating the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals.

47 U.S.C.A. § 543 (cont’d)

(f) Negative option billing prohibited

A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

(g) Collection of information

The Commission shall, by regulation, require cable operators to file with the Commission or a franchising authority, as appropriate, within one year after October 5, 1992, and annually thereafter, such financial information as may be needed for purposes of administering and enforcing this section.

(h) Prevention of evasions

Within 180 days after October 5, 1992, the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this section and shall, thereafter, periodically review and revise such standards, guidelines, and procedures.

(i) Small system burdens

In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers.

(j) Rate regulation agreements

During the term of an agreement made before July 1, 1990, by a franchising authority and a cable operator providing for the regulation of basic cable service rates, where there was not effective competition under Commission rules in effect on that date, nothing in this section (or the regulations thereunder) shall abridge the ability of such franchising authority to regulate rates in accordance with such an agreement.

47 U.S.C.A. § 543 (cont'd)

(k) Reports on average prices

The Commission shall annually publish statistical reports on the average rates for basic cable service and other cable programming, and for converter boxes, remote control units, and other equipment, of--

(1) cable systems that the Commission has found are subject to effective competition under subsection (a)(2) of this section, compared with

(2) cable systems that the Commission has found are not subject to such effective competition.

(l) Definitions

As used in this section--

(1) The term "effective competition" means that--

(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;

(B) the franchise area is--

(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area;

(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area; or

(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

(2) The term "cable programming service" means any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.

(m) Special rules for small companies

(1) In general

Subsections (a), (b), and (c) of this section do not apply to a small cable operator with respect to--

(A) cable programming services, or

(B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994,

in any franchise area in which that operator services 50,000 or fewer subscribers.

(2) "Small cable operator" defined

For purposes of this subsection, the term "small cable operator" means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.

(n) Treatment of prior year losses

Notwithstanding any other provision of this section or of section 532 of this title, losses associated with a cable system (including losses associated with the grant or award of a franchise) that were incurred prior to September 4, 1992, with respect to a cable system that is owned and operated by the original franchisee of such system shall not be disallowed, in whole or in part, in the determination of whether the rates for any tier of service or any type of equipment that is subject to regulation under this section are lawful.

47 U.S.C.A. § 1302(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 12 -- BROADBAND

§ 1302. Advanced telecommunications incentives

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

. . . . .

EXHIBIT ONE

Defendant's Memorandum of Law in Support of Motion for Judgment on the Pleadings in *Hart v. Comcast*, No. 07-06350 (N.D. Cal.) filed May 21, 2008

MICHAEL J. STORTZ (State Bar No. 139386)
Michael.Stortz@dbr.com
DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, California 94105-2235
Telephone: (415) 591-7500
Facsimile: (415) 591-7510

Attorneys for Defendants
COMCAST OF ALAMEDA, INC.; COMCAST OF CALIFORNIA II, INC.; COMCAST OF CALIFORNIA III, INC.; COMCAST OF CALIFORNIA IX, INC.; COMCAST OF CALIFORNIA V, INC.; COMCAST OF CALIFORNIA VI, INC.; COMCAST OF CALIFORNIA X, INC.; COMCAST OF CALIFORNIA XIII, INC.; COMCAST CORPORATION; COMCAST OF FRESNO, INC.; COMCAST OF MARIN I, INC.; COMCAST OF MARIN II, INC.; COMCAST OF NORTHERN CALIFORNIA I, INC.; COMCAST OF NORTHERN CALIFORNIA II, INC.; COMCAST OF SACRAMENTO I, LLC; COMCAST OF SACRAMENTO II, LLC; COMCAST OF SAN LEANDRO, INC.; COMCAST OF SIERRA VALLEYS, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JON HART, On Behalf of Himself and All Others Similarly Situated, and On Behalf of the General Public,

Plaintiff,

v.

COMCAST OF ALAMEDA, INC.; COMCAST OF CALIFORNIA II, INC.; COMCAST OF CALIFORNIA III, INC.; COMCAST OF CALIFORNIA IX INC.; COMCAST OF CALIFORNIA V INC.; COMCAST OF CALIFORNIA VI INC.; COMCAST OF CALIFORNIA X INC.; COMCAST OF CALIFORNIA XIII INC.; COMCAST CORPORATION; COMCAST OF FRESNO, INC.; COMCAST OF MARIN I, INC.; COMCAST OF MARIN II, INC.; COMCAST OF NORTHERN CALIFORNIA I, INC.; COMCAST OF NORTHERN CALIFORNIA II, INC.; COMCAST OF SACRAMENTO I, LLC; COMCAST OF SACRAMENTO II, LLC; COMCAST OF SAN LEANDRO, INC.; COMCAST OF SIERRA VALLEYS, INC.; and DOES 1-250,

Defendants.

Case No. C-07-06350 PJH

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Date: May 21, 2008
Time: 9:00 a.m.
Dept: Courtroom 3
Judge: The Honorable Phyllis J. Hamilton

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DECISIONS

DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105

DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105

DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105

STATUTES & CODES

DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105

OTHER AUTHORITIES

DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105

DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105

I. INTRODUCTION

This case presents a sweeping state law challenge to Comcast's management of congestive peer-to-peer ("P2P") file sharing protocols on its broadband Internet network. As explained below, the Court should issue a stay or enter judgment against Mr. Hart, as his claims are within the primary jurisdiction of the FCC, are preempted by federal law, and fail to state a claim under the laws of California (or any other state for that matter).

Mr. Hart posits that Comcast's management of P2P file sharing traffic violates California law because it is "unfair" and because any network management that may have the effect of slowing a particular activity renders "fraudulent" Comcast's advertisement of "high speed" service. Of course, if Comcast were required to permit P2P traffic to occupy its network unchecked by any form of management, as Mr. Hart here demands, then it would surely breach any alleged "promise" of "high speed" service for the vast majority of its subscribers. Indeed, "speed" would be the least of anyone's worries in the world that Mr. Hart envisions, as basic activities such as Web browsing and video streaming would be routinely degraded at any speed. In recognition of that fact, the FCC has declared that "reasonable network management" is integral to the provision of broadband Internet service. *See In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14986, 14988 n.15 (2005) (hereinafter the "Internet Policy Statement").

It is no exaggeration to say that these issues are at the top of the FCC's agenda. The FCC has several open dockets that bear on these issues; is accepting public comment and hearing public testimony from various interested parties, including Comcast and purported consumer advocates; has been asked to declare that Comcast's network management is illegal; has been asked to enact formal rules for network management and disclosures; and has been asked to impose civil forfeitures on Comcast. *See In re Vuze, Inc., Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators*, WC Docket No. 07-52 (Nov. 14, 2007); *In re Free Press,*

et al., 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 (Nov. 1, 2007). Because these issues are within the subject matter jurisdiction of the FCC, and because the FCC is actively investigating them, this Court should stay its hand under the primary jurisdiction doctrine. To be clear, Comcast believes that regulation of network management by Internet Service Providers ("ISPs") is unnecessary and unwarranted, as the marketplace always has resolved and always will resolve such issues on its own. But the fact remains that the FCC is reviewing the very allegations that fuel this lawsuit. This Court should stay this action and allow the FCC to provide guidance in this important area before moving forward.

If the Court does not stay its hand, it should enter judgment against Mr. Hart. As a matter of federal law, the reasonableness of an ISP's network management cannot be determined by reference to any state's laws, let alone the disparate laws of fifty states. Congress has declared that the Internet should be "unfettered" by regulation, and nothing could conflict more with that policy than allowing each of the fifty states to establish its own framework for how ISPs may manage their networks. Indeed, a fifty-state morass of varying network management rules would make it virtually impossible for ISPs to operate their interstate networks with any consistency. And as a matter of state law, Comcast's conduct is not unfair, unlawful or "fraudulent." To the contrary, its conduct is absolutely necessary, abundantly reasonable and adequately disclosed; its advertisements were run-of-the-mill puffery that were neither untrue nor misleading; and its conduct did not breach any contractual or quasi-contractual duty it may have owed Mr. Hart.

Taken to their logical extreme, Mr. Hart's claims would prevent Comcast from filtering spam email (500 million of which its network filters each day), from intercepting viruses and other "malware," from addressing cyber-bullying, and from blocking child pornography – none of which would be good for anyone, including Mr. Hart. If this Court is inclined to move forward and adjudicate these claims without the benefit of the FCC's resolution of the matters now before it, then these claims should all be rejected.

DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105

II. BACKGROUND

A. Comcast's P2P Management Is Necessary

On a global level, the Internet deals with bandwidth congestion quite well. Information that is transmitted over the Internet is broken down into various "packets," each of which is separately forwarded from one packet switch (or "node") to another. Unlike traditional circuit-switched networks, packet-switched networks do not require a single, dedicated physical circuit from one end to the other for the duration of the communication session. Instead, packets of data are delivered over multiple physical paths, each of which may be automatically redirected in order to avoid congested areas, and reassembled for use when they reach their final destination. On a local level, however, bandwidth congestion is not so easily avoided. In that "last mile," there is no multiplicity of nodes, and thus no way for packets to be rerouted around congested areas. This is especially true with "shared" networks, such as those used by cable and wireless providers. In short, if there is congestion, packets wait in line (and may even be lost) until it abates. As a result, one subscriber's use can significantly affect another's. *See, e.g.*, Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 Geo. L.J. 1847, 1852, 1862, 1875, 1879 (Aug. 2006).

Never has this phenomenon been more apparent than with P2P technology. P2P is a form of distributed computing that has become popular of late because it reduces the burden on content providers. A content provider that in the past had to transmit a complete copy of a file to every customer who requested it (and purchase many servers and much associated bandwidth in order to do so) can now publish a file once and rely on its customers to do the rest of the work. Take, for example, the BitTorrent protocol. BitTorrent allows a content provider to act as an "initial seeder" of a .torrent file. The initial person to download that file downloads it from the initial seeder, but as more peers download it, there will be more sources (or "seeders") from which to download it. Subsequent downloaders can then download small "pieces" of the file from a "swarm" of perhaps hundreds or thousands of seeders who already have copies of it.

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50 Fremont Street, 20th Floor
San Francisco, CA 94105

Although P2P reduces the burden on content distributors, it significantly increases the burden on networks, as the protocol is inherently inefficient. *See* James Martin & James Westall, *Assessing the Impact of BitTorrent on DOCSIS Networks*, at 1-2 (Sep. 2007), available at http://people.clemson.edu/~jmarty/papers/bittorrentBroadnets.pdf; *see also* Gordon Haff, CNet Blogs, *Whatever else it is, P2P is inefficient* (Nov. 20, 2007), available at http://www.cnet.com/8301-13556_1-9821330-61.html. Decentralized file-sharing has certain benefits to be sure, but efficiency is not one of them. Nor was it meant to be. Bram Cohen, the creator of the BitTorrent protocol, was recently quoted as follows: "My whole idea was, 'Let's use up a lot of bandwidth,' . . . I had a friend who said, 'Well, ISPs won't like that.' And I said, 'Why should I care?'" David Downs, *BitTorrent, Comcast, EFF Antipathetic to FCC Regulation of P2P Traffic*, S.F. Weekly (Jan. 23, 2008), available at http://news.sfweekly.com/2008-01-23/news/bittorrent-comcast-eff-antipathetic-to-fcc-regulation-of-p2p-traffic. That inefficiency takes its toll on broadband networks. Indeed, P2P accounts for 50 to 95% of all broadband traffic,[1] and studies have demonstrated that as few as ***fifteen*** BitTorrent users can congest the network associated with a node, significantly affecting Internet telephony (VoIP), online gaming, and other common Internet applications. *See* Martin & Westall at 6; *see also* Leslie Ellis, *BitTorrent's Swarms Have a Deadly Bite on Broadband Nets*, Multichannel News (May 8, 2006), available at http://www.multichannel.com/article/CA6332098.html.

Although Comcast invests hundreds of millions of dollars every year to improve the speed and scope of its network,[2] its bandwidth, like any ISP's bandwidth, is finite. Broadband providers are thus faced with a choice: either allow P2P protocols to degrade

[1] *See* Downs, *supra*; Yoo, *supra*, at 1879 n.145; Peter Svensson, Associated Press, *Comcast Blocks Some Internet Traffic* (Oct. 19, 2007), available at http://www.msnbc.msn.com/id/21376597; Ipoque, *Internet Study 2007* (2007), available at http://www.ipoque.com/media/internet_studies/internet_study_2007; Avis Rivers, *Network Neutrality: Hysteria Makes for Bad Law*, Seattle Times (Dec. 20, 2007), available at http://seattletimes.nwsource.com/html/opinion/2004083048_broadband20.html.

[2] For example, Comcast is working toward deploying later this year a DOCSIS 3.0 technology that will significantly increase bandwidth, allowing subscribers to download a high-definition movie in less than four minutes. *See* Fact Sheet, *Comcast's Network: America's Leading Network* (Jan. 9, 2008), available at http://www.comcast.com/ces/content/images/Wideband/WidebandNetworkFS.pdf.

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San Francisco, CA 94105

the experience of all subscribers or use tools that manage P2P protocols as infrequently and innocuously as possible.[3] Consistent with the FCC's pronouncements in this area, Comcast has chosen the latter. *See In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14986, 14988 n.15 (2005) ("The principles we adopt are subject to reasonable network management."). Indeed, even the Distributed Computing Industry Association, whose members develop P2P protocols, concedes that its members "should bear some meaningful responsibility for consuming disproportionate amounts of network resources" and ISPs "should be permitted to take into account and manage their networks to address any such impact." DCIA, *Comment On Petition For Rulemaking*, No. 07-52, at 9 (Feb. 13, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519841058.

Network management, it should also be noted, does more than enable ISPs to address congestion in the short term. Opponents of network management posit a world in which ISPs waive a magic wand and have infinite bandwidth, making management unnecessary. But that isn't possible today and it never will be. *See generally* Yoo, *supra*. Increasing bandwidth capacity is an extremely expensive and labor-intensive endeavor. Allowing ISPs to manage their networks in order to address occasional congestion allows them to defer some of those costs and, in turn, avoid raising subscriber fees and allocate funds toward expanding and upgrading networks. In short, network management allows ISPs to offer service to those who otherwise could not receive or pay for it, especially low- and fixed-income subscribers and rural subscribers. *Id.* at 1853-55, 1885, 1908.

B. Comcast's P2P Management Is Reasonable

Managing a network is a dynamic exercise, changing – often in real time – as new technologies emerge and subscriber habits evolve. That said, Comcast's current P2P management measures can be summarized as follows: if P2P protocols that have a history

[3] A third option would be to prohibit and block P2P outright. Comcast does not, but notes that some academic institutions do. *See, e.g.*, Harvard Medical School, Information Technology Department, *HMS IT Peer To Peer (P2P) Policy*, available at http://it.med.harvard.edu/pg.asp?pn=security_p2p.

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50 Fremont Street, 20th Floor
San Francisco, CA 94105

of congesting Comcast's network reach a preset level in a neighborhood, Comcast begins issuing instructions called "reset packets"[4] in order to temporarily limit the number of new unidirectional uploads (*i.e.*, uploads that occur when the subscriber is not also downloading) those P2P protocols can initiate in that neighborhood until the congestion in the neighborhood drops below the predetermined level. Comcast does ***not*** manage downloads, does ***not*** manage bidirectional uploads (*i.e.*, uploads that occur when the subscriber is also downloading), does ***not*** manage uploads that are already underway, and does ***not*** "block" even the P2P uploads that it does temporarily manage.[5]

This practice is entirely reasonable. First, because computers commonly receive reset packets when network problems occur, applications and services know to automatically try to reestablish the P2P connection without the subscriber's having to manually intervene. That is especially useful for P2P users, who often set up their computers to seed files while they are unattended. *See* Pete Abel, *Fair vs. Foul in Net Neutrality Debate*, themoderatevoice.com (Nov. 24, 2007), available at http://themoderatevoice.com/media/internet/16239/fair-vs-foul-in-net-neutrality-debate. Indeed, this network management practice is designed only to affect unidirectional uploads, which is to say only computers that are uploading but not downloading at the same time – a telltale sign of an unattended computer.

Second, there is no direct effect on P2P ***downloads*** by Comcast's subscribers, and little if any indirect effect on downloads by anyone. At most, if new unidirectional uploads have been temporarily foreclosed in a given neighborhood due to localized network congestion, there would be a very brief delay as a downloader's P2P protocol seeks out copies of the file from a different peer. In the typical P2P situation,[6] when a

[4] A "reset" is simply a bit in the packet header that signals that a new connection needs to be established because there are error conditions in the network.

[5] *See, e.g.*, Richard Bennett, *Harold and Kumar Go to Comcastle* (Nov. 6, 2007), available at http://www.theregister.co.uk/2007/11/06/richard_bennett_comcastle ("BitTorrent isn't disabled on the Comcast network. I'm a Comcast customer, and as I write this I'm seeding several video files. . . .").

[6] Much of the hullabaloo over P2P management began as a result of an Associated Press test in which the P2P swarming functionality was bypassed by searching for a unique file from a unique seeder.

DRINKER BIDDLE & REATH LLP
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San Francisco, CA 94105

download begins, the P2P protocol searches for multiple seeders that have the same file. Thus, even if one seeder's uploading is delayed, the protocol is already searching for, and in the vast majority of cases has already found, other seeders from which to download. Moreover, the network will allow the computer to begin uploading once congestion has abated, which could be anywhere from a few milliseconds to a few minutes. In light of the fact that P2P protocols are often used for files that may take hours to transmit, any such delay would be negligible. And in light of the delays other subscribers would experience were P2P not managed, it would be more than fair.

Third, although there are various ways to address congestion generally, there are few practical ways to address the congestion caused by P2P. *See* George Ou, *EFF Wants to Saddle You with Metered Internet Service*, Real World IT, ZDNet Blogs (Dec. 3, 2007), available at http://blogs.zdnet.com/ou/?p=914&page=3 ("Since BitTorrent has no such congestion control mechanism . . ., the only machine language it understands" is reset packets, a technique that "is common in the networking and software industry where alternatives don't exist."); George Ou, *A Rational Debate on Comcast Traffic Management*, Real World IT, ZDNet Blogs (Nov. 6, 2007), available at http://blogs.zdnet.com/ou/?p=852&page=3; Richard Bennett, The Register, *Dismantling a Religion: The EFF's Faith-Based Internet* (Dec. 13, 2007), available at http://www.theregister.co.uk/2007/12/13/bennett_eff_neutrality_analysis ("The Internet's traffic toolkit is nearly barren, so it's no wonder that Comcast and its peers would use" reset packets "to accomplish an end that all rationale people agree is worthwhile."); DCIA, *Comment on Petition for Rulemaking*, *supra*, at 5. Accordingly, many ISPS use management tools that are similar to, if not substantially the same as, the ones currently used by Comcast. *See, e.g.*, http://www.azureuswiki.com/index.php/Bad_ISPs#United_States_of_America.

Finally, Comcast's network management practices are narrowly tailored. They are

See Peter Svensson, Associated Press, *How The AP Tested Comcast's File-Sharing Filter* (Oct. 19, 2007), available at http://abcnews.go.com/Technology/wireStory?id=3750910.

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content-agnostic, meaning they do not manage uploads based on content; they were designed (and will continue to be refined) to affect only those P2P protocols that have historically had a congestive effect on Comcast's network; and they are only activated if a predetermined threshold of network activity is reached and are suspended as soon as it abates. In short, they are minimally intrusive and were designed solely to ensure that the needs of the many are not outweighed by the needs of the few – or the one.

C. Comcast's P2P Management Is Disclosed

Mr. Hart admits that he subscribed to Comcast's high-speed Internet service in September 2007 and, before doing so, reviewed and agreed to the terms and conditions of the subscriber agreement that was posted on Comcast's website. Pl.'s Compl. ¶¶ 41-42. He therefore admits that he agreed to comply with the terms of the then-applicable Acceptable Use Policy ("AUP"). Comcast Agreement for Residential Services § 7, available at http://www6.comcast.net/terms/subscriber. The AUP disclosed that, because Comcast's service was offered via a shared network, subscribers could not use the service in a way that would adversely affect others. *See* AUP § 7, previously available at http://www6.comcast.net/terms/use ("Prohibited uses include . . . generating levels of traffic sufficient to impede others' ability to send or retrieve information") (Exhibit A to RFJN); *id.*, Network, Bandwidth, Data Storage and Other Limitations ("You shall ensure that your use of the Service does not restrict, inhibit, interfere with, or degrade any other user's use of the Service, nor represent (in the sole judgment of Comcast) an overly large burden on the network. . . ."). The AUP also disclosed that Comcast would take appropriate action to prevent subscribers from engaging in prohibited uses, including managing individual transmissions when necessary. *Id.*, Inappropriate Content and Transmissions ("Comcast reserves the right . . . to refuse to transmit or post and to remove or block any information or materials, in whole or in part, that it, in its sole discretion, deems to be offensive, indecent, or otherwise inappropriate. . . ."); *id.*, Violation of Acceptable Use Policy ("Comcast and its suppliers reserve the right at any time to monitor bandwidth. . . . [I]f the Service is used in a way that Comcast or its

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suppliers . . . believe violate this AUP, Comcast or its suppliers may take any responsive actions they deem appropriate. These actions include . . . the immediate suspension or termination of all or any portion of the Service.").

Mr. Hart's subscriber agreement also disclosed that Comcast's service would not be free of delays and was therefore not appropriate for uses that require delay-free performance. *See* Comcast Agreement for Residential Services, ¶ 10 ("NEITHER COMCAST NOR ITS AFFILIATES . . . WARRANT THAT THE COMCAST EQUIPMENT OR THE SERVICES WILL MEET YOUR REQUIREMENTS, PROVIDE UNINTERRUPTED USE, OR OPERATE AS REQUIRED, WITHOUT DELAY. . . .") (typography in original); *id.* § 11(e). It also disclosed that Comcast could manage its network by monitoring it for objectionable transmissions and managing such transmissions when it became necessary to do so:

> [Y]ou acknowledge and agree that Comcast and its agents have the right to monitor, from time to time, any such postings and transmissions. . . . We reserve the right to refuse to upload, post, publish, transmit or store any information or materials, in whole or in part, that, in our sole discretion, is unacceptable, undesirable or in violation of this agreement.

Id. § 3(b).

Comcast is constantly in the process of updating its AUP and FAQs in order to reflect its present practices and respond to its customers' questions. To that end, a recent revision to the AUP describes Comcast's P2P network management in even more detail:

> Comcast uses various tools and techniques to manage its network. . . . These tools and techniques are dynamic, like the network and its usage, and can and do change frequently. For example, these network management activities may include . . . temporarily delaying peer-to-peer sessions (or sessions using other applications or protocols) that users of the Service may wish to establish during periods of high network congestion [and] limiting the number of peer-to-peer sessions users of the Service may establish. . . .

AUP, *available at* http://www6.comcast.net/terms/use. Comcast's FAQs were recently revised as well: "Comcast may on a limited basis temporarily delay certain P2P traffic when that traffic has, or is projected to have, an adverse effect on other customers' use of the service. . . ." Frequently Asked Questions About Network Management, *available at* http://www.comcast.net/help/faq/index.jsp?faq=SecurityNetwork_Management19163.

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III. DISCUSSION

A. Plaintiff's Claims Are Within The FCC's Primary Jurisdiction

The primary jurisdiction doctrine promotes "uniformity in administration" of regulatory law by "ensuring that administrative bodies possessed of both expertise and authority delegated by Congress pass on issues within their regulatory authority before consideration by the courts." *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362, 1365 (9th Cir. 1987). Pursuant to this doctrine, a court is "obliged to defer" to an agency where the "issue brought before a court is in the process of litigation through procedures originating in the [agency]." *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 647 (1972). As the Ninth Circuit has said, "an issue either is within an agency's primary jurisdiction or it is not, and, if it is, a court may not act until the agency has made the initial determination." *Gen. Dynamics*, 828 F.2d at 1364 n.15; *see also Phone-Tel Commc'ns, Inc. v. AT&T Corp.*, 100 F. Supp. 2d 313, 321 (E.D. Pa. 2000).

GTE.net LLC v. Cox Commc'ns, Inc., 185 F. Supp. 2d 1141, 1147 (S.D. Cal. 2002) is instructive. In *GTE.net*, the parties disputed whether cable Internet qualified as a "telecommunications service" under the Telecommunications Act. After acknowledging the "widespread and frustrating disagreement over the proper classification of cable Internet service" that had prompted the FCC to examine the issue, the court decided to stay the proceedings: "The regulation of cable Internet involves complex issues with far-reaching consequences. The issue is clearly not being taken lightly by the experts at the FCC, and this Court defers to that concern and pending investigation." *Id.* at 1445.

Any inquiry into whether Comcast's P2P management is unlawful falls squarely within the FCC's subject matter jurisdiction. *See id.*; *In re Inquiry Concerning High-Speed Access to the Internet Over Cable*, 17 F.C.C.R. 4798, ¶ 77 (2002), *aff'd National Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 976, 980, 996 (2005); *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14853, ¶ 109 (2005); *In re Broadband Industry Practices*, NOI, 22 F.C.C.R. 7894, ¶ 4 (2007); *see also AT&T Corp. v. City of Portland*, 216 F.3d 871,

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879-80 (9th Cir. 2000); *Metrophones Telecomms. Inc. v. Global Crossing Telecomms. Inc.*, 423 F.3d 1056, 1070 (9th Cir. 2005). In fact, the FCC has multiple dockets open that seek public comment on whether it should adopt rules implementing its Internet Policy Statement, and it is actively investigating whether ISPs in general, and Comcast in particular, may use the sort of network management tools that are at issue here:

- **March 22, 2007.** The FCC issues a Notice of Inquiry asking "whether network platform providers and others favor or disfavor particular content, how consumers are affected by these policies, and whether consumer choice of broadband providers is sufficient to ensure that all such policies ultimately benefit consumers. . . ." *In re Broadband Industry Practices*, NOI, 22 F.C.C.R. 7894, ¶ 1 (2007).[7]

- **November 1, 2007.** Free Press files a Petition alleging that Comcast is degrading P2P traffic in violation of the FCC's Internet Policy Statement. *In re Free Press, et al., 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 (2007), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519825121. It asks the FCC to enjoin Comcast from managing P2P traffic, to impose fines for every subscriber affected, including Mr. Hart, and to declare Comcast's business practices deceptive.

- **November 14, 2007.** Vuze files a Petition asking the FCC "to examine the network operators' network management practices and to adopt reasonable rules that would prevent the network operators from engaging in practices that discriminate against particular Internet applications, content or technologies." *In re Vuze, Inc., Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators*, WC Docket No. 07-52, at ii (2007), available at http://fjallfoss.fcc.gov/

[7] *See also In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report & Order & NPRM, 20 F.C.C.R. 14853, 14929-35, ¶¶ 146-59 (2005); *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 and NPRM, 17 F.C.C.R. 4798, 4839-54 ¶¶ 72-111 (2002).

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prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519811711.

- **January 8, 2008.** FCC Chairman Kevin Martin announces that the FCC will "investigate complaints that Comcast Corp. actively interferes with Internet traffic as its subscribers try to share files online." Associated Press, *House Committee Launches Probe of FCC Management*, Wall Street Journal, at B9 (Jan. 8, 2008), available at http://online.wsj.com/article/SB119982972316175627.html?mod=googlenews_wsj.

- **January 14, 2008.** The FCC issues two Public Notices that seek comment on the Vuze and Free Press Petitions. *FCC Public Notice, Comment Sought on Petition for Declaratory Ruling Regarding Internet Management Policies*, WC Docket No. 07-52 (2008); available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519837887; *FCC Public Notice, Comment Sought on Petition for Rulemaking to Establish Rules Governing Network Management Practices by Broadband Network Operators*, WC Docket No. 07-52 (2008); available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-92A1.pdf.

- **February 13, 2008.** Representative Markey introduces legislation that would require the FCC to complete an investigation and report to Congress within one year. *See* Internet Freedom Preservation Act, H.R. 5353, 110th Cong. (2nd Sess.).

- **February 25, 2008.** The FCC holds public hearings on P2P management, during which Comcast and others offer statements and other evidence concerning the necessity and reasonableness of its network management practices and disclosures.

Because the FCC is actively reviewing the conduct that Mr. Hart complains about, and because that conduct falls squarely within the FCC's subject matter jurisdiction, this Court should stay this action and allow the FCC to make an initial determination regarding the reasonableness of P2P management. Doing so would preserve resources, promote comity, and prevent potentially conflicting judgments.[8]

[8] Of course, the Court also has the inherent authority to stay this action if the primary jurisdiction doctrine is found to be inapplicable. *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 817 (9th Cir. 2003).

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B. Mr. Hart's Claims Are Preempted By Federal Law

In the event the Court does not stay this action in deference to the FCC, the Plaintiff's claims should all be dismissed because they are preempted by federal law. The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, preempts state laws that "interfere with or are contrary to, the laws of Congress . . . ." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). In determining whether there is federal preemption, Congress's intent is the "ultimate touchstone of [the] analysis." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). The intent to preempt may be implied from the scope or effect of federal law, but may be expressly stated as well.

The Supreme Court's recent decision in *Rowe v. New Hampshire Motor Transp. Ass'n*, 128 S.Ct. 989 (2008) is instructive. In *Rowe*, the State of Maine passed laws that were meant to prevent the transportation of tobacco products to minors. Transport carriers associations sought to have the state laws stricken as preempted by a federal statute that deregulated the trucking industry and preempted state laws that conflicted with that federal deregulatory policy. The District Court, the Circuit Court, and the Supreme Court all agreed that the state laws, though well meaning, were preempted:

> The Maine law thereby produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for "competitive market forces" in determining (to a significant degree) the services that motor carriers will provide. . . To allow Maine to insist that the carriers provide a special checking system would allow other States to do the same. And to interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations. That state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.

Id. at 995-96.

Here, Congress has expressed its intent to preempt state regulation of the Internet, declaring that "the policy of the United States" is "to promote the continued development of the Internet" and "to preserve the vibrant and competitive free market that presently exists for the Internet" by ensuring that it remains "unfettered by Federal or State regulation." 47 U.S.C. § 230(b); *id.* § 230(e)(3) ("No cause of action may be brought and

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no liability may be imposed under any State or local law that is inconsistent with this section."); *see also* Telecommunications Act of 1996, P.L. 104-104, Title VII, § 706, 110 Stat. 153 (codified at 47 U.S.C. § 157 note) ("the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" should be encouraged through "regulatory forbearance"). By any measure, that policy has been a resounding success. When the Internet first emerged, it was accessible to only a handful of people. It is now available and affordable to hundreds of millions of people, from all parts of the country and all walks of life. In short, it has become a ubiquitous part of every day life.

Federal courts have given effect to § 230(b)(2). For example, in *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998), landline telephone companies appealed an FCC order which, among other things, exempted ISPs from paying the interstate access charges that they as common carriers were required to pay. The FCC relied on § 230(b)(2) in concluding that ISPs should be unfettered from such state regulation, and the United States Court of Appeals for the Eighth Circuit affirmed its reliance on § 230(b)(2). *Id.* at 544. Similarly, in *Vonage Holdings Corp. v. MPUC*, 290 F. Supp. 2d 993 (D. Minn. 2003), the State of Minnesota tried to regulate Vonage's Internet telephone (VoIP) service as if Vonage were a traditional landline telephone carrier. The FCC again concluded that state regulation was preempted. In an opinion that was later affirmed by the Eighth Circuit, the United States District Court for the District of Minnesota cited § 230(b)(2) in support of its affirmance of the FCC's ruling. *Id.* at 997 ("Congress has spoken with unmistakable clarity on the issue. . . .").

For its part, the FCC has frequently cited § 230(b)(2) and the national policy of regulatory forbearance where the Internet is involved. *See, e.g., In re Vonage Holdings Corp.*, 19 F.C.C.R. 22404, ¶¶ 22-24, 34-37 (2004); *In re Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educ. and Other Advanced Servs. in the 2150-2162 and 2500-2690 MHz Bands*, 18 F.C.C.R. 6722, ¶ 34 (2003) ("Broadband services should exist in an environment that eliminates regulations that deter investment and innovation. . . .");

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Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, 17 F.C.C.R. 3019, ¶ 5 (2002) ("broadband services should exist in a minimal regulatory environment that promotes investment and innovation. . . ."); *In re Inquiry Concerning High-Speed Access to the Internet Over Cable*, 17 F.C.C.R. 4798, ¶ 73 (2002) ("we are mindful of the need to minimize both regulation of broadband services and regulatory uncertainty. . . .").

The need to maintain a uniform regulatory framework for the Internet is critical. Permitting state law claims such as those asserted in this case to proceed would create a patchwork of fifty different standards regarding the propriety of network management, an untenable result that flies in the face of § 230(b)(2). As the FCC has explained:

> We would be concerned if a patchwork of State and local regulations beyond matters of purely local concern resulted in inconsistent requirements affecting cable modem service, the technical design of the cable modem service facilities, or business arrangements that discouraged cable modem service deployment across political boundaries. We also would be concerned if State and local regulations limited the Commission's ability to achieve its national broadband policy goals. . . .

Id. ¶ 97. Those concerns are well founded, for the inevitable morass of conflicting state regulation would make Internet services impractical, if not impossible, to provide. *See In re Vonage Holdings Corp.*, 19 F.C.C.R. 22404, ¶ 30 ("Due to the intrinsic ubiquity of the Internet, nothing short of Vonage ceasing to offer its service entirely" could prevent it from being subjected to regulations imposed by "more than 50 separate jurisdictions."); *id.* ¶ 37 ("Allowing Minnesota's order to stand would invite similar imposition of 50 or more additional sets of different economic regulations on DigitalVoice, which could severely inhibit the development of this and similar VoIP services. We cannot, and will not, risk eliminating or hampering this innovative advanced service. . ."); *id.* ¶ 35 ("[I]n interpreting section 230 . . . we cannot permit more than 50 different jurisdictions to impose traditional common carrier economic regulations . . . and still meet our responsibility to realize Congress's objective.").[9]

[9] These concerns have caused courts and the FCC to alternatively invoke the Commerce Clause to strike down legislation regulating the Internet. *PSINet, Inc. v. Chapman*, 362 F.3d 227, 239-40 (4th Cir.

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Regulation through private litigation rather than public legislation raises the same concerns and suffers the same fate. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J. concurring) ("[The] effects of the state agency regulation and the state tort suit are identical" and to "distinguish between them for pre-emption purposes would" be an "anomalous result."); *see also Cipollone*, 505 U.S. at 521 ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). Here, Mr. Hart's claims are at loggerheads with Congress's sound decision to free the Internet from state regulation. Nothing could more clearly conflict with the objectives of Congress than allowing claims like this to proceed in state court or under state law. Accordingly, Mr. Hart's claims are preempted by federal law and Comcast is entitled to the entry of judgment in its favor.

C. Mr. Hart's Claims Fail As A Matter Of State Law

If this Court were to proceed without a stay under the primary jurisdiction doctrine, and assuming for the sake of argument there is no federal preemption, the Court should nonetheless enter judgment against Mr. Hart because he cannot state a claim under the Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200, the Consumer Legal Remedies Act (CLRA), Cal. Civ. Code § 1770 (CLRA), the False Advertising Law (FAL), Cal. Bus. & Prof. Code § 17500, or any other state law for that matter. We begin with the claim that P2P management is actionable under § 17200 as "unfair."

1. Comcast's Conduct Is Not "Unfair"

California courts have been unable to agree on one definition of the term "unfair" as used in the UCL. Recently, the Ninth Circuit approved two "unfairness" tests. *Lozano*

2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003); *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1162-63 (10th Cir. 1999) ("[C]ertain types of commerce have been recognized as requiring national regulation. The Internet is surely such a medium."); *Center for Democracy and Tech. v. Pappert*, 337 F. Supp. 2d 606, 662-63 (E.D. Pa. 2004); *Am. Libraries Assoc. v. Pataki*, 969 F. Supp. 160, 183 (S.D.N.Y 1997) ("[C]ertain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of those areas..."); *In re Vonage Holdings Corp.*, 19 F.C.C.R. 22404, ¶¶ 38-41.

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v. AT&T Wireless Servs., 504 F.3d 718, 735-36 (9th Cir. 2007). After *Lozano*, courts may apply a balancing test that weighs the alleged impact on the plaintiff against the justifications of the defendant, or may apply an arguably narrower test that requires that the plaintiff's claim be "tethered" to a declared legislative policy. *Id.*; *Morris v. BMW of N. Am., LLC*, No. 07-2827, 2007 U.S. Dist. LEXIS 85513, *21 (N.D. Cal. Nov. 7, 2007).

Bardin v. DaimlerChrysler Corp., 136 Cal. App. 4th 1255 (2006) is instructive. In *Bardin*, the plaintiffs claimed that the defendant's use of tubular steel in its exhaust manifolds violated the UCL because the industry standard was to use more durable cast-iron instead. The court rejected their claim, reasoning that any impact on the plaintiffs was theoretical and outweighed by the defendant's business justifications, *id.* at 1270, and in any event the "the right to have a vehicle containing an exhaust manifold that lasts as long as an 'industry standard' cast-iron exhaust manifold is one based on a contract such as a warranty, not on a legislatively declared policy." *Id.* at 1273.

As in *Bardin*, the proper test to apply in this case is an interesting but ultimately academic question, as Comcast's conduct cannot be considered "unfair" under either test. First, the FCC has explicitly decided to permit reasonable network management, and it is not for this Court to revisit – let alone reverse – that sound policy decision. *See, e.g.*, *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 182-83 (1999) ("If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination."); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001). Second, the "fairness" or "reasonableness" of these practices is not something that should be decided by reference to state law or in this forum, at least not initially. *See supra*. Finally, if the Court is inclined to reach the issue, this practice is more than fair: it has no discernible effect on Comcast subscribers or others; it is content agnostic; it only affects those protocols that have historically had a congestive effect on Comcast's network; and it is only activated when there is congestion and is suspended as soon as congestion abates. It is also absolutely necessary, making it possible to deliver the services that millions of Americans enjoy and rely on every day,

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such as dialing 911 with VoIP services, viewing Presidential debates, or blogging about current events, just to name a few. It simply cannot be considered unfair to temporarily place the needs of the vast majority of subscribers above the desires of a small minority of subscribers whose conduct could consume all available network bandwidth. Indeed, it would be unfair to subscribers who do ***not*** use bandwidth-intensive P2P protocols to allow their Internet service to be degraded by the few subscribers who do. *See, e.g.*, *Kunert v. Mission Fin. Servs. Corp.*, 110 Cal. App. 4th 242, 265 (2003) (dismissing UCL claim because dealer's commission system was standard in the industry); *Walker v. Countrywide Home Loans, Inc.*, 98 Cal. App. 4th 1158, 1175 (2002) (rejecting UCL claim due to utility of defendant's property inspection fee).

2. Comcast's Conduct Is Not "Unlawful"

Mr. Hart also alleges that Comcast's business practices are "unlawful" because he believes they violate the FCC's Internet Policy Statement and Section 1030(a)(5)(A)(1) of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030. He is mistaken.

Mr. Hart's unlawfulness claim fails as it relates to the Internet Policy Statement not only because that document expressly permits reasonable network management, but also because it is a statement of ***policy***, not of prescriptive rules. *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14986, 14988 n.15 (2005) ("Accordingly, we are not adopting rules in this policy statement."). That document was issued without the benefit of a notice-and-comment rulemaking proceeding, was not published in the Code of Federal Regulations or even the Federal Register, and by its terms is only a statement of hortatory "principles," not prescriptive rules. To be sure, the FCC is debating whether to adopt formal rules along the lines of those informal policies. But unless and until it does, there is no "law" to be violated, and thus no basis for an unlawfulness claim. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986); *Wilderness Soc'y v. Norton*, 434 F.3d 584, 597 (D.C. Cir. 2006); *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487, 489 (D.C. Cir. 1998); *Metro Publ'g Ltd. v. San Jose Mercury News*, 861 F. Supp. 870, 881 (N.D.

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Cal. 1994) (dismissing "unlawfulness" claim because underlying claim lacked merit).

Mr. Hart's claim fails as it relates to Section 1030(a)(5)(A)(1) of the CFAA because Comcast did not violate it. First, that provision only prohibits activities that "damage" a computer. *See* 18 U.S.C. § 1030(a)(5)(A)(1); *id.* § (e)(8) (defining "damage" as "any impairment to the integrity or availability of data, a program, a system, or information"). Mr. Hart's computer has not been "damaged." Because any files he uploaded remain on his computer unless he himself deleted them, the "integrity" of those files has not been impaired. *Cf. Worldspan L.P. v. Orbitz, LLC*, No. 05-5386, 2006 U.S. Dist. LEXIS 26153, at *14-15 (D. Ill. 2006); *Resdev, LLC v. Lot Builders Ass'n*, No. 04-1374, 2005 U.S. Dist. LEXIS 19099, at *13 n.3 (M.D. Fla. 2005); *Lockheed Martin Corp. v. Speed*, No. 05-1580, 2006 U.S. Dist. LEXIS 53108 (M.D. Fla. 2006). And because Comcast does not manage downloads, the "availability" of information to him has not been affected. As for any anonymous third parties to whom Mr. Hart may have tried to send pieces of a file, the availability of information to them also has not been impaired. Due to the swarming nature of P2P, if a downloader has trouble connecting with a seeder, her computer instantaneously seeks out a new one. Mr. Hart obviously knows this, as he cited no specific delay in downloading by anyone. It bears repeating that the use of "reset" packets in connection with packet-based communication sessions is a ubiquitous industry practice that has inflicted no damage on the nearly infinite number of computers that have received them over time.

Second, even if Mr. Hart's computer had been "damaged," which it was not, he has failed to allege that the damage resulted in a "loss," either to him or to anyone else, that exceeds $5,000. *See* 18 U.S.C. § 1030(a)(5)(B)(i). A claim under § 1030(a)(5) requires plaintiffs to plead and prove that a defendant's conduct caused a $5,000 loss or other effects (such as physical injury) not relevant here. *See id.* § 1030(a)(5)(B)(i)-(iv). Here, Mr. Hart claims Comcast has caused a loss in excess of $5,000. Pl.'s Compl. ¶ 88. However, the CFAA was amended in 2001 in order to limit "loss" to the costs of "responding to an offense, conducting a damage assessment, and restoring the data,

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program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." *Id.* § 1030(e)(11); *see also Resdev, LLC*, 2005 U.S. Dist. LEXIS 19099, at *7. Mr. Hart has not alleged that he spent any time or money restoring data or information. Nor has he alleged that he lost any information. He simply states that his losses exceed $5,000. Pl.'s Compl. ¶ 8. That is not enough. *Second Image, Inc. v. Ronsin Photocopy, Inc.*, No. 07-5424, 2007 U.S. Dist. LEXIS 95417, at *3-4 (N.D. Cal. 2007) (Hamilton, J.).

Third, Comcast did not act "without authorization." 18 U.S.C. § 1030(a)(5)(A)(1). Quite the opposite, in fact, as Mr. Hart's contract authorizes Comcast to monitor network congestion and take remedial action. As a result, Mr. Hart asks the Court to focus not on the end (managing P2P seeding), but on the means (transmitting reset packets). To him, the issue here is whether the transmission of reset packets was authorized. Pl.'s Compl. ¶ 88 ("Under the CFAA, it is unlawful to knowingly and without authorization cause the transmission of a program, information, code or command. . . ."). Mr. Hart is mistaken. In Section 1030(a)(5)(A)(i), "without authorization" does not modify "transmission." Rather, it modifies "damage."[10] *See* 18 U.S.C. § 1030(a)(5)(A)(i) ("Whoever . . . knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer."); *Arthur J. Gallagher & Co. v. Edgewood Ptnrs. Ins. Ctr.*, No. 07-06418, 2008 U.S. Dist. LEXIS 8924, *7 (N.D. Cal. 2008); *Speed*, 2006 U.S. Dist. LEXIS 53108, *21 n.8; *Lloyd v. United States*, No. 03-813, 2005 U.S. Dist. LEXIS 18158, at *24 (D.N.J. 2005) ("[T]he term 'without authorization' modifies the element of intentionally causing damage to a computer. To read the statute as Petitioner does requires twisting the statutory language and violates common sense."). Accordingly, it does not matter whether Comcast was authorized to transmit reset packets. What matters is whether it was authorized to temporarily delay congestive transmissions on its network. And it was.

[10] This is in contrast to other the other parts of § 1030(a)(5)(A), in which Congress decided that "without authorization" would modify "access." *See* 18 U.S.C. §§ 1030(a)(5)(A)(ii), (a)(5)(A)(iii).

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Finally, applying the CFAA here would give it a scope unintended by Congress. *See* 136 Cong. Rec. S4568-01, 4614 (Apr. 1990) (statement of Sen. Leahy) (explaining that the CFAA should not "open the floodgates" to litigation); *Shamrock Foods Co. v. Gast*, No. 08-0219, 2008 WL 450556, at *4 (D. Ariz. Feb. 20, 2008) ("[T]he legislative history supports a narrow view of the CFAA" because it "[t]he civil component is an afterthought."). The very purpose of Section 1030(a)(5) is to prevent hackers from damaging computer systems or clogging networks with worms or other malware. *See* S. Rep. No. 101-544, at 5-6 (1990) (discussing worm that "quickly replicated itself and spread to computers throughout the network" and "clogged the network for two days"); S. Rep. No. 104-357, at 4-5 (1996) (discussing amended § 1030(a)(5)); 139 Cong. Rec. S16421-03 (Nov. 19, 1993) (statement of Sen. Leahy) (discussing worms that "hopelessly clog computer networks"); *Werner-Matsuda*, 390 F. Supp. 2d 479, 496 (D. Md. 2005). Congress cannot have intended for the CFAA, a criminal statute,[11] to be read in a way that prevents P2P management and allows P2P traffic to clog the Internet. In short, imposing liability here would turn the CFAA on its head. Such an "anomalous result" is, to put it mildly, "not easily attributable to congressional intent." *Cedar Rapids v. Garret F.*, 526 U.S. 66, 78 n.10 (1999); *American Tobacco v. Patterson*, 456 U.S. 63, 71 (1982).

3. Comcast's Advertisements Are Not "Untrue or Misleading"

Mr. Hart's fraud claims also fail because Comcast disclosed that it manages network congestion and because none of its advertisements was untrue or misleading.

It is axiomatic that a consumer fraud claim cannot stand if the practice in question is disclosed. *See Plotkin v. Sajahtera, Inc.*, 106 Cal. App. 4th 953, 965 (2003); *Shvarts v. Budget Group, Inc.*, 81 Cal. App. 4th 1153 (2000). Here, although for a variety of valid reasons Comcast did not provide a blueprint of its network management tools,[12] it did

[11] A criminal statute first and foremost, the CFAA must be narrowly construed. *Werner-Matsuda*, 390 F. Supp. 2d at 499; *see also Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004).

[12] Disclosures must strike an appropriate balance between informing consumers and other important considerations. For example, requiring an ISP to describe its network management in detail would allow a small but sophisticated group of users to evade those measures altogether. This is a real problem, not an

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disclose that it monitors congestion and takes appropriate steps to prevent congestive transmissions from interfering with the use of its services, including managing them when necessary. In light of those disclosures, Mr. Hart's fraud claims cannot stand.

And assuming for the sake of argument that Comcast's disclosures are deemed inadequate in some way, Mr. Hart's claims still fail because none of the advertisements he cites was misleading. Under the CLRA, FAL and UCL, a statement is only actionable if it is false or reasonably likely to mislead a reasonable consumer. *Williams v. Gerber Prods. Co.*, 439 F. Supp. 2d 1112, 1115 (S.D. Cal. 2006); *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1139 (C.D. Cal. 2005); *Summit Tech., Inc. v. High-Line Med. Instruments, Co.*, 933 F. Supp. 918, 931 (C.D. Cal. 1996); *In re All Terrain Vehicle Litig.*, 771 F. Supp. 1057, 1061 (C.D. Cal. 1991); *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1361 (2003). Comcast's advertisements were neither.

Most of the representations cited by Mr. Hart are puffery that is not actionable. For example, Mr. Hart cites advertisements in which Comcast offered "lightning speed," "scorching speed," "mind-blowing speed," "crazy fast speed," and speed that is "way faster than DSL." Pl.'s Compl. ¶ 40. Those statements are incapable of measurement, could not possibly have misled Mr. Hart,[13] and, more importantly, could not possibly

imagined one. *See* DCIA, *Comment on Petition for Rulemaking*, *supra*, at 8; Rich Karpinski, Telephony Online, *BitTorrent developers seek traffic-shaping route-around* (Feb. 19, 2008) (reporting only a week after Comcast filed FCC comments that BitTorrent programmers had used the now-public information to develop a way to "thwart" Comcast's P2P management), available at http://telephonyonline.com/broadband/news/bittorrent-traffic-shaping-0219; *see also* Ernesto, *How to Encrypt BitTorrent Traffic*, TorrentFreak.com, available at http://torrentfreak.com/how-to-encrypt-bittorrent-traffic. Thus, it is no answer to say, as Mr. Hart may, that network management should simply be disclosed more completely. If it were, it would be ineffective. As a result, any state law that requires "disclosure" of actual network management would be preempted for the reasons set forth above. In addition, requiring Comcast to describe its network management in detail would make its contracts hundreds of pages long, and no doubt Mr. Hart would take issue with their length. *See, e.g.*, Pl.'s Compl. ¶ 30.

[13] It bears mention that Mr. Hart has not alleged seeing or relying on any of these advertisements. *See* Pl.'s Compl. ¶¶ 40-41. The only representation he specifically alleges seeing was the statement that he would "enjoy unfettered access" to the Internet. *Id.* ¶ 55. But he does not allege whether he saw that FAQ before he subscribed or whether he or his counsel simply saw it while preparing his Complaint. Accordingly, he has not satisfied Federal Rule of Civil Procedure 9(b), *see Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004), or established causation as required by the UCL and CLRA. *See* Cal. Civ. Code § 1770(a); Cal. Bus. & Prof. Code § 17204; *see also Wilens v. TD Waterhouse Group, Inc.*, 120 Cal. App. 4th 746, 754 (2003); *Caro v. Proctor & Gamble*, 18 Cal. App. 4th 644, 668 (1998).

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have mislead a reasonable consumer. After all, at what point does speed become "scorching"? And would a reasonable consumer even want speed that was literally "mind-blowing"? These are innocuous, subjective statements. They are not actionable.

Mr. Hart also claims that he was promised a "maximum upload speed" and speed that was "up to 4 times faster than 1.5 Mbps DSL and up to twice as fast as 3.0 Mbps DSL." Pl.'s Compl. ¶¶ 42, 40. Although these statements may seem more objective, they are not relevant to Mr. Hart's claims, as he does not allege that Comcast slows the transmission speed of uploads in any way. And it doesn't. At most, an upload might have to be restarted during periods of congestion, and only when necessary to preserve the quality of service being provided to the great majority of subscribers. But even then, the transmission speed during the actual upload is never slowed. Thus, advertisements about "speed" could in no way be fraudulent. In any event, Mr. Hart cites a "maximum" speed "up to" a certain level, not a minimum speed no slower than a certain level – statements that would only be untrue if his service were ***too fast***.

The only other representation cited by Mr. Hart is the statement that he would "enjoy unfettered access to all the content, services, and applications that the internet has to offer." Pl.'s Compl. ¶ 55. This too is puffery, as no reasonable consumer – let alone a sophisticated user of P2P protocols – would expect that the use of Comcast's service would be unconstrained in any way whatsoever. Taken literally, this statement would even prevent Comcast from managing its network in order to protect subscribers from spam and worms, as that protection conceivably "fetters" access to the Internet. Reasonable consumers expect Comcast to use its best efforts to filter such things. Indeed, they rely on Comcast to do so. Thus, Mr. Hart can only quibble about the propriety of managing congestive P2P traffic as opposed to managing congestive worms or spam – a policy debate better left to the FCC, which is hearing that debate at this very moment. Moreover, this statement comes from a FAQ formerly posted on Comcast's website. Read in its entirety, that FAQ cannot reasonably be understood to suggest that Comcast does not manage its network. Rather, it stated that subscribers would not be restricted

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based on the type of lawful ***content*** they choose to view, which is true.[14] That becomes clear when this FAQ is read in conjunction with Mr. Hart's contract, the AUP, and the other FAQs on Comcast's website – all of which disclose that Comcast offers a shared network, that Comcast monitors its network for congestive transmissions that could affect other users, and that Comcast takes appropriate action to prevent that from happening.

4. Comcast Did Not Breach Any Contractual Duty To Mr. Hart

Mr. Hart's breach of contract claim fails for the simple reason that he has not identified, and cannot identify, a single provision of his contract that has been breached. A breach of contract claim requires not only a contract, but also a breach of that contract, and it is the plaintiff's burden to identify one. *Kapsimallis v. Allstate Ins. Co.*, 104 Cal. App.4th 667, 675 (2002); *Acoustics, Inc. v. Trepte Constr. Co.*, 14 Cal. App. 3d 887, 913 (1971). Here, Mr. Hart has not identified any provision of his contract that was breached. And it is abundantly clear that he cannot, as Comcast did exactly what it said it would do: monitor its network for congestion and take appropriate remedial measures as needed.[15] More importantly, however, there is no provision in Mr. Hart's contract that promises ***not*** to engage in network management activities such as those at issue here, and thus no provision that even arguably has been breached by Comcast's doing so.

5. Comcast Did Not Breach Any "Implied" Duty To Mr. Hart

Perhaps recognizing that his contract has not been breached in any way, Mr. Hart has pleaded an alternative claim for breach of an implied covenant of good faith and fair dealing, the gravamen of which is that it is unfair for Comcast to manage P2P traffic.

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[14] *See* FAQ: Do You Discriminate Against Particular Types Of Online Content?, previously available at http://www.comcast.net/help/faq/index.jsp?faq=Hot118988 ("Do you discriminate against particular types of online content? No. There is no discrimination based on the type of content. Our customers enjoy unfettered access to all the content, services, and applications that the Internet has to offer. . . .") (Exhibit B to RFJN).

[15] Mr. Hart alleges that "none of the terms of service state that Comcast can or will impede, limit, discontinue, block or otherwise impair or treat differently" file-sharing applications. Pl.'s Compl. ¶ 42. That is patently false, as explained above. Although normally the allegations of a complaint are taken as true for purposes of pre-discovery dispositive motions, they are not if they concern documents that are referenced in the complaint. *See, e.g.*, *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

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50 Fremont Street, 20th Floor
San Francisco, CA 94105

This claim is defective for a number of reasons. First, like Mr. Hart's other state law claims, this claim is preempted by federal law. Second, courts cannot imply a duty not to do something if the parties' contract permits them to do that very thing. *See Yerkovich v. MCA, Inc.*, No. 98-55660, 2000 U.S. App. LEXIS 3259, at *4 (9th Cir. 2000) (citing *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798 (1995)). But that is just what Mr. Hart is asking this Court to do, as the parties' contract specifically permits Comcast to manage congestive transmissions such as P2P file sharing traffic. Finally, Comcast's P2P management does not amount to bad faith. To the contrary, it is essential to the provision of broadband services. As a matter of law, conduct does not amount to bad faith if it is commercially reasonable under the circumstances. This is. *See Foothill Props. v. Lyon Copley Corona Assocs.*, 46 Cal. App. 4th 1542, 1551-1552 (1996); *Balfour, Burthrie & Co. v. Gourmet Farms*, 108 Cal. App. 3d 181, 191 (1980).

IV. CONCLUSION

As the Ninth Circuit has observed, deciding what our national Internet policy should be "is not our task, and in our quicksilver technological environment it doubtless would be an idle exercise. . . . Like Heraclitus at the river, we address the Internet aware that courts are ill-suited to fix its flow; instead, we draw our bearings from the legal landscape, and chart a course by the law's words." *City of Portland*, 216 F.3d at 876. Here, the legal landscape and the letter of the law require that these claims either be rejected or stayed until the FCC does so.

Respectfully submitted,

Dated: March 14, 2008

DRINKER BIDDLE & REATH LLP

/s/ Michael J. Stortz
MICHAEL J. STORTZ

Counsel for Defendants

DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105

EXHIBIT TWO

Order of June 25, 2008 in
Hart v. Comcast, No. 07-06350 (N.D. Cal.)
Holding case in abeyance

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JON HART,

Plaintiff,

v.

COMCAST OF ALAMEDA, et al.,

Defendants.
_____/

No. C 07-6350 PJH

ORDER GRANTING REQUEST TO STAY

Defendants' motion for judgment on the pleadings and corresponding request for a stay came on for hearing before this court on June 18, 2008. Plaintiff John Hart ("plaintiff") appeared through his counsel, Mark N. Todzo. Defendants, various Comcast entities (collectively "defendants"), appeared through their counsel, Seamus Duffy and Michael P. Daly. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS defendants' request for a stay as follows, for the reasons indicated at the hearing, and summarized as follows.

Defendants' preliminary challenge to plaintiff's complaint, on primary jurisdiction grounds, is well taken. The primary jurisdiction doctrine "is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision-making responsibility should be performed by the relevant agency rather than the courts." See Davel Commc'ns, Inc. v. Qwest Corp., 460 F.3d 1075, 1080, 1086 (9th Cir. 2006) (doctrine applies to claims properly cognizable in court that contain some issue within the special competence of an administrative agency); see also Syntek Semiconductor Co., Ltd. v. Microchip Tech., Inc., 307 F.3d 775, 780 (9th Cir. 2002). The doctrine is applicable

whenever the enforcement of a claim subject to a specific regulatory scheme requires resolution of issues that are within the special competence of an administrative body. See Davel Commc'ns, 460 F.3d at 1086. The doctrine is furthermore appropriate where conduct is alleged which is "at least arguably protected or prohibited by a regulatory statute," and agency resolution of an issue "is likely to be a material aid to any judicial resolution." See, e.g., GTE.Net LLC v. Cox Commc'ns, Inc., 185 F. Supp. 2d 1141, 1144 (S.D. Cal. 2002)(granting motion to stay on primary jurisdiction grounds).

While no fixed formula exists for applying the doctrine, the Ninth Circuit traditionally looks to four factors that must be satisfied for the doctrine to apply: (1) the need to resolve an issue that; (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority; (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that; (4) requires expertise or uniformity in administration. See Davel, 460 F.3d at 1087; United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987).

On balance, the court finds these factors satisfied here. Plaintiff has alleged that defendants' internet management practices with respect to "peer to peer" ("P2P") file sharing applications are unlawful, and unfairly discriminate against P2P applications. See, e.g., Complaint at ¶¶ 3-4 ("by impairing use of the Blocked Applications while permitting the unimpaired use of other applications, defendants unfairly discriminate against certain internet applications, in violation of established [FCC] policy"); id. at ¶¶ 58-59 (allegations that defendants "unreasonably, secretly, and in bad faith schem[ed] to impede use of the blocked applications"); id. at ¶ 88 (defendants violated CFAA by taking actions "in order to block and/or impede [class members'] use of the Blocked Applications"); id. at ¶ 90 (alleging that "defendants' practice of discriminating against use of the Blocked Applications violates FCC Policy Statement, FCC 05-151"). This issue – i.e., the reasonableness of a broadband provider's network management practices – has, however, been firmly placed within the jurisdiction of the Federal Communications Commission ("FCC"), an

administrative agency whose authority to regulate internet broadband access companies' services is well-established. See 47 U.S.C. § 151 et seq. (establishing FCC and charging it with task of regulating interstate communications); see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1002 (2005); In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 F.C.C.R. 14853, ¶¶ 1, 109 ("In this Order, we establish a new regulatory framework for broadband Internet access services offered by wireline facilities-based providers").

Indeed, the FCC's expertise on the precise issue raised by plaintiff – *Comcast*'s reasonable internet management vis-a-vis its P2P protocols – is already being sought. Two petitions, filed by Free Press and Vuze, Inc., are currently pending before the FCC and specifically ask the FCC to (a) adopt reasonable rules preventing network operators from adopting practices that discriminate against particular internet applications, and (b) enjoin Comcast from managing P2P applications. See Def. Mot. at 11:15-16; 11:24-12:1. The FCC has furthermore announced that it will actively investigate the issue of Comcast's network interference with P2P applications, and it has sought public comment to that effect. See, e.g., id. at 12:2-6. The FCC's actions on this issue make sense, moreover, as the reasonableness of defendants' internet management practices logically implicate issues that require expertise or uniformity in administration. See Nat'l Cable & Telecomms. Ass'n, 545 U.S. at 1002 (noting that Commission's regulation and categorization of broadband internet providers raised questions that involve a "subject matter [that] is technical, complex and dynamic," and that "[t]he Commission is in a far better position to address these questions than we are").

Based on the above, the court concludes that the FCC is already using its recognized expertise to consider some of the exact questions placed before the court here, in an effort to promote uniformity in internet broadband regulation. As such, all prerequisites for application of the primary jurisdiction doctrine are satisfied. See Davel Commc'ns, 460 F.3d at 1087. Accordingly, the court will allow the FCC to resolve its

investigation into reasonable internet management practices, particularly with respect to Comcast's P2P network management, prior to reaching that issue in the action before the court here. Defendants' request to stay the action is GRANTED, pending the FCC's resolution of the network management issues noted above.

The stay shall furthermore apply to all claims in this action. While plaintiff is correct that not all claims implicate the reasonableness of Comcast's network management practices, even those claims that do not directly implicate the issue – e.g, plaintiff's claims for breach of contract, false advertising, etc. – are nonetheless sufficiently interrelated with the network management issue such that it cannot be said that the FCC's consideration and determination of the network management issue will have no impact on resolution of these claims. See, e.g., Complaint at ¶ 52 ("defendants unjustifiably breached the contract by restricting plaintiff's and the class' access to, and use of, the Service"); id. at ¶ 55 ("defendants did not inform plaintiff and the class that it could or would limit their service by impeding and/or blocking the Blocked Applications"); id. at ¶ 72 (allegations that defendants unlawfully "promote[] and advertis[e] the fast speeds that apply to the Service without limitation, when, in fact, defendants severely limit the speed of the Service for certain applications"). Indeed, the court finds it not altogether unlikely that the FCC's resolution of the underlying technology questions at issue may impact the very extent to which defendants' network management protocols can form the basis for legal liability.

In sum, application of the primary jurisdiction doctrine is appropriate. While the court finds defendants' other arguments (preemption and failure to state a claim) less persuasive, the court declines to reach the merits of those arguments in light of the stay. Within thirty days following action by the FCC, the parties shall meet and confer and advise the court how they wish to proceed, if at all, on these remaining grounds, and shall request a mutually agreeable Thursday for a case management conference.

For calendar control purposes, the court requests a status statement to be filed on or about December 12, 2008, if the FCC has not acted by then. The parties' requests for

judicial notice are also GRANTED.

IT IS SO ORDERED.

Dated: June 25, 2008

PHYLLIS J. HAMILTON
United States District Judge

08-1291

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Comcast Corporation, Petitioner,

v.

Federal Communications Commission and
the United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Joel Marcus, hereby certify that on September 21, 2009, I filed the foregoing Brief for Respondents electronically with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users, whose names appear without asterisks in the list below, will be served automatically by the CM/ECF system.

According to the Court's records, some of the participants in the case are not CM/ECF users. I certify further that I have directed that paper copies of the Brief be mailed by First-Class Mail to the non-CM/ECF participants, whose names are marked with an asterisk in the list below.

*James Lund Casserly
David Paul Murray
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238
Counsel for: Comcast Corporation

Elbert Lin
Eve Klindera Reed
Helgi C. Walker
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006-2359
Counsel for: Comcast Corporation

*David H. Solomon
Wilkinson Barker Knauer
2300 N Street, N.W.
Suite 700
Washington, D.C. 20037-1128
Counsel for: Comcast Corporation

Nancy Caroline Garrison
Catherine G. O'Sullivan
U.S. Department of Justice
Antitrust Division, Appellate Section
Room 3224
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Counsel for: USA

*Richard Cotton
*Margaret Tobey
NBC Universal, Inc.
1299 Pennsylvania Avenue, N.W.
11th Floor East
Washington, D.C. 20004
Counsel for: NBC Universal

Harold Jay Feld
Jef Pearlman
Public Knowledge
1875 Connecticut Avenue, N.W.
Suite 650
Washington, D.C. 20009-5731
Counsel for: Consumer Federation of America, Consumers Union, Free Press and Public Knowledge, Vuze

Andrew Jay Schwartzman
Media Access Project
1625 K Street, N.W.
Suite 1000
Washington, D.C. 20006
Counsel for: Consumer Federation of America, Consumers Union, Vuze

*Neal Morse Goldberg
*Michael Stuart Schooler
NCTA
25 Massachusetts Avenue, N.W.
Suite 100
Washington, D.C. 20001-1431
Counsel for: NCTA

Howard Jeffrey Symons
Mintz Levin Cohn Ferris Glovsky and Popeo, PC
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004-2608
Counsel for NCTA

*Robert B. McKenna, Jr.
Qwest Communications International, Inc.
607 14th Street, N.W.
Suite 950
Washington, D.C. 20005
Counsel for: Qwest Communications International

Marvin Ammori
Free Press
501 Third Street, N.W.
Suite 875
Washington, D.C. 20001
Counsel for: Free Press and Public Knowledge, Barbara van Schewick, Lawrence Lessig

*Henry Goldberg
Goldberg, Godles, Wiener & Wright
1229 19th Street, N.W.
Washington, D.C . 20036
Counsel for Open Internet Coalition

Kyle David Dixon
Kamlet Reichert, LLP
1225 19th Street, N.W.
Suite 800
Washington, D.C. 20036
Counsel for: The Progress and Freedom Foundation, James B. Speta, Professor, Glen O. Robinson

John Forbes Blevins
South Texas College of Law
1303 San Jacinto Street
Houston, TX 77002
Counsel for: Jack M. Balkin, Jim Chen, Timothy Wu

/s/ Joel Marcus