

ORAL ARGUMENT NOT YET SCHEDULED

No. 08-1291

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

COMCAST CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

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

OPENING BRIEF FOR PETITIONER COMCAST CORPORATION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies as follows:

A. Parties and Amici

The principal parties to this case are Petitioner Comcast Corporation (“Comcast”), Respondent Federal Communications Commission (“FCC” or “Commission”), and Respondent United States of America. National Cable and Telecommunications Association, NBC Universal, Inc., and Qwest Communications International, Inc. have appeared as intervenors in support of Petitioner. Vuze, Inc., Consumers Union, Consumer Federation of America, Free Press, Public Knowledge, and Open Internet Coalition have appeared as intervenors in support of Respondents. Professor James B. Speta, The Progress & Freedom Foundation, and Glen O. Robinson have appeared as amici curiae in support of Petitioner. Professors Barbara van Schewick and Lawrence Lessig have appeared as amici curiae in support of Respondents. Professors van Schewick and Lessig have moved to add Professors Jack M. Balkin, Jim Chen, and Timothy Wu as additional amici curiae in support of Respondents.

As set forth in the appendix to the ruling under review, the persons who appeared before the agency in the proceedings below are:

Ad Hoc Telecom Manufacturer Coalition

Advanced Communications Law & Policy Institute at New York Law School
Beth Ahern
American Homeowners Grassroots Alliance
American Legislative Exchange Council, Telecommunications & Information Technology Task Force
American Library Association
AT&T Inc.
Richard Bennett
BeSafe Technologies Inc.
Center for Democracy & Technology
Christian Coalition of America; the CP80 Foundation; Enough is Enough; and Stop Child Predators
Cisco Systems, Inc.
CTIA – The Wireless Association
Comcast Corporation
Competitive Enterprise Institute
Computer & Communications Industry Association
Consumer Federation of America and Consumers Union
Discovery Institute
Distributed Computing Industry Association
Electronic Frontier Foundation
Embarq
Fiber-to-the-Home Council
Dean Fox
Free Press; Public Knowledge; Media Access Project; Consumer Federation of America; Consumers Union; New America Foundation; Participatory Culture Foundation
Free State Foundation
Frontier Communications
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Health Tech Strategies, LLC
Independent Telephone & Telephone Communications Alliance
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Information Technology Association of America
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Motion Picture Association of America
National Association of Realtors
National Association of State Utility Consumer Advocates
National Association of Telecommunications Officers and Advisors
National Black Chamber of Commerce; Labor Council for Latin American
Advancement; Latinos in Information Sciences and Technology
Association; League of Rural Voters; National Black Justice Coalition;
National Council of Women's Organizations; and National Congress of
Black Women
National Cable and Telecommunications Association
National Grange of the Order of Patrons of Husbandry
National Public Safety Telecommunications Council
National Telecommunications Cooperative Association
NBC Universal, Inc.
New Jersey Division of Rate Counsel
New York Public Service Commission
The OASIS Institute
Open Internet Coalition
Organization for the Promotion and Advancement of Small
Telecommunications Companies
George Ou
Part-15 Organization
Barry Payne
The Progress and Freedom Foundation
Qwest Communications International, Inc.
Recording Industry Association of America
SafeMedia Corporation
Small Business and Entrepreneurship Council
Christopher Soghoian
Songwriters Guild of America
Sony Electronics, Inc.
Sprint Nextel Corporation
Anthony Tarsia

Telecommunications for the Deaf and Hard of Hearing, Inc.
Telecommunications Industry Association
S. Michael Telford
Time Warner Cable, Inc.
Steven Titch, The Reason Foundation
Robert M. Topolski
Michael Trausch
Joseph Tucek
U.S. Chamber of Commerce
U.S. Distance Learning Association
United States Hispanic Leadership Institute
United States Internet Industry Association
United States Telecom Association
Verizon and Verizon Wireless
Viacom Inc.
Vonage Holdings Corp.
Vuze, Inc.
Women Impacting Public Policy
Wireless Communications Association International, Inc.

B. Ruling Under Review

Comcast seeks review of the final order of the Federal Communications Commission captioned *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,”* 23 F.C.C.R. 13028 (adopted Aug. 1, 2008; released Aug. 20, 2008) (“*Order*”) (JA__ - __).

C. Related Cases

In addition to Comcast's Petition for Review of the *Order* filed in this Court, petitions for review of the *Order* were filed in the Second, Third, and Ninth Circuits. Pursuant to an order of the Judicial Panel on Multidistrict Litigation dated September 8, 2008, those three petitions were transferred to this Court for consolidation with this case and docketed as follows:

PennPIRG v. FCC, No. 08-1302;

Consumers Union of the United States, Inc. v. FCC, No. 08-1318;

Vuze, Inc. v. FCC, No. 08-1320.

On December 16, 2008, this Court consolidated those three cases with the instant case. This Court then granted Comcast's motion to dismiss those three petitions for lack of jurisdiction and issued an order on April 1, 2009 terminating the consolidation. *See Order, Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. Apr. 1, 2009).

Undersigned counsel are not aware of any other cases pending in this Court or any other court that raise issues substantially the same as, or similar to, the issues to be raised in this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of this Court, Comcast hereby submits the following corporate disclosure statement:

Comcast is a Pennsylvania corporation that is not a subsidiary of any other corporation. Comcast is publicly traded on the NASDAQ National Market under the symbols “CMCSA” and “CMCSK.” No publicly held corporation owns 10% or more of the stock of Comcast.

STATEMENT REGARDING JOINT APPENDIX

The parties have conferred and intend to use a deferred joint appendix.

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GLOSSARY

<i>Adelphia Order</i>	FCC Order released July 21, 2006 approving with certain conditions merger of Comcast and Adelphia Communications Corp.
<i>Cable Modem Declaratory Ruling and NPRM</i>	Declaratory Ruling and Notice of Proposed Rulemaking released by FCC on March 15, 2002 finding that cable modem service is an information service and inviting comment on the regulatory implications of that finding
Comcast Comments	Comments of Comcast filed February 12, 2008 responding to FCC's request for public comment in WC Dkt No. 07-52
Comcast July 10 Ex Parte	<i>Ex Parte</i> response of Comcast filed on July 10, 2008 in WC Dkt No. 07-52
Comcast July 21 Ex Parte 1	<i>Ex Parte</i> letter of Comcast, and accompanying declaration filed on July 21, 2008 in WC Dkt No. 07-52 discussing facts of Comcast's contested network management practices
Comcast July 21 Ex Parte 2	<i>Ex Parte</i> letter of Comcast filed on July 21, 2008 in WC Dkt No. 07-52 addressing legal issues in proceedings
Comcast July 24 Ex Parte	<i>Ex Parte</i> letter of Comcast filed on July 24, 2008 in WC Dkt No. 07-52
Comcast July 25 Ex Parte	<i>Ex Parte</i> letter of Comcast filed on July 25, 2008 in WC Dkt No. 07-52
Comcast Reply Comments	Reply Comments of Comcast filed February 28, 2008 further responding to FCC's request for public comment on WC Dkt No. 07-52
Comcast Response	Response by Comcast, dated January 25, 2008 to Enforcement Letter
Complaint	Formal Complaint filed by Free Press and Public

Knowledge against Comcast on November 1, 2007

Enforcement Letter	Request from FCC Enforcement Bureau dated January 11, 2008 to Comcast seeking response to the Complaint
Free Press Memo 1	Memorandum submitted as Attachment 1 to <i>Ex Parte</i> of Free Press filed on June 12, 2008 in WC Dkt No. 07-52
Free Press Memo 2	Memorandum submitted as Attachment 2 to <i>Ex Parte</i> of Free Press filed on June 12, 2008 in WC Dkt No. 07-52
Free Press Memo 3	Memorandum submitted as Attachment 3 to <i>Ex Parte</i> of Free Press filed on June 12, 2008 in WC Dkt No. 07-52
ISPs	Internet service providers, including those providing high-speed cable modem service, wireline (telephone) or wireless broadband, and broadband over power lines
MAP	Media Access Project
Order	Order released by FCC on August 20, 2008, finding Comcast violated “federal Internet policy” and requiring Comcast to cease certain broadband network management practices
P2P	Peer-to-Peer
Petition	Petition for Declaratory Ruling of Free Press <i>et al.</i> filed on November 1, 2007
Petition for Rulemaking	Petition for Rulemaking of Vuze, Inc. filed on November 14, 2007 requesting that the FCC determine the parameters of reasonable network management
Policy Statement	Statement of policy relating to broadband Internet service released by FCC on September 23, 2005
Public Notice	Request for Public Comment on the Petition issued by the FCC’s Wireline Competition Bureau on January 14, 2008

PUHCA

Public Utility Holding Company Act

***Wireline Broadband
Order and NPRM***

Order released by FCC on September 23, 2005, reclassifying wireline (telephone) broadband as an interstate information service and inviting comments on whether the FCC should regulate wireline ISPs

STATEMENT OF JURISDICTION

Comcast is a party aggrieved by a final order of the FCC. This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342 and 2344. Venue is proper under 28 U.S.C. § 2343.

Comcast's Petition for Review was timely filed within the 60-day period under 28 U.S.C. § 2344. Petition for Review, *Comcast v. FCC*, No. 08-1291 (D.C. Cir. filed Sept. 4, 2008).

STATUTES AND REGULATIONS

Pertinent statutes are contained in an addendum to this brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the FCC unlawfully enforced a mere policy statement or statutory policy against Comcast.
2. Whether the FCC violated the procedural requirements of the Administrative Procedure Act ("APA") and fundamental principles of due process by adopting and applying to Comcast's past conduct new legal norms through adjudication in the absence of pre-existing law.
3. Whether the *Order* exceeds the FCC's statutory authority.
4. Whether the *Order* is arbitrary and capricious under the APA.

STATEMENT OF FACTS

This case involves a challenge to the final order of the FCC finding that Comcast violated “federal Internet policy,” *Order* ¶ 41 (JA__-__), by engaging in certain network management practices, which were designed to ensure that all customers could use and enjoy their High-Speed Internet service, and requiring that Comcast, among other things, cease those practices.

The Provision of Broadband Internet Services. Comcast was among the first to develop and deploy residential broadband Internet service, and remains today an industry leader. *See* Comments of Comcast Corporation, WC Dkt No. 07-52, at 3, 5 (Feb. 12, 2008) (“Comcast Comments”) (JA__, __). The availability of broadband Internet service has spurred the development and growth of diverse new Internet content, applications, and services, many of which consume vastly greater quantities of bandwidth than were needed just a year or two ago. *Id.* at 13 (JA__). On average, each Comcast High-Speed Internet customer used more than 40% more bandwidth in 2008 than in 2007. *Id.* at 13 n.31 (JA__). “YouTube alone requires more bandwidth than the *entire Internet* did in 2000.” *Id.* (internal quotations and citation omitted).

Comcast invests hundreds of millions of dollars annually to make its High-Speed Internet service faster and more reliable, *id.* at 13 (JA__), but Comcast must also manage its network to address problems such as spam, viruses, and

congestion. Congestion is an issue because bandwidth is a finite resource. Without network management, users who make disproportionately resource-intensive demands on the network can crowd out fellow users. *Id.* at 17 (JA__). Accordingly, Internet service providers (“ISPs”) such as Comcast universally manage their networks to ensure that high-volume usage by a minority of customers does not harm others’ Internet experiences. *Id.* at 21-23 (JA__-__).

One specific challenge for network operators is the use by a very small number of Internet users of certain peer-to-peer (“P2P”) protocols that consume immense amounts of bandwidth in ways that are unpredictable and inconsistent. *Id.* at 14 (JA__). Only six to seven percent of Comcast’s customers use P2P protocols to share files at any time during a given week, but this activity consumes approximately half (and in some areas as much as two-thirds) of total upstream bandwidth. Letter from Kathryn A. Zachem, Comcast, to Marlene H. Dortch, FCC, WC Dkt No. 07-52, attach. A at 6 (July 21, 2008) (“Comcast July 21 *Ex Parte* 1”) (JA__). To prevent P2P usage from degrading *all* of its customers’ Internet experiences, Comcast managed, in limited circumstances and in a limited manner, those P2P protocols that had an objectively demonstrated history of generating excessive burdens on its network. Comcast Comments at 27 (JA__). Specifically, it temporarily delayed certain P2P uploads (but not downloads), on a content-agnostic basis. *Id.*

The FCC's Deregulatory Approach to Broadband Internet Services. In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”), Congress recognized that the Internet had “flourished” under “a minimum of government regulation,” 47 U.S.C. § 230(a), and declared it the policy of the United States to keep the Internet “unfettered by Federal or State regulation,” *id.* § 230(b). Respecting this guidance, the FCC has repeatedly determined that “broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.”¹ Accordingly, the Commission decided, in a ruling affirmed by the Supreme Court, that cable modem services should not be classified as heavily-regulated common carrier services but, rather, as largely-unregulated information services. *See Brand X*, 545 U.S. at 986-1000; *Cable Modem Declaratory Ruling and NPRM*, 17 F.C.C.R. at 4825, 4828-31

¹ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802 (¶ 5) (2002) (“*Cable Modem Declaratory Ruling and NPRM*”), *aff'd in part, vacated in part by Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *see Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report & Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14853, 14855 (¶ 1) (2005) (“*Wireline Broadband Order and NPRM*”) (adopting a “minimal regulatory environment for wireline broadband Internet access services to benefit American consumers and promote innovative and efficient communications”); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, First Report, 14 F.C.C.R. 2398, 2405 (¶ 18) (1999) (“In no respect are we considering regulating the Internet.”).

(¶¶ 44, 52-55). It later extended that same treatment to wireline broadband, wireless broadband, and broadband over powerline services.² In connection with the cable modem proceeding, the FCC initiated a rulemaking to consider whether it “can and should” regulate those services. *Brand X*, 545 U.S. at 996; see *Cable Modem Declaratory Ruling and NPRM*, 17 F.C.C.R. at 4802 (¶¶ 72-112); see also *Wireline Broadband Order and NPRM*, 20 F.C.C.R. at 14929-35 (¶¶ 146-59) (seeking comment on whether the Commission should regulate wireline broadband services).

The Commission adopted, on the same day as the *Wireline Broadband Order and NPRM*, a statement of policy relating to broadband Internet service. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 F.C.C.R. 14986 (2005) (“*Policy Statement*”). The *Policy Statement* set forth “guidance and insight into [the FCC’s] approach to the Internet and broadband,” articulating four “principles” for consumer expectations and stating, in a footnote, that the principles were “subject to reasonable network

² *Wireline Broadband Order and NPRM*, 20 F.C.C.R. at 14857, 14862-65, 14875-98 (¶¶ 4, 12-17, 41-85); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 F.C.C.R. 5901, 5901, 5908-14 (¶¶ 1, 18-34) (2007); *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Mem. Op. & Order, 21 F.C.C.R. 13281, 13281, 13285-89 (¶¶ 1, 7-15) (2006).

management.” *Id.* at 14987 & n.15 (¶¶ 3, 5 n.15). The agency expressly stated that it was “not adopting rules,” and observed that the principles were “consistent with [the] Congressional directives” in Sections 230(b) of the Communications Act and 706(a) of the 1996 Act. *Id.* at 14987-88 (¶¶ 2, 3 & n.15); *see* 47 U.S.C. §§ 230(b), 1302(a) (formerly codified at 47 U.S.C. § 157 note).

Then-Chairman Martin elaborated that the *Policy Statement* neither “establish[ed] rules nor [was an] enforceable document[.]” FCC, News Release, *Chairman Kevin J. Martin Comments on Commission Policy Statement* (Aug. 5, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A2.pdf. Commissioner Copps expressed disappointment that the statement was not a “rule that [the FCC] could use to bring enforcement action.” *Wireline Broadband Order and NPRM*, 20 F.C.C.R. at 14980 (Copps); *see also Order* (Copps Statement) (JA__) (describing genesis of *Policy Statement* in relation to *Wireline Broadband Order*). So did proponents of so-called “net neutrality” regulation. *See Public Wants Government to Ensure Net Neutrality, Consumer Groups Say*, Telecom A.M. (Jan. 19, 2006) (quoting an analyst for Consumers Union as complaining that “the FCC ‘went out of its way’ to stress that its ... policy statement on net neutrality wasn’t ‘enforceable’”). And the Wireline Competition Bureau Chief explained that the *Policy Statement* set forth “principles” that “are not enforceable.” *FCC Adopts a Policy Statement Regarding*

Network Neutrality, TechLawJournal.com, Aug. 5, 2005, available at <http://techlawjournal.com/topstories/2005/20050805.asp>.

Two years later, the Commission, having taken no action in any above-referenced rulemaking, issued a Notice of Inquiry seeking comment on “whether ... the Commission ha[s] the legal authority to enforce the *Policy Statement* in the face of particular market failures or other specific problems” and what the “challenges” might be “[i]f the Commission were to promulgate rules in th[e] area” of broadband. *Broadband Industry Practices*, Notice of Inquiry, 22 F.C.C.R. 7894, 7989 (¶ 11) (2007). The Commission reiterated that “[t]he *Policy Statement* did not contain rules.” *Id.* at 7898 n.20 (¶ 11 n.20); see also *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors, to Time Warner Cable Inc., et al.*, Mem. Op. & Order, 21 F.C.C.R. 8203, 8299 (¶ 223) (2006) (“*Adelphia Order*”) (“The Commission held out the possibility of codifying the *Policy Statement*’s principles ... [but] chose not to adopt rules in the *Policy Statement*.”). No rules have resulted from this proceeding either.

The Proceedings Below. On November 1, 2007, Free Press and Public Knowledge filed a self-styled “Formal Complaint” regarding Comcast’s network management practices and alleged that Comcast was “violating the FCC’s [] *Policy Statement*.” *Formal Complaint of Free Press and Public Knowledge Against*

Comcast Corporation at 1 (Nov. 1, 2007) (“Complaint”) (JA__). That same day, Free Press, Public Knowledge, and Media Access Project (“MAP”), among others, filed a Petition for Declaratory Ruling similarly seeking a declaration that Comcast’s practices “violate[] the FCC’s [] *Policy Statement*” and are not “reasonable network management.” *Petition for Declaratory Ruling of Free Press et al.*, WC Dkt No. 07-52, at 3 (Nov. 1, 2007) (“Petition”) (JA__). Two weeks later, Vuze, Inc. filed a Petition for Rulemaking requesting that the FCC “determine the parameters of ‘reasonable network management’ by broadband network operators[.]” *Petition for Rulemaking of Vuze, Inc.*, WC Dkt No. 07-52, at 1 (Nov. 14, 2007) (“Petition for Rulemaking”) (JA__).

Despite the absence of any rules authorizing or establishing an administrative process for “Formal Complaints” regarding violations of the *Policy Statement* in general or ISPs’ network management practices in particular, the FCC’s Enforcement Bureau requested a response from Comcast on January 11, 2008. Letter from Kris A. Monteith, FCC Enforcement Bureau, to Mary McManus, Comcast, File No. EB-08-IH-1518 (Jan. 11, 2008) (“Enforcement Letter”) (JA__). The company responded two weeks later, explaining the propriety of its practices, demonstrating the unenforceability of the *Policy Statement*, and urging dismissal of the Complaint. Letter from Mary McManus, Comcast, to Kris A. Monteith, FCC Enforcement Bureau, File No. EB-08-IH-1518 (Jan. 25, 2008)

(“Comcast Response”) (JA__-__). Meanwhile, the Commission’s Wireline Competition Bureau sought public comment on the Petition and the Petition for Rulemaking. *Comment Sought on Petition for Declaratory Ruling Regarding Internet Management Policies*, Public Notice, 23 F.C.C.R. 340 (Jan. 14, 2008) (“Public Notice”) (JA__); *Comment Sought on Petition for Rulemaking To Establish Rules Governing Network Management Practices by Broadband Network Operators*, Public Notice, 23 F.C.C.R. 343 (Jan. 14, 2008) (JA__). In response, Comcast submitted comments and reply comments, emphasizing, *inter alia*, the unenforceability of the *Policy Statement* and arguing that if the Commission wished to regulate ISPs’ network management practices it could proceed with any one of multiple pending rulemakings on the subject. *See* Comcast Comments at 45-48, 43-45, 52 (JA__-__, __-__, __); Reply Comments of Comcast Corporation, WC Dkt No. 07-52, at 40-45 (Feb. 28, 2008) (“Comcast Reply Comments”) (JA__-__). Just before reply comments were due, the Commission held the first of three public “hearings” around the country on the Complaint, Petition, and Petition for Rulemaking. *See Order* ¶ 11 (JA__). No transcripts of these hearings were ever placed in the record.

More than three months after the comment period closed, Free Press submitted in the Petition docket three “memoranda” setting forth multiple new legal theories to support its request for enforcement action. *See* Letter to Marlene

H. Dortch, FCC, from Marvin Ammori, Free Press (June 12, 2008), attach. 1 (“Free Press Memo 1”) (JA__-__), attach. 2 (“Free Press Memo 2”) (JA__-__), attach. 3 (“Free Press Memo 3”) (JA__-__). In light of Comcast’s demonstration that the *Policy Statement* is unenforceable, Free Press sought to recharacterize its allegation that Comcast violated the *Policy Statement*. See Free Press Memo 2 at 2 (JA__) (asserting that, by “referring to ‘enforcing’ the *Policy Statement*,” Free Press did not mean that the agency should “‘enforce’ the *Policy Statement*” but instead “adjudicate a complaint and make policy in line with its announced statement of policy that interprets its Congressional directives”).

Faced with a moving target, Comcast filed a response to the three memoranda. See Response of Comcast Corporation, WC Dkt No. 07-52 (July 10, 2008) (“Comcast July 10 *Ex Parte*”) (JA__-__). Over the next two weeks, Free Press and MAP made additional last-minute filings in the Petition docket in an attempt to bolster their new legal theories,³ to which Comcast also responded.⁴

³ Letter from Marvin Ammori, Free Press, to Marlene H. Dortch, FCC, WC Dkt No. 07-52 (July 17, 2008) (JA__-__); Letter from Marvin Ammori, Free Press, to Marlene H. Dortch, FCC, WC Dkt No. 07-52 (July 20, 2008) (JA__-__); Letter from Harold Feld, MAP, to Marlene H. Dortch, FCC, WC Dkt No. 07-52 (July 17, 2008) (JA__-__); Written *Ex Parte* Comments of Media Access Project on Comcast Waiver of Jurisdictional Arguments Against Commission Authority to Adjudicate Complaint, WC Dkt No. 07-52 (July 22, 2008) (JA__-__); Letter from Marvin Ammori, Free Press, to Marlene H. Dortch, FCC, WC Dkt No. 07-52 (July 24, 2008) (JA__-__).

The Order. On August 1, 2008, the FCC announced that it was “order[ing] Comcast to end discriminatory network management practices.” Press Release, FCC, *Commission Orders Comcast To End Discriminatory Network Management Practices* 1 (Aug. 1, 2008) (JA__). According to the press release, the agency found, using the language of the *Policy Statement*, that Comcast had “unduly interfered with Internet users’ right to access the lawful Internet content and to use the applications of their choice” and thereby “contravene[d] federal policies.” *Id.* This announcement marked the Commission’s first major attempt to exercise legal authority in the much-debated area of “net neutrality.”

On August 20, 2008, the Commission released the *Order*. Procedurally, the *Order* purported to resolve both the Complaint and the Petition, claiming to “consolidate the records of the two proceedings.” *See Order* ¶ 11 n.40 (JA__). Substantively, the *Order* proceeded in three parts.

Implicitly acknowledging its lack of direct authority to regulate the network management practices of ISPs, the Commission first attempted to justify its action based on ancillary authority. The *Order* listed every conceivable statutory basis (a

⁴ Letter from Kathryn A. Zachem, Comcast, to Marlene H. Dortch, FCC, WC Dkt No. 07-52 (July 21, 2008) (“Comcast July 21 *Ex Parte* 2”) (JA__ -__); Letter from Kathryn A. Zachem, Comcast, to Marlene H. Dortch, FCC, WC Dkt No. 07-52 (July 24, 2008) (“Comcast July 24 *Ex Parte*”) (JA__ -__); Letter from Kathryn A. Zachem, Comcast, to Marlene H. Dortch, FCC, WC Dkt No. 07-52 (July 25, 2008) (“Comcast July 25 *Ex Parte*”) (JA__ -__).

total of seven provisions) for such indirect regulatory power. *See id.* ¶¶ 12-27 (JA__-__). Evincing little confidence in the merits of its “everything but the kitchen sink” approach, the Commission went so far as to embrace MAP’s claim that Comcast waived any challenge to the exercise of ancillary authority by failing to contest certain *dicta* in a prior, unrelated order approving Comcast’s merger with Adelphia Communications Corporation. *See id.* ¶ 27 (JA__-__) (discussing *Adelphia Order*, 21 F.C.C.R. at 8298 (¶ 220)).

The Commission then devoted thirteen paragraphs to justifying its decision to announce and simultaneously apply so-called “new federal policy” through adjudication rather than adopting prospective standards by rulemaking. *See id.* ¶¶ 28-40 (JA__-__). Although the agency relied heavily on its discretion to choose between rulemaking and adjudication, it failed to address the lack of any pre-existing binding legal norm governing ISPs’ network management that it could possibly interpret or apply in the instant proceedings, despite Comcast’s emphasis on this point below. *See, e.g.*, Comcast July 10 *Ex Parte* at 14-16 (JA__-__). The *Order* also rejected Comcast’s argument that, given the absence of any legal norm governing the conduct at issue, retroactive enforcement action would violate fundamental principles of due process such as fair notice.

Finally, the FCC concluded that Comcast’s contested network management practices “r[an] afoul of federal Internet policy.” *Order* ¶ 41 (JA__-__); *see id.* ¶¶

41-56 (JA__-__). The agency found that Free Press had “made a prima facie case that Comcast’s practices ... impede Internet content and applications,” *id.* ¶ 43 (JA__-__), again employing language from the *Policy Statement*. The Commission then determined that Comcast’s practices did not constitute “reasonable network management” because Comcast failed to carry its “high” burden of showing “careful[] tailor[ing]” to a “critically important interest.” *Id.* ¶ 47 (JA__-__). These legal norms, as well as the standard of review (derived without explanation from unrelated contexts such as dormant Commerce Clause jurisprudence), appeared in a Commission document for the first time in the *Order*.

Based on its determination that Comcast’s network management practices were “discriminatory and arbitrary[,]” “contravene[d]” federal policy, and did “not constitute reasonable network management,” *id.* ¶¶ 1, 43, 51 (JA__, __-__, __), the FCC “institute[d] a plan that w[ould] bring Comcast’s unreasonable conduct to an end,” *id.* ¶ 1 (JA__). The *Order*’s “overriding aim [was] to end Comcast’s use of unreasonable network management practices” and to “send[] the unmistakable message that Comcast’s conduct must stop.” *Id.* ¶ 54 (JA__-__). The *Order* thus required Comcast to cease its contested practices by December 31, 2008 (a process Comcast had already initiated), and to establish and disclose new network management practices in their place. *Id.* ¶¶ 54-55 (JA__). Failure to comply with the changes and disclosures prescribed in the *Order* would result in an immediate

injunction, issuance of a show cause order, and a hearing on that order. *Id.* ¶ 55 (JA__). The Commission concluded that it would “closely monitor the company’s network management practices” and thus did “not terminate this proceeding but [] retain[ed] jurisdiction over this matter.” *Id.* ¶ 56 (JA__). The Commission took no action on the Petition for Rulemaking, which remains pending.⁵

Commissioners McDowell and Tate dissented. Commissioner McDowell explained: “[W]e do not have any rules governing Internet network management to enforce.” *Id.* (McDowell Statement) (JA__). “[T]he Commission did not intend for the Internet Policy Statement to serve as enforceable rules but, rather, as a statement of general policy guidelines.” *Id.* (JA__). As for ancillary authority, he observed, “[u]nder the analysis set forth in the *[O]rder*, the Commission can apparently do *anything* so long as it frames its actions in terms of promoting the Internet or broadband deployment.” *Id.* (JA__). Commissioner Tate “associate[d] [her]self ... with the procedural and substantive legal arguments of” Commissioner McDowell, and noted the *Order*’s “minimal substantive discussion about ... the growing problem of illegal content distribution.” *Id.* (Tate Statement) (JA__).

⁵ On January 5, 2009, Comcast informed the FCC that, in compliance with the *Order*, it had ceased the contested network management practices as of December 31, 2008. *See* Letter of Kathryn A. Zachem, Comcast, to Marlene H. Dortch, FCC, WC Dkt No. 07-52, File No. EB-08-IH-1518, at 1 (Jan. 5, 2009) (JA__-__).

SUMMARY OF THE ARGUMENT

In this case, Comcast challenges the FCC's *Order* finding that the company violated "federal Internet policy," *id.* ¶ 41 (JA__-__), by engaging in certain network management practices that were designed to ensure that all customers could use and enjoy their Internet service without experiencing slow-downs due to disproportionate bandwidth usage by others on shared networks.

The *Order* arose out of a self-styled "Formal Complaint" and a petition for declaratory ruling that urged the Commission to enforce against Comcast the agency's 2005 statement of policy relating to broadband Internet services, which set forth hortatory "principles" regarding consumer expectations for such services. The *Policy Statement* was widely and correctly understood, at the time of its adoption and thereafter, not to impose binding legal norms on ISPs but rather to articulate, by the plain terms of the statement, the Commission's "insight[s]" on "the Internet and broadband." *Policy Statement*, 20 F.C.C.R. at 14987 (¶ 3); *see also Order* (McDowell Statement) (JA__) (explaining that the FCC had no "rules governing Internet network management to enforce").

Thus, at the time Free Press made its filings, *no provision of federal law* – whether a statute, agency rule, or agency precedent – *governed the network management practices of ISPs*. There was simply no federal law to interpret, enforce, or apply against Comcast. The Commission nonetheless pressed ahead,

refusing to dismiss the filings in favor of a rulemaking. Comcast consequently found itself at risk of substantial regulatory sanction for conduct that was lawful when undertaken on the basis of a fictional claim, an unknown process for the resolution of that claim, an ever-evolving theory of liability against which to defend, and a “high” burden of proof that it did not know it was required to meet until the burden was applied in the *Order*. *Order* ¶ 47 (JA__-__).

Despite the well-established unenforceability of policy statements and the absence of any other possible binding legal norm in the area of ISP network management, the FCC took enforcement action against Comcast. Although the *Order* attempted to sidestep the unenforceability of the *Policy Statement* by claiming to construe the Complaint as alleging violations of the two statutory provisions cited in the statement, the agency in actuality measured Comcast’s network management practices against the “principles” of the *Policy Statement* and its footnoted exception for reasonable network management, found that the practices “r[an] afoul” of those standards, *id.* ¶ 41 (JA__-__), declared the practices unlawful, and, on that basis, ordered an end to the practices and asserted continuing jurisdiction over the company’s network management.

This historic action was not undertaken pursuant to any federal statute, regulation, or precedent governing the network management practices of ISPs. Rather, it was based on the agency’s claimed “ancillary authority,” cobbled

together out of no less than seven unrelated statutory provisions (the majority of which are themselves mere declarations of policy), to announce and simultaneously “enforce” in 2008 the “federal Internet policy,” *id.*, that Comcast’s prior conduct was determined to have violated. At bottom, the *Order* put the enforcement cart before the regulatory horse.

As explained below, the *Order* is unlawful because it: violates elementary tenets of administrative law regarding the unenforceability of policy statements; cannot be justified as an exercise of agency discretion to choose between adjudication and rulemaking because there was no federal law to interpret or apply to the facts at issue; circumvents the rulemaking requirements of the APA; contravenes fundamental principles of due process by applying binding legal norms to Comcast’s past conduct without fair notice; and fails to justify the exercise of ancillary authority. Because these failings are fundamental legal flaws that cannot be cured on remand, the *Order* must be vacated.

STANDING

Comcast has statutory standing because it is a “party aggrieved” by the *Order*. 28 U.S.C. § 2344. Comcast’s Article III standing is “self-evident” because it is the “object” of the *Order*. *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)).

ARGUMENT

I. STANDARD OF REVIEW

Whether the FCC unlawfully enforced mere policy against Comcast, violated the procedural requirements of the APA, and failed to provide fair notice are subject to *de novo* review. No deference is due the Commission on these purely legal issues that are not matters of agency choice. *See Prof'l Reactor Operator Soc'y v. NRC*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (“[R]eviewing courts do not owe the same deference to an agency’s interpretation of statutes that, like the APA, are outside the agency’s particular expertise and special charge to administer.” (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990))); *see also Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 909 n.11 (9th Cir. 2003) (“The agency is not entitled to deference because complying with the notice and comment provisions when required by the APA ‘is not a matter of agency choice.’”); *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1144 (9th Cir. 2000) (“Purely legal questions are reviewed *de novo*[.]”).

The propriety of the FCC’s exercise of ancillary authority is likewise subject to *de novo* review. The agency receives no deference on the question whether it has acted within the scope of its delegated authority. *See Am. Library Ass’n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005) (“[A]n ‘agency’s interpretation of [a] statute is not entitled to deference absent a *delegation of authority* from Congress

to regulate in the areas at issue.” (quoting *MPAA v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002)); *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (“[I]t seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power.”); *see also Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (“Deference in accordance with *Chevron* ... is warranted only ‘when it appears ... that the agency interpretation claiming deference was promulgated in the exercise of [delegated] authority’” (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001))). Indeed, “[w]hen an agency’s assertion of power into new arenas is under attack, ... courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue.” *ACLU*, 823 F.2d at 1567 n.32.

Comcast’s remaining challenges to the *Order* are reviewed under the “arbitrary and capricious” standard of the APA. In determining whether agency action is arbitrary and capricious, “a reviewing court does not serve as a mere rubber stamp for agency decisions.” *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130, 1145 (D.C. Cir. 1980).

II. THE *ORDER* IS UNLAWFUL BECAUSE NEITHER THE *POLICY STATEMENT* IT ACTUALLY ENFORCED AGAINST COMCAST, NOR THE STATUTORY PROVISIONS IT PURPORTED TO ENFORCE, GOVERNED THE CONDUCT AT ISSUE.

For the FCC to conclude that an entity has acted in violation of federal law and to take enforcement action for such a violation, there must have been “law” to violate. Because “[t]he Commission ‘has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress,’” *Am. Library Ass’n*, 406 F.3d at 698 (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)), the “law” in an FCC proceeding must be either a statutory provision or an agency rule or precedent properly promulgated pursuant to an underlying statute.

Here, no such law existed. Specifically, neither the *Policy Statement* that the FCC actually enforced against Comcast, nor the statutory provisions that the agency professed to enforce, are binding legal norms that governed the conduct at issue. As set forth below, the *Policy Statement* is unenforceable as a matter of law. Although the Commission attempted to characterize the *Order* as having enforced something other than the *Policy Statement*, review of the *Order* demonstrates otherwise. Even accepting that the *Order* did not enforce the *Policy Statement* but rather the statutory provisions referenced in the statement (a proposition irreconcilable with the record and independently arbitrary and capricious, *see infra* Section V), the *Order* is still unlawful because those statutory provisions are

themselves mere expressions of policy and therefore did not create any binding legal norms either.

A. The Commission Unlawfully Enforced the *Policy Statement Against Comcast.*

It is hornbook administrative law that an agency statement of policy does not establish binding legal standards and thus is unenforceable. An agency may only “establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents.” *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974). A “general statement of policy” is “neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications.” *Id.* As a result, a statement of policy has no more legal effect than a “press release” and “does not establish a ‘binding norm.’” *Id.*; accord, e.g., *Chamber of Commerce of U.S. v. U.S. Dep’t of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999).

This distinction between a statement of policy and binding agency action is “critical.” *Ctr. for Auto Safety v. NHTSA.*, 452 F.3d 798, 807 (D.C. Cir. 2006). An agency “cannot apply or rely upon a general statement of policy as law.” *Pac. Gas*, 506 F.2d at 38. To apply the policy, the agency must “support [its action] just as if the policy statement had never been issued.” *Id.* Otherwise, the agency will

have “escape[d] its responsibility to present evidence and reasoning supporting its substantive rules.” *Id.* at 38-39.

The *Policy Statement* lacked any binding legal effect. By its terms, the *Policy Statement* merely “offer[ed] guidance and insight into [the FCC’s] approach to the Internet and broadband.” 20 F.C.C.R. at 14987 (¶¶ 2-3). It expressly disclaimed the adoption of rules, *id.* at 14988 n.15 (¶ 5 n.15), stating that it contained “principles” that the Commission intended to “incorporate ... into its ongoing policymaking activities,” *id.* at 14988 (¶ 5). Thus, the *Policy Statement* was, at most, “merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications.” *Pac. Gas*, 506 F.2d at 38. The *Policy Statement* also was not published in the Code of Federal Regulations – “[t]he real dividing point between” general statements of policy and binding regulations. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986).⁶

Accordingly, the FCC “cannot apply or rely upon” the *Policy Statement* “as law.” *Pac. Gas*, 506 F.2d at 38. Policy providing “insight” consistent with policy,

⁶ The *Policy Statement* does not even deserve the respect afforded a proper statement of policy. Such statements ordinarily “represent[] an agency position with respect to how it will treat – typically *enforce* – *the governing legal norm*,” *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (emphasis added), and the APA requires that they be published in the Federal Register, *see* 5 U.S.C. §§ 552(a)(1)(D), 553(d).

together with a promise to make more policy, does not create an enforceable legal norm. See Barbara Esbin & Adam Marcus, “*The Law Is Whatever the Nobles Do*”: *Undue Process at the FCC*, 17 *CommLaw Conspectus* *1, *17 (2009), <http://commlaw.cua.edu//articles/v17/17.2/Esbin-Marcus-Revised.pdf>. The then-Chairman, a Commissioner, and a Bureau Chief, as well as disappointed advocates of net neutrality regulation, recognized this immediately. See *supra* pp. 6-7. The Commission reiterated, one year later, that it “chose not to adopt rules in the *Policy Statement*” and, two years later, that the *Policy Statement* “did not contain rules.” See *id.* at 7. As Commissioner McDowell summed it up: “[T]he Commission did not intend for the Internet Policy Statement to serve as enforceable rules but, rather, as a general statement of policy guidelines.” *Order* (McDowell Statement) (JA__).⁷

Tacitly recognizing the unenforceability of the *Policy Statement*, the *Order* sought to obscure what it was actually enforcing, claiming vaguely to address the question “whether Comcast’s conduct runs afoul of federal Internet policy.” *Id.* ¶ 41 (JA__ - __). Even though the Complaint (and Petition) expressly alleged only a violation of the *Policy Statement* and the proceedings were conducted almost

⁷ The Commission’s imposition (on parties other than Comcast) of merger conditions requiring compliance with the *Policy Statement* further evidences the agency’s understanding that the statement is not independently enforceable. See Comcast July 10 *Ex Parte* at 6-7 (JA__ - __).

entirely on that basis, *see supra* pp. 7-8, the Commission relied on Free Press' eleventh-hour filing to construe the Complaint as alleging violations of "the statutory provisions interpreted in and cited by the [] *Policy Statement*," *Order* ¶ 41 n.177 (JA__ - __) (citing Free Press Memo 2 at 3).

This Court has long held that "it is the substance of what the [agency] has purported to do and has done which is decisive," not the label the agency affixes to its actions. *Chamber of Commerce of U.S. v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980) (quoting *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942)); *accord Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 26 (D.C. Cir. 2006) (collecting cases). In light of the history of the proceedings and the analysis in the *Order*, it is clear that the Commission unlawfully applied the *Policy Statement* to Comcast's contested practices.

The Complaint, Enforcement Letter, Comcast Response, Petition, Public Notice, and comments were uniformly and unambiguously framed in terms of an alleged violation of the *Policy Statement*. The Complaint asserted that Comcast was "violating the FCC's [] *Policy Statement*." Complaint at 1, 35 (JA__, __). The Enforcement Letter asked Comcast for a response "to [the] allegations [of the Complaint]," Enforcement Letter at 1 (JA__), and that response explained why the challenged practices did not "violate[] the [] *Policy Statement*," Comcast Response at 13 (JA__); *see id.* at 8-11, 13-15 (JA__ - __, __ - __). Similarly, the Petition

sought a declaration that Comcast’s practices “violate[] the FCC’s [] *Policy Statement*” and do not constitute “reasonable network management.” Petition at 3 (JA__). The Public Notice sought comment on precisely those issues, *see* Public Notice, 23 F.C.C.R. at 340 (¶ 1) (JA__) (seeking comment on whether ““degrading peer-to-peer traffic violates the FCC’s Internet Policy Statement”” and whether such practices “meet the Commission’s exception for reasonable network management” (quoting Petition at 3)), and the comments submitted focused on those “narrow” questions, Comments of Free Press *et al.*, WC Dkt No. 07-52, at 15 (Feb. 13, 2008) (JA__-__); *see* Reply Comments of Free Press *et al.*, WC Dkt No. 07-52, at 3-4 (Feb. 28, 2008) (JA__-__).⁸

Consistent with this record, the *Order*’s discussion of the legality of Comcast’s conduct turned on the principles of the *Policy Statement* and its exception for “reasonable network management.” The *Policy Statement* provided, as relevant here, that consumers are entitled “to access the lawful Internet content of their choice,” “to run applications and use services of their choice,” and “to competition,” subject to “reasonable network management.” 20 F.C.C.R. at 14987-88 & n.15 (¶ 4 & n.15). Quoting three times from the *Policy Statement* (and

⁸ The caption of the *Order* also described the decision as regarding a petition “for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for ‘Reasonable Network Management.’” *Order* at Caption (JA__).

paraphrasing its language throughout), the *Order* closely followed that blueprint. *See, e.g., Order* ¶¶ 43, 50 (JA__-__, __) (quoting *Policy Statement*, 20 F.C.C.R. at 14988 (¶ 4)). It found that “Free Press ha[d] made a prima facie case that Comcast’s practices do impede Internet content and applications,” *id.* ¶ 43 (JA__-__), that “Comcast’s practice[s] ... pose[] significant risks of anticompetitive abuse,” *id.* ¶ 47 (JA__-__), and that “Comcast’s practices do not constitute reasonable network management,” *id.* ¶ 51 (JA__). The reference to “reasonable network management” – a term of art with no legal relevance or regulatory history outside the *Policy Statement* – also evidences application of the *Policy Statement*. The Commission further made clear that it was applying the *Policy Statement* by choosing to address and reject Comcast’s argument that the contested conduct did not come within the scope of the *Policy Statement*. *Id.* ¶ 44 (JA__-__).⁹

Other statements by the FCC, elsewhere in the *Order* and issued since, confirm that the agency enforced the *Policy Statement* against Comcast. In the

⁹ The separate statements in the *Order* corroborate that it enforced the *Policy Statement*. *See, e.g., Order* (Martin Statement) (JA__) (stating that *Order* shows that “the Commission can and will enforce the principle that consumers should be able to access any content and application” and is “ready, willing, and able to enforce the principles” of the *Policy Statement*); *id.* (Copps Statement) (JA__) (stating that *Order* is “based upon the four principles” of the *Policy Statement*); *id.* (Adelstein Statement) (JA__) (stating that *Order* “interpret[s] the specific provisions of the *Internet Policy Statement*” and “makes clear” how far the “protections of the *Internet Policy Statement* extend”).

Order, the Commission repeatedly emphasized its view that Comcast had prior notice that its conduct would be “measured” against the *Policy Statement*. *Id.* ¶ 27 (JA__ - __) (internal quotation marks omitted); *see id.* ¶ 34 (JA__) (alleging an earlier “commitment [by the FCC] to ensure compliance with the principles set forth in the [] *Policy Statement*”). And just this April, the FCC described the *Order* as having “clarif[ied]” and “assert[ed] the Commission’s authority to enforce the [] *Policy Statement*.” *A National Broadband Plan for Our Future*, Notice of Inquiry, 24 F.C.C.R. 4342, 4357-58 & n.67 (¶ 47 & n.67) (2009).

Accordingly, despite the Commission’s efforts to muddy the issue, it is clear that the *Order* enforced the *Policy Statement* against Comcast. The agency did not “support [its action] just as if the policy statement had never been issued,” *Pac. Gas*, 506 F.2d at 38, but simply applied to the conduct at issue the principles of the *Policy Statement* and its exception for “reasonable network management,” and declared the conduct unlawful for failure to comply with the *Policy Statement*. But the *Policy Statement* was not law. For this reason alone, the *Order* cannot stand.

B. The Statutory Provisions That the Commission Purported To Enforce Did Not Govern the Conduct at Issue.

Even if this Court were to accept the Commission’s strained characterization of the *Order* as enforcing “the statutory provisions interpreted in and cited by the [] *Policy Statement*,” *Order* ¶ 41 n.177 (JA__ - __), the *Order* is still unlawful. Although the *Policy Statement* did not “interpret” anything, it cited Sections 230(b)

of the Communications Act and 706(a) of the 1996 Act. Those statutory provisions, like the *Policy Statement*, are mere expressions of policy and do not create any binding legal norms either.

Section 230(b) does no more than set forth “the policy of the United States.” 47 U.S.C. § 230(b). It does not even remotely establish mandatory standards of conduct governing network management by ISPs; to the contrary, it specifies that Internet services are to be “unfettered by Federal or State regulation.” *Id.* Similarly, Section 706(a) merely sets forth general goals for the FCC and state regulators to pursue in order to encourage the deployment of broadband services, and its language does not by any stretch regulate ISPs’ network management practices. *See* 47 U.S.C. § 1302(a). As the Commission has expressly held, “[S]ection 706 does not constitute an independent grant of authority.” *Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, Mem. Op. and Order, 13 F.C.C.R. 24012, 24047 (¶ 77) (1998).¹⁰

The *Policy Statement*’s treatment of Sections 230(b) and 706(a) suggests the Commission itself understood that it cannot directly enforce those two provisions. Nowhere in that document did the Commission assert that it could independently

¹⁰ The Commission’s abdication of this precedent without any explanation, *see Order* ¶ 18 n.81 (JA__-__), is arbitrary and capricious. *See infra* Section V; Comcast July 10 *Ex Parte* at 31-32 (JA__-__).

“enforce” or promulgate an “enforcement policy” for either statutory provision. Rather, the *Policy Statement* carefully stated that it merely provided “guidance and insight” that was “consistent with” those two provisions. 20 F.C.C.R. at 14987 (¶¶ 2-3).

Even the *Order* reflects a reluctance to assert that the agency was enforcing Sections 230(b) and 706(a) directly against Comcast. In the thirteen paragraphs discussing the legality of Comcast’s conduct, *see Order* ¶¶ 41-53 (JA__-__), the FCC barely addressed Section 230(b), *see id.* ¶¶ 43, 49 (JA__-__, __-__). And the agency cited to Section 706(a) only in a footnote that summarily asserted five other supposed (but likewise unalleged) statutory violations by Comcast. *Id.* ¶ 43 n.201 (JA__-__). This cursory assertion, relegated to a footnote, is not a serious suggestion by the agency that Section 706(a), or any of the other five statutory provisions cited in passing, could be enforced against Comcast.¹¹ In fact, the *Order*, notwithstanding its construction of the Complaint, studiously avoided stating that it enforces Sections 230(b) or 706(a), instead referring repeatedly to enforcement of “federal policy.” *See id.* ¶¶ 12-14, 24, 41, 43 (JA__-__, __, __-__,

¹¹ In any event, these additional statutory provisions, like Section 706(a), are either not independently enforceable at all or, even if enforceable to some extent, not reasonably applicable to the challenged conduct. The error of the agency’s separate contention that the provisions justify the exercise of ancillary authority is discussed *infra* in Section IV.

__-__). If the Commission truly believed that *any* statutory provision was *directly* enforceable against Comcast’s conduct, it would not have premised the *Order* entirely on *ancillary* authority. *See id.* ¶¶ 12-27 (JA__-__).

In sum, the *Order* is unlawful whether properly read as enforcing the *Policy Statement* or considered on the FCC’s own (arbitrary and capricious) terms as enforcing the statutory provisions cited in the *Policy Statement*.

III. TO THE EXTENT THE *ORDER* ENFORCED A NEW STANDARD OF CONDUCT BY ADJUDICATION, IT VIOLATED THE PROCEDURAL REQUIREMENTS OF THE APA AND FUNDAMENTAL PRINCIPLES OF DUE PROCESS GIVEN THE ABSENCE OF PRE-EXISTING LAW.

To account for the above-demonstrated lack of binding legal norms governing the conduct at issue, the *Order* at times appears to suggest that it adopted and applied a wholly new standard of conduct by adjudication. *See id.* ¶ 28 (JA__-__) (discussing use of adjudication to “enunciate and enforce new federal policy”). To the extent the *Order* may be deemed to have done so, it violated the APA’s procedural requirements and fundamental principles of due process.

A. The Commission Violated the APA by Adopting and Applying New Standards by Adjudication.

With no pre-existing legal norm to interpret, enforce, or otherwise apply to Comcast, the FCC’s adoption and application of any new standards of conduct through adjudication rather than rulemaking violated the APA. The Commission

defended its abnormal process by relying on its discretion to choose between adjudication and rulemaking under cases such as *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (“*Chenery I*”), and *NLRB v. Bell Aerospace Co. Division of Textron Inc.*, 416 U.S. 267 (1974). See *Order* ¶¶ 28-29 (JA__ - __). But those cases make plain that an agency’s freedom to choose adjudication over rulemaking *presupposes* a pre-existing statutory or regulatory mandate that the agency could elect to implement either by general rules or case-by-case decisionmaking.

Bell Aerospace and *Chenery II* both involved agency adjudications that spelled out the scope or meaning of an extant federal statutory mandate. *Bell Aerospace* affirmed the NLRB’s refinement, by adjudication, of the scope of certain statutory protections in the National Labor Relations Act. 416 U.S. at 272. *Chenery II* upheld the SEC’s interpretation, by adjudication, of Sections 7 and 11 of the Public Utility Holding Company Act (“PUHCA”) in a factual context “not previously ... confronted.” 332 U.S. at 203, 207.

Indeed, the Supreme Court emphasized in *Chenery II* that it had previously *reversed* the SEC for attempting to apply a new standard of conduct by adjudication absent any applicable “principles of law or equity.” *Id.* at 198. In *Chenery I*, the Court rejected the SEC’s original action due to the lack of “some standard[] of conduct prescribed by an agency of government authorized to prescribe such standards,” explaining that “before transactions otherwise legal can

be outlawed ... they must fall under the ban of” such a standard. *SEC v. Chenery Corp.*, 318 U.S. 80, 92-93 (1943) (“*Chenery I*”). When the case returned to the Supreme Court in *Chenery II* following remand, the SEC had corrected its error by revising its approach and expressly interpreting the PUHCA. 332 U.S. at 199. Here, as in *Chenery I*, there was no “positive command of law” to apply in the adjudication. 318 U.S. at 93.

The Court’s reasoning in *Chenery II* and *Bell Aerospace* similarly limits an agency’s discretion to announce new principles by adjudication to circumstances where there are pre-existing legal norms for the agency to interpret and apply in the particular matter before it. In *Chenery II*, the Supreme Court acknowledged a “place for the case-by-case evolution of *statutory standards*” to permit development of “principle[s] essential to the effective administration of a *statute*” where there is not already a “relevant general rule.” 332 U.S. at 202-03 (emphases added). Thus, in order to “perform its *statutory duty* in [a given] case,” the Court reasoned, an agency has discretion in an adjudication to “formulate new standards of conduct within the framework of [an existing] *Act*” to “fill[] in the interstices of th[at] *Act*.” *Id.* at 202 (emphases added). In *Bell Aerospace*, the Supreme Court likewise explained that an agency has discretion to proceed by adjudication in order to fulfill its “*statutory duty*,” 416 U.S. at 292 (emphasis added), and also

made clear that the discretion described in *Chenery II* is not unbounded, *id.* at 292-95.

The basic limitation on adjudication inherent in *Chenery II* and *Bell Aerospace* is also supported by more recent case law that defines adjudication as concerning “what the law was.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Scalia, J., concurring). This Court has observed, for instance, that an agency’s resolution of a dispute over existing but unclear law is “the stuff that adjudications are made of.” *Atchison, Topeka & Santa Fe Ry. v. ICC*, 851 F.2d 1432, 1437 (D.C. Cir. 1988). Moreover, in explaining that agency adjudications “general[ly]” apply retroactively, this Court began with the premise that agencies are “interpret[ing] a statute.” *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc). As the Fourth Circuit has explained, “adjudications involve application of *existing laws* to *the facts of a particular case*, while legislative acts “[look] to the future and [change] existing conditions by making a new rule to be applied thereafter to all or some part of those subject to [their] power[s].” *Jordahl v. Democratic Party of Va.*, 122 F.3d 192, 199 (4th Cir. 1997) (quoting *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 477 (1983)) (emphasis added).

None of the additional cases invoked by the *Order* support its novel proposition. *See Order* ¶ 28 nn.132-36 (JA__); *id.* ¶ 38 n.167 (JA__). In each

case, there was a pre-existing statute relevant to the standard of conduct that the agency construed and applied by adjudication. This is true of the FCC's adoption of its comparative broadcast hearings policy,¹² the *Carterfone* proceedings,¹³ the children's programming proceedings,¹⁴ this Court's decision in *CBS, Inc. v. FCC*,¹⁵ and the Seventh Circuit's decision in *Negrete-Rodriguez v. Mukasey*.¹⁶ These cases thus do not expand the scope of an agency's discretion to adopt and apply a

¹² The comparative broadcast hearings policy set forth guidance with respect to the FCC's statutory duty to "choose among qualified new applicants for the same broadcast facilities." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 393 (1965); see 47 U.S.C. §§ 307(a)-(b), 308(b), 309(a), (e).

¹³ The *Carterfone* proceedings involved the direct enforcement of Sections 201(b) and 202(a) of the Communications Act. See *Use of the Carterfone Device in Message Toll Telephone Service*, Decision, 13 F.C.C.2d 420, 426 (1968).

¹⁴ In the children's programming proceedings, the Commission carried out its statutory duty to regulate broadcast licensees. See *Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Programs*, Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 2 (1974) (discussing 47 U.S.C. § 303(b)).

¹⁵ In *CBS*, this Court upheld the Commission's adjudicatory extension of Section 312(a)(7) of the Communications Act, 47 U.S.C. § 312(a)(7), which expressly regulates individual broadcasters, to broadcast networks. *CBS, Inc. v. FCC*, 629 F.2d 1, 26-27 (D.C. Cir. 1980); see *Comcast July 21 Ex Parte 2* at 3-4 (JA__ - __).

¹⁶ In *Negrete-Rodriguez*, the court upheld the Board of Immigration Appeals' adjudicatory interpretation of a statutory definition as part of its statutory duty to decide the deportability of an alien. 518 F.3d 497, 504 (7th Cir. 2008).

new standard of conduct by adjudication beyond that originally described in *Chenery II* and *Bell Aerospace*.¹⁷ The lack of any apparent authority supporting the extraordinary proposition that an agency may use adjudication to promulgate a new standard in the absence of *any* pre-existing legal norm reveals the extremity of the procedure employed in the *Order*.

Although the use of adjudication might have been a convenient means for the Commission to take immediate enforcement action against Comcast, it is well-settled that an agency cannot use an adjudication “to circumvent the [rulemaking] requirements of the [APA]” or to “bypass ... pending rulemaking[s].” *Union Flights, Inc. v. Adm’r, FAA*, 957 F.2d 685, 688-89 (9th Cir. 1992). As the Supreme Court has explained, the APA’s rulemaking requirements “may not be avoided by the process of making rules in the course of adjudicatory proceedings.” *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion); *see also Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003) (“[A]n administrative agency may not slip by the notice and comment rule-making requirements ... through adjudication.”).

¹⁷ *N.Y. State Comm’n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984), did not even involve the adoption and application of a new standard of conduct but, rather, *preemption* of state and local regulation. *See Comcast July 25 Ex Parte* at 2 (JA__ - __).

In proceeding by adjudication, the FCC made an end-run around multiple pertinent rulemakings, *see supra* p. 5, and the directly relevant Petition for Rulemaking, and thereby excused itself from the APA's rulemaking requirements. The agency did not provide notice or an opportunity to comment in the manner required by the APA. *See* 5 U.S.C. § 553(b)(2)-(3); Comcast July 21 *Ex Parte* 2 at 6-8 (JA__-__).¹⁸ Notice is especially important where, as here, the agency has no express statutory authority to act but only, at best, ancillary authority pursuant to statutes that do not govern the conduct at issue. The Commission failed to publish any new standards in the Federal Register, *see* 5 U.S.C. § 552(a)(1), or provide a 30-day period prior to effectiveness, *see id.* § 553(d); *cf. Order* ¶ 60 (JA__) (mandating that *Order* "SHALL BE EFFECTIVE upon release"). Finally, the FCC did not make its new standards purely prospective, as rules generally must be,¹⁹ but applied those standards to Comcast's past conduct. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 280 (1994) (providing that a statute is retroactive

¹⁸ The Commission also signaled its "intent to adjudicate future complaints in this area with dispatch," making clear that it would not comply with these requirements in subsequent proceedings involving other parties either. *See Order* ¶ 29 n.138 (JA__).

¹⁹ *See Bowen*, 488 U.S. at 208 ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

if it “attaches new legal consequences to events completed before its enactment” or “impose[s] new duties with respect to transactions already completed”); *see also Order* ¶ 35 n.157 (JA__-__) (acknowledging *Order* “may have a retroactive effect”). That the Commission considered but never adopted enforceable rules in this area, ultimately issuing only a policy statement, *see supra* pp. 5-6, makes its circumvention of rulemaking all the more troubling.

In short, the agency had no authority to proceed by adjudication in the absence of any pre-existing law. Had the Commission proceeded by rulemaking, any new standards would have been prospective only, and regulated parties could have adjusted their behavior to avoid liability. But the Commission refused to take this approach, instead plowing ahead by unlawful adjudication in order to sanction Comcast.

B. The Order Violated Fundamental Principles of Due Process by Failing To Provide Comcast Fair Notice.

The lack of a pre-existing legal norm in an enforcement context also raises an independent question of fair notice. This Court has long held that “[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.” *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987); *see also Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995). This follows the Supreme Court’s teaching that “[e]lementary

considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.” *Landgraf*, 511 U.S. at 266.

Even where an agency has enacted a regulation to govern certain conduct, which the FCC never did here, such a regulation provides fair notice only if the standards of conduct are set forth with “ascertainable certainty.” *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 631 (D.C. Cir. 2000). This requires the standards to be “in[] [the regulation] itself, or at least [be] referenced ... in [the regulation].” *Id.* (quoting *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998)). Moreover, where regulations are “baffling and inconsistent,” *id.* at 621 (quoting *Satellite Broad. Co.*, 824 F.2d at 2), or an agency’s interpretation of a regulation is “far from a reasonable person’s understanding,” *Gen. Elec. Co.*, 53 F.3d at 1330, there is no fair notice.

Because there was no pre-existing legal norm at all here, Comcast could not have discerned from any relevant law the standards of conduct applied in the *Order* with *any*, much less “ascertainable,” certainty. The FCC’s suggestion that the *Policy Statement* itself provided Comcast fair notice of the legal norms it applied in the *Order*, see *Order* ¶ 35 (JA__), is unavailing. Foremost, the *Policy Statement* nowhere adopted or provided notice of any rules but *disclaimed* the adoption of regulations. See *supra* p. 6. Even if the *Policy Statement* could be found to have

provided notice of impending regulation, it did not set forth with ascertainable certainty the class of entities subject to its reach or the specific legal norms that the *Order* applied, including: (i) the standard for a “prima facie case,” *Order* ¶ 43 (JA__-__); (ii) the “critically important interest” and “careful[] tailor[ing]” necessary to constitute reasonable network management, *id.* ¶ 47 (JA__-__); (iii) the required burden of proof, *id.*; (iv) the non-discrimination mandate, *id.* ¶¶ 42, 49 (JA__-__, __-__); and (v) the obligation for disclosure, *id.* ¶¶ 52-53 (JA__-__). Aside from reasonable network management, none of these legal norms were even “in[] [the *Policy Statement*] itself, or ... referenced ... in [the statement].” *Trinity Broad.*, 211 F.3d at 631 (quoting *Chrysler Corp.*, 158 F.3d at 1354).

Although the *Policy Statement* mentioned reasonable network management in a footnote, *see* 20 F.C.C.R. at 14988 n.15 (¶ 5 n.15), it provided no explanation of the exception and certainly did not give notice of the heightened scrutiny employed in the *Order*.²⁰ To the contrary, the term “reasonable” implies a substantial degree of discretion on the part of network operators. The Commission’s requirement of a “critically important interest” and “careful[] tailor[ing]” for reasonable network management, *Order* ¶ 47 (JA__-__), is thus

²⁰ This Court rejected a similar attempt by the Commission to rely on a sparsely worded footnote “as [a] beacon ... illuminating the petitioners’ treacherous path ... and guiding them safely to [a] conclusion that the Commission” later articulated. *McElroy Elecs. Corp. v. FCC*, 990 F.2d 1351, 1362 (D.C. Cir. 1993).

both “baffling and inconsistent” with the term “reasonable,” *Trinity Broad.*, 211 F.3d at 621 (internal quotation marks omitted), and “far from a reasonable person’s understanding” of that word, *Gen. Elec. Co.*, 53 F.3d at 1330. The agency appears simply to have lifted the standard of review from entirely unrelated contexts such as dormant Commerce Clause jurisprudence, *see Order* ¶ 47 n.221 (JA__-__), further demonstrating the lack of notice.

The FCC’s “warnings” that it might take some sort of further action with respect to the *Policy Statement*, *id.* ¶ 35 n.157 (JA__-__), also did not constitute fair notice. None of these statements, including the *dicta* in the *Adelphia Order* that Comcast’s conduct might be “measured” against the principles of the *Policy Statement*, *Adelphia Order*, 21 F.C.C.R. at 8298 (¶ 220), indicated with ascertainable certainty the specific legal norms, discussed above, applied in the *Order*.

To the extent these statements merely suggested that the agency might attempt to directly enforce the *Policy Statement*, those statements do not amount to fair notice of anything because, as discussed, the *Policy Statement* is unenforceable as a matter of law. Accordingly, reasonable people would have expected some intermediate agency action to establish the *Policy Statement* as law prior to enforcement action. *See Order* (McDowell Statement) (JA__) (noting that “additional action ... contemplated was [further rulemaking] – not an

unprecedented, and likely unsustainable, jump to rulemaking by adjudication”). In short, the agency should have “put the horse before the cart and conducted a rulemaking, issued rules, and *then* enforced them.” *Id.*

IV. THE *ORDER* IS UNLAWFUL BECAUSE IT FAILS TO JUSTIFY THE EXERCISE OF ANCILLARY AUTHORITY.

Even setting aside the foregoing deficiencies of the *Order*, each of which provides an adequate and independent ground for reversal, the *Order* is unlawful for the additional reason that the FCC failed to justify the exercise of ancillary authority over Comcast and other ISPs.

As this Court has repeatedly explained, the FCC “literally has no power to act” absent a statutory delegation of authority. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986). The exercise of such power is only appropriate when: “(1) the Commission’s general jurisdictional grant under Title I covers the subject of the regulations; and (2) the regulations are *reasonably ancillary* to the Commission’s effective performance of its statutorily *mandated responsibilities*.” *Am. Library Ass’n*, 406 F.3d at 700 (citing *United States v. Sw. Cable Co.*, 392 U.S. 157, 177-78 (1968)) (emphases added). “[S]keptical” review is appropriate where, as here, the agency asserts power in “new arenas.” *ACLU*, 823 F.2d at 1567 n.32.

Comcast does not dispute the Commission’s subject matter jurisdiction over Internet services.²¹ The *Order* falls far short of meeting the second part of the test, however, for three overarching reasons. *First*, the majority of the seven statutory provisions upon which the FCC relied do not “mandate[]” any agency “responsibilities” at all. They are statements of federal policy or purpose. *Second*, the *Order* fails to demonstrate a reasonable connection between the regulation imposed here and the effective performance of any actual agency duties under those provisions. *Third*, there is no record suggestion that the actual problem to be remedied here was the FCC’s inability effectively to perform its responsibilities under any of those provisions. As Commissioner McDowell observed, acceptance of the Commission’s theory would result in virtually limitless agency authority over the Internet. *See supra* p. 14.

A. The Policy and Purpose Provisions Cited by the Order Do Not Support the Exercise of Ancillary Authority.

Section 1 of the Communications Act expressly sets forth the “purpose” for enactment of the Act and the creation of the Commission, and it establishes the

²¹ The FCC’s claim that Comcast’s position on this issue conflicted with the position the company took in related class action litigation, *see Order* ¶ 23 (JA__-__), is unfounded. In the litigation, as here, Comcast stated that “[a]ny inquiry into whether Comcast’s P2P management is unlawful falls squarely within the FCC’s *subject matter jurisdiction*.” Comcast July 10 *Ex Parte* at 28 n.202 (internal quotation marks omitted).

FCC's subject matter jurisdiction over "wire ... communication." 47 U.S.C. § 151. But this is all Section 1 does, rendering untenable the Commission's reliance on the provision, *see Order* ¶ 16 (JA__-__), as a source of both jurisdiction and substantive regulatory responsibility.

As this Court has explained, Title I, which contains Section 1, has "not ... been read as a general grant of power to take any action necessary and proper" to fulfill the goals set forth therein. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 614 n.77 (D.C. Cir. 1976) ("NARUC"); *see also California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) (rejecting Title I as "independent source[s] of regulatory authority"). Rather, the Commission's power under Title I "is restricted to that reasonably ancillary to the effective performance of [the FCC's] various responsibilities under [T]itles II and III of the Act." *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1479 (D.C. Cir. 1994) (citation and quotation marks omitted).

None of the decisions of this Court cited by the FCC in support of its Section 1 argument, *see Order* ¶¶ 16 n.76, 22 (JA__-__, __), approve the exercise of ancillary authority based upon that provision alone. In *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) ("CCIA"), this Court upheld the regulation at issue because it directly implicated the Commission's responsibilities under Section 205 to ensure "just and reasonable"

charges and Section 201(b) to prevent “unjust and unreasonable” rates for common carrier services.²² The FCC decision affirmed in *Rural Telephone Co. v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988), was similarly tied – as the orders on review evidenced²³ – to substantive regulatory power conferred by Title II.²⁴

Even if these cases could be read to suggest otherwise, this Court has since clarified that ancillary authority cannot rest solely upon Title I provisions. Because

²² In the order at issue, the Commission relied on these provisions, as well as numerous others. See *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, 452 (¶ 176) (1980) (“The basic power to require this change in current practices by carriers offering interstate communications services inheres, we believe, in Section 205 of the Act.”); *id.* at 494 (¶ 279) (discussing authority under 47 U.S.C. §§ 211, 218(a), and 219); see also *id.* at 496 (¶ 286) (citing, *inter alia*, 47 U.S.C. §§ 201-205).

²³ See *MTS & WATS Market Structure*, 50 Fed. Reg. 939, 943 n.25 (¶ 27 n.25) (Jan. 4, 1985) (citing, *inter alia*, 47 U.S.C. §§ 201, 202, 203, 205, 218, and 221(c)); *Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board*, 96 F.C.C.2d 781, 881 (¶ 77) (1984) (citing, *inter alia*, 47 U.S.C. § 221(c)); see also *MTS & WATS Market Structure*, 93 F.C.C.2d 241, 341 (¶ 369) (1983) (citing, *inter alia*, 47 U.S.C. §§ 201, 202, 203, 205, and 218).

²⁴ None of the out-of-circuit cases cited by the FCC support its position either. In each, the Commission likewise pointed to a substantive source of authority outside of Title I. See *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730-31 (2d Cir. 1973) (upholding exercise of ancillary authority over computer data processing services of common carriers based on FCC’s power over common carriers under Title II); *Gen. Tel. Co. of the Sw. v. United States*, 449 F.2d 846, 854 (5th Cir. 1971) (upholding exercise of ancillary jurisdiction based not only on Sections 1 and 2(a) but also Section 214 of the Communications Act). The Commission’s citation to another of its own orders, never subjected to judicial review, in which it relied solely on Section 1 as the basis for ancillary authority proves nothing.

Title I does not confer any “statutorily mandated responsibilities” on the FCC, *Am. Library Ass’n*, 406 F.3d at 700, a contrary approach would allow the exercise of ancillary authority that is “ancillary to nothing,” *id.* at 702. This Court has thus “categorically reject[ed]” the “bare suggestion that [the FCC] possesses plenary authority to act within a given area simply because Congress has endowed it with some authority to act in that area.” *Id.* at 708 (quoting *Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994)).

While the *Order* maintained that the Supreme Court has never expressly “rejected [S]ection 1 as a basis for [] ancillary [authority],” *Order* ¶ 16 n.76 (JA__ - __) (emphasis added), that fails to contradict this Court’s unqualified disapproval of unbounded FCC power. Significantly, the agency cited no case in which the Supreme Court has *approved* the exercise of ancillary authority based solely on Section 1. Contrary to the Commission’s characterization, *see id.* ¶ 22 (JA__), in *Midwest Video I*, the Supreme Court upheld the exercise of ancillary authority founded not only upon Section 1, but also upon the FCC’s substantive regulatory obligation to “facilitate the more effective performance of [its] duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities” in granting station licenses pursuant to Section 307(b) of the Communications Act. *Midwest Video Corp. v. FCC*, 406 U.S. 649, 669-70 (1972) (“*Midwest Video I*”). And in *Midwest Video II*, the Court explained that the

FCC’s authority under Title I “would be unbounded” absent “reference to the provisions of the Act directly governing broadcasting” in Title III, and *struck down* an attempted exercise of ancillary authority based on a direct conflict with other statutory provisions. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (“*Midwest Video II*”).²⁵

Sections 230(b) and 601(4) of the Communications Act and 706 of the 1996 Act, *see Order* ¶¶ 15, 18, 21 (JA __-__, __-__, __-__), likewise cannot support the exercise of ancillary authority because they embody statements of policy and do not set forth any “statutorily mandated responsibilities.” As already discussed, Section 230(b) reflects the “policy of the United States” with respect to the Internet and interactive computer services but neither delegates authority to, nor requires any action by, the FCC. 47 U.S.C. § 230(b); *see Order* ¶ 15 (JA __-__) (stating that Section 230(b) “enshrine[s]” “the national Internet policy”). Section 706 of the 1996 Act similarly describes “congressional policy,” *Nat’l Cable & Telecomms.*

²⁵ The FCC is wrong, in any case, that regulating network management would be “reasonably ancillary” to any of Section 1’s purposes even if it could be viewed as conferring substantive regulatory responsibilities. *See Order* ¶ 16 (JA __-__). Far from making Internet services more “rapid” and “efficient,” *id.*, prohibiting ISPs from managing their networks will have precisely the opposite effect, *see, e.g., Comcast Comments* at 11-19, 24-27 (JA __-__, __-__); *Comcast Reply Comments* at 14-16 (JA __-__). And the Commission cited no record evidence that the FCC’s action could reasonably be expected to result in “downward pressure on cable television prices,” *see Order* ¶ 16 (JA __-__), or that this was the actual problem to be remedied here, because there was none.

Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327, 339 (2002), as the Commission has previously acknowledged, *see supra* p. 28. And Section 601 sets forth “[t]he purposes of” Title VI. 47 U.S.C. § 521.

Preambles and statutory statements of “policy” (which have come to replace preambles in modern federal legislation²⁶) are “not an operative part of the statute, and [do] not enlarge or confer powers on administrative agencies.” *Ass'n of Am. R.Rs. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *see Yazoo & M.V.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889) (“[A]s the preamble is no part of the act, [it] cannot enlarge or confer powers.”). As such, they necessarily fail to set forth “statutorily mandated responsibilities,” *Am. Library Ass'n*, 406 F.3d at 700, and cannot support the exercise of ancillary authority.²⁷ There is, as explained above, *see supra* pp. 43-46, also no merit to the FCC’s contention that *Midwest Video I* or *CCIA* approved the exercise of ancillary authority based on mere “policy,” *see*

²⁶ See 1A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 20:12 (6th ed. 2002).

²⁷ The Commission’s reliance on cases in which it *preempted* state regulations that were inconsistent with Section 230(b), *Order* ¶ 15 n.69 (JA__), rests upon a misunderstanding of the relationship between the power to preempt and ancillary authority. Conflict preemption merely requires that state action would undermine federal policy goals, *see CCIA*, 693 F.2d at 214-15, while ancillary authority requires the existence of an antecedent statutory duty. Further, Section 230(c) makes clear that Congress envisioned a particular method of implementing the “policy” set forth in Section 230(b) – civil immunity from damages in suits adjudicated by courts, not FCC regulation.

Order ¶ 22 (JA__). And there was no credible suggestion, let alone any record evidence, to support the conclusion that the Commission’s action against Comcast was actually related to the effective implementation of any of these provisions.

B. The Other Provisions Cited in the *Order* Do Not Support the Exercise of Ancillary Authority.

Portions of the remaining provisions cited by the Commission – Sections 257(b), 201(b), and 256 of the Communications Act – might be construed to set forth FCC “responsibilities” but nevertheless fail to justify the FCC’s exercise of ancillary authority. As to Section 257, the FCC alleged that its action would “promote the Act’s policies favoring ‘a diversity of media voices and technological advancement.’” *Order* ¶ 20 (JA__) (quoting 47 U.S.C. § 257(b)). To the extent Section 257 merely sets forth “policy,” however, it cannot be construed to set forth “responsibilities.” *See supra* p. 47.

The Commission also claimed that the *Order* would ensure that Comcast’s actions “do not inappropriately hinder entry by ‘entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.’” *Order* ¶ 20 (JA__) (quoting 47 U.S.C. § 257(a)). But the statutory reference to avoiding barriers to entry appears in a subsection that “order[s] the Commission to produce a report,” and this Court has held that such provisions cannot support the exercise of ancillary authority. *MPAA*, 309 F.3d at 807. “Once the Commission complete[s] the task of preparing the report ... its

delegated authority on the subject end[s].” *Id.* In any event, there is nothing in the record to suggest that a desire to promote market entry by entrepreneurs was the driving force for the regulation of ISPs’ network management practices.

Turning to Section 201(b), while the Commission strung together multiple hypothetical chains of events to suggest that its action was sufficiently related to ensuring “just and reasonable” rates for broadband Internet services provided on a common carrier basis,²⁸ *see Order* ¶ 17 (JA__ - __), the FCC cited no evidence that Comcast’s actions actually did, or even were reasonably likely to, render rates for such services unjust or unreasonable. There was no such evidence in the record, and in fact no common carrier ever complained that Comcast’s network management practices actually increased their cost of providing broadband Internet service on a common carrier basis. Thus, nothing in the record supports the notion that the extension of regulatory authority in the *Order* was actually necessitated by the effective implementation of Section 201(b). In any case, there is no reason – and the Commission did not even attempt to proffer one – why the agency could not *directly* exercise its Section 201(b) authority over any common carriers whose rates it believed were not “just and reasonable,” rather than *indirectly* doing so by regulating Comcast.

²⁸ Comcast’s High-Speed Internet service is not a common carrier service, *see supra* pp. 4-5, and thus is not subject to Section 201(b).

The Commission's reliance on Section 256, *see id.* ¶ 19 (JA__), is also misplaced. *First*, the FCC primarily relied on Section 256(a)(2). The agency concluded that its action was ultimately “a reasonable exercise of ... authority ancillary to Section 256 to promote the ability of Comcast customers and customers of other networks ... to ‘seamlessly and transparently transmit and receive information.’” *Id.* (quoting 47 U.S.C. § 256(a)(2)). But the cited subsection merely sets forth the statutory “purposes,” 47 U.S.C. § 256(a), and, as shown above, such statements of purpose do not set forth any “statutorily mandated responsibilities” as necessary to justify the exercise of ancillary authority, *see supra* p. 47.

Second, the FCC ignored two portions of Section 256 that explicitly *limit* the agency's authority to that which existed prior to the enactment of the 1996 Act. *See* 47 U.S.C. § 256(c) (“Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under the law in effect before [the date of enactment of the 1996 Act].”); *id.* § 256(b)(2) (authorizing the Commission's “participat[ion], in a manner consistent with its authority and practice prior to [the enactment of Section 256], in the development by appropriate standard-setting organizations of public telecommunications interconnectivity standards that promote [certain] access”). The attempted exercise of ancillary authority necessarily “expand[ed]” the FCC's powers in contravention of Section

256(c), and the Commission pointed to no “authority” or “practice” pre-dating the enactment of Section 256 with which its action against Comcast is “consistent,” as required by Section 256(b)(2).

Third, the only mandatory responsibilities contained in Section 256 involve establishment of “procedures for Commission oversight of coordinated network planning” for “interconnection of public telecommunications networks used to provide telecommunications services.” *Id.* § 256(b)(1). The *Order*, however, was premised on concerns regarding the ability of *end users* to utilize certain services over Comcast’s High-Speed Internet service,²⁹ not the ability of two or more “public telecommunications networks” to interconnect with each other. Nor did the Commission even attempt to establish that the *Order* was “reasonably ancillary” to its ability to effectuate any duty relating to “procedures for [] oversight of coordinated network planning.” *Id.* § 256(b)(1). That is because, as with the other asserted bases for the exercise of ancillary authority, the record contains not a scintilla of evidence that problems with the effective implementation of Section 256 undergirded the exercise of ancillary authority here.

²⁹ As noted, that service is an information service, not a telecommunications service, *see supra* pp. 4-5, and thus is not subject to Section 256.

C. The Exercise of Ancillary Authority Contravenes Other Provisions of the Communications Act.

The FCC not only failed to justify the exercise of ancillary authority based on its statutory laundry list, but its attempt to exercise such authority also cannot stand because that action *contravenes* other provisions of the Communications Act. As this Court has directed, “it is appropriate to inquire ... whether any statutory commandments are directly contravened by the assert[ion]” of ancillary authority. *NARUC*, 533 F.2d at 607 (footnote omitted) (citing *Sw. Cable*, 392 U.S. at 169 n.29). Ancillary authority must “not [be] inconsistent with” the Communications Act. 47 U.S.C. § 154(i).

The FCC determined that Comcast’s actions were unlawful because they were “discriminatory.” *Order* ¶ 42 (JA__-__). But non-discrimination obligations are the hallmark of *common carrier* regulation, *see* 47 U.S.C. § 202(a), and the Communications Act expressly prohibits the FCC from regulating entities as common carriers except when they are providing common carrier services, *see id.* § 153(44); *see also Midwest Video II*, 440 U.S. at 705 n.15 (striking down attempt to regulate cable operators as common carriers where statute prohibited such regulation as to broadcasters). Comcast’s High-Speed Internet service, however, is an information service, not a common carrier service. *See supra* pp. 4-5. The extension of quintessential common carrier regulation to Comcast’s services

cannot stand.³⁰

Finally, the FCC’s assertion that Comcast is “barred” from challenging the *Order*’s exercise of ancillary authority because it did not “seek judicial review” of the *Adelphia Order*, see *Order* ¶ 27 (JA__ - __), has no merit. The *Adelphia Order* did *not* impose on the company any conditions relating to network management and *granted* its request for approval of the merger. 21 F.C.C.R. at 8296-99, 8332 (¶¶ 217-223, 311). Comcast could not have sought judicial review of that *dicta* in a favorable decision. See *Crowley Caribbean Trans., Inc. v. Pena*, 37 F.3d 671, 674 (D.C. Cir. 1994) (“[A] litigant’s ‘interest in [an agency’s] legal reasoning and its potential precedential effect does not by itself confer standing where ... it is uncoupled from any injury in fact caused by the substance of the ... adjudicatory action.’” (quoting *Telecomms. Research & Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990))); see also Comcast July 24 *Ex Parte* at 9 n.52 (JA__).

Nor does *Brand X* preclude this argument. See *Order* ¶ 14 (JA__ - __). *Brand X* presented the question whether the FCC had permissibly classified cable Internet services as “information services,” not whether any particular regulation of such services was within the agency’s statutory authority. In fact, at the time

³⁰ In addition, the Commission’s action contradicts the decidedly *deregulatory* bent of Section 230(b). See Comcast July 10 *Ex Parte* at 36-37 (JA__ - __).

Brand X was decided there were no such regulations to review (and still are none today). Accordingly, the Court's statement regarding Title I ancillary authority, *see Brand X*, 545 U.S. at 976, is *dicta*, and even so can only be understood as concerning the first prong of the ancillary authority test – whether the Commission has *subject matter jurisdiction* to regulate in this area. In any event, *Brand X* does not excuse the FCC from satisfying the legal test for ancillary authority, under either prong, in a particular case or controversy. As shown above, the *Order* failed to do so.

V. THE ORDER IS ARBITRARY AND CAPRICIOUS.

The *Order* is also arbitrary and capricious for at least three reasons. Principally, the Commission's construction of the Complaint as alleging something other than a violation of the *Policy Statement*, *see Order* ¶ 41 n.177 (JA__), cannot be reconciled with the unambiguous terms of the Complaint, the Public Notice, the comments, the enforcement documents, or even the *Order*. As discussed, the Complaint and Free Press's own comments repeatedly alleged "violations" of the *Policy Statement*, and virtually the entire proceedings were conducted on this basis. *See supra* pp. 7-8; *see also Comcast July 10 Ex Parte* at 9 (JA__). Although the Commission claimed that the Complaint "is reasonably interpreted to rest on ... statutory provisions," *Order* ¶ 41 n.177 (JA__), the Complaint did not provide a single citation to any statute as the basis for its allegations, rendering such an

interpretation decidedly *unreasonable*. The Commission's construction is also internally inconsistent with the *Order* itself, which, despite its artificial interpretation of the Complaint, actually applied the principles and exception of the *Policy Statement*. *See supra* Section II.A.

The FCC also arbitrarily and capriciously departed from past precedent without acknowledgement. Where, as here, the agency reverses course, it must “articulate a satisfactory explanation for its action[,]” and this requirement “ordinarily demand[s] that [the agency] display awareness that it *is* changing position.” *Fox Television Stations, Inc. v. FCC*, 129 S. Ct. 1800, 1810-11 (2009) (citation omitted). The *Order* marked an abrupt departure from the Commission's settled deregulatory framework for Internet services and its consistent position that the absence of regulation furthered statutory policies. *See supra* pp. 4-5. The Commission, however, failed even to “display awareness that it [*wa*]s changing position.” *Fox*, 129 S. Ct. at 1811. Quite the opposite, the Commission purported to act consistent with prior precedent. *See, e.g., Order* ¶ 39 (JA__ - __). This form of “sub silentio” departure from prior policy is another arbitrary and capricious aspect of the *Order*. *Fox*, 129 S. Ct. at 1811.

Finally, the *Order* is arbitrary and capricious because the agency failed 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. *See* Comments of NBC Universal, Inc., WC Dkt No. 07-52, at 1-4 (Feb. 13, 2008) (JA__-__); Reply Comments of NBC Universal, Inc., WC Dkt No. 07-52, at 11-18 (Feb. 28, 2008) (JA__-__); *see also* *Order* (Tate Statement) (JA__).

VI. THE APPROPRIATE REMEDY IS VACATUR OF THE *ORDER*.

Under the APA, this Court “shall ... hold unlawful and set aside agency action” that, among other things, is “in excess of statutory jurisdiction,” is “arbitrary and capricious,” or is taken “without observance of procedure required by law.” 5 U.S.C. § 706(2). “The decision whether to vacate” an unlawful agency order “depends on the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Here, vacatur is amply warranted.

As shown above, the Commission committed a serious legal error by enforcing the *Policy Statement*, an action that contravenes elementary administrative law principles. *See supra* Section II.A. This Court has frequently vacated agency documents that, while styled as informal policy statements (or “directives” or “guidances”), were found to constitute attempts to impose binding rules without compliance with statutory notice and comment requirements. *E.g.*,

CropLife Am. v. EPA, 329 F.3d 876, 885 (D.C. Cir. 2003); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000); *Chamber of Commerce*, 174 F.3d at 213; *U. S. Tel. Ass'n v. FCC*, 28 F.3d 1232, 1233 (D.C. Cir. 1994).

The *Order* also exceeded the FCC's statutory authority. *See supra* Section IV. On multiple prior occasions this Court has vacated FCC decisions that, like the *Order*, involved unjustified attempts to rely on ancillary authority in particular. *Am. Library Ass'n*, 406 F.3d at 708; *MPAA*, 309 F.3d at 807; *Home Box Office v. FCC*, 567 F.2d 9, 26 (D.C. Cir. 1977); *see Midwest Video II*, 440 U.S. at 695-96 (affirming decision "set[ting] aside" FCC rules that were found to exceed ancillary authority). This Court also has ordered vacatur in numerous other cases generally involving agency action in excess of statutory authority. *E.g.*, *Nat'l Treas. Employees' Union v. Chertoff*, 452 F.3d 839, 868 (D.C. Cir. 2006); *Williams Gas Processing - Gulf Coast Co. v. FERC*, 373 F.3d 1335, 1343, 1344-45 (D.C. Cir. 2004) (Roberts, J.); *AT&T Corp. v. FCC*, 323 F.3d 1081, 1082, 1088 (D.C. Cir. 2003); *Elec. Indus. Ass'n v. FCC*, 636 F.2d 689, 698 (D.C. Cir. 1980).

Either the enforcement of the *Policy Statement* or the invalid exercise of ancillary authority – standing alone – support vacatur. But when these errors are considered together with the improper use of adjudication, the lack of fair notice, and the arbitrary and capricious nature of the *Order*, there can be no doubt that the *Order* as a whole is premised on "quite serious" legal error, *Indep. U.S. Tanker*

Owners Comm. v. Dole, 809 F.2d 847, 855 (D.C. Cir. 1987), rendering vacatur all the more appropriate. Indeed, some members of this Court have stated that the APA requires vacatur of *any* agency decision that violates that Act. *See, e.g., Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., concurring); *see also Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting).

The Commission's errors cannot be corrected on remand. The FCC could not, of course, retroactively render the *Policy Statement* enforceable. There is similarly no reason to believe that the Commission could justify the exercise of ancillary authority at issue here on remand; the *Order* presents every conceivable basis for the exercise of FCC enforcement powers against Comcast and still fails to satisfy this Court's test. A remand for proper rulemaking also would serve no purpose because multiple proceedings relating to broadband network management, including the pending Petition for Rulemaking addressing the very issues involved here, are already before the Commission. *See supra* pp. 5, 8, 14.

Finally, there is no risk of disruption because Comcast has complied with the *Order*. The pendency of other proceedings, which provide the FCC with a ready forum in which to demonstrate that it has statutory authority to adopt specific rules governing network management, also means that vacatur would not result in any disruption. *See Allied-Signal*, 988 F.2d at 150-51.

CONCLUSION

For the foregoing reasons, Comcast respectfully requests that the Court grant its Petition for Review and vacate the *Order*.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rule of Appellate Procedure because this brief contains 13,895 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rule of Appellate Procedure and Circuit Rule 32(a)(2).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2003 version of Microsoft Word in 14 point Times New Roman.

/s/ Helgi C. Walker

Helgi C. Walker

STATUTES AND REGULATIONS

5 U.S.C. § 552(a)(1)

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

* * *

5 U.S.C. § 553

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

- (1) a military or foreign affairs function of the United States; or
- (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 151

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.

47 U.S.C. § 154(i)

* * *

(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. § 201(b)

* * *

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the

different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

* * *

47 U.S.C. § 202(a)

(a) Charges, services, etc. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

* * *

47 U.S.C. §§ 230(a), (b), (c)

(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.

ADDENDUM

(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.

(c) Protection for “good samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

* * *

47 U.S.C. § 256

(a) Purpose

It is the purpose of this section—

(1) to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications service through—

(A) coordinated public telecommunications network planning and design by telecommunications carriers and other providers of telecommunications service; and

(B) public telecommunications network interconnectivity, and interconnectivity of devices with such networks used to provide telecommunications service; and

(2) to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks.

(b) Commission functions

In carrying out the purposes of this section, the Commission—

(1) shall establish procedures for Commission oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications service for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications service; and

(2) may participate, in a manner consistent with its authority and practice prior to February 8, 1996, in the development by appropriate industry standards-setting organizations of public telecommunications network interconnectivity standards that promote access to—

(A) public telecommunications networks used to provide telecommunications service;

(B) network capabilities and services by individuals with disabilities; and

(C) information services by subscribers of rural telephone companies.

(c) Commission's authority

Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before February 8, 1996.

(d) "Public telecommunications network interconnectivity" defined

As used in this section, the term "public telecommunications network interconnectivity" means the ability of two or more public telecommunications networks used to provide telecommunications service to communicate and exchange information without degeneration, and to interact in concert with one another.

47 U.S.C. § 257

(a) Elimination of barriers

Within 15 months after February 8, 1996, the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers for

entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.

(b) National policy

In carrying out subsection (a) of this section, the Commission shall seek to promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

(c) Periodic review

Every 3 years following the completion of the proceeding required by subsection (a) of this section, the Commission shall review and report to Congress on—

(1) any regulations prescribed to eliminate barriers within its jurisdiction that are identified under subsection (a) of this section and that can be prescribed consistent with the public interest, convenience, and necessity; and

(2) the statutory barriers identified under subsection (a) of this section that the Commission recommends be eliminated, consistent with the public interest, convenience, and necessity.

47 U.S.C. § 303(b)

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * *

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class

* * *

47 U.S.C. §§ 307(a)-(b)

(a) Grant

ADDENDUM

The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) Allocation of facilities

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * *

47 U.S.C. § 308(b)

* * *

(b) Conditions

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

* * *

47 U.S.C. § 309(a), (e)

(a) Considerations in granting application

ADDENDUM

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * *

(e) Hearings; intervention; evidence; burden of proof

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

* * *

47 U.S.C. § 312(a)(7)

(a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit—

* * *

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

* * *

47 U.S.C. § 521

The purposes of this subchapter are to—

- (1) establish a national policy concerning cable communications;
- (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
- (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
- (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
- (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and
- (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

47 U.S.C. § 1302

**Formerly 47 U.S.C. § 157 nt.; Editorially transferred pursuant to Pub. L. No. 110-385, § 103(a), 122 Stat. 4096 (2008).*

(a) In general

ADDENDUM

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.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1) of this section) and to the extent that data from the Census Bureau is available, determine, for each such unserved area—

- (1) the population;
- (2) the population density; and
- (3) the average per capita income.

(d) Definitions

For purposes of this subsection:

- (1) Advanced telecommunications capability

ADDENDUM

The term “advanced telecommunications capability” is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools

The term “elementary and secondary schools” means elementary and secondary schools, as defined in section 7801 of Title 20.

CERTIFICATE OF SERVICE

I hereby certify that, on behalf of Comcast Corporation, on July 27, 2009, I caused a true and accurate copy of the foregoing document to be served on the following persons electronically via the Notice of Docket Activity generated by this Court's Case Management/Electronic Case Filing system or by first class U.S. mail, postage prepaid, as appropriate:

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