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March 11, 2008

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 - 12th Street, SW
Washington, DC 20554

**Re: In re Broadband Industry Practices, WC Docket No. 07-52;
*Ex Parte Communication***

Dear Ms. Dortch:

Attached for the record in the above-captioned proceeding is a letter sent on Monday, March 10, 2008 from David L. Cohen, Comcast Corporation's Executive Vice President, to Chairman Kevin J. Martin. Copies of the letter were also sent to each of the other Commissioners.

Should you have any questions regarding this matter, please feel free to contact the undersigned.

Sincerely,

/s/ Kathryn A. Zachem
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cc: Daniel Gonzalez
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March 7, 2008

Chairman Kevin J. Martin
Federal Communications Commission
554 12th Street, SW
Washington, DC 20554

Re: Broadband Industry Practices, WC Docket No. 07-52

Dear Chairman Martin,

At the hearing on February 25, you inquired whether the Commission has legal authority to enjoin Comcast from continuing its reasonable network management of high-speed Internet services. While we firmly believe the basic answer to your question is no, the question is sufficiently important that it merits a thoughtful and reasoned response, which I would like to provide in this letter.

There are several reasons why the Commission cannot lawfully issue an injunction against Comcast with regard to the provision of Internet services, even were it to conclude -- contrary to what we have demonstrated in our previous communications with the Commission -- that Comcast's behavior is inconsistent with the *Internet Policy Statement*.

The Commission's statutory authority to issue injunctions (cease-and-desist orders) is limited to enforcing pre-existing legal requirements. The Commission cannot use adjudication to create new binding obligations in the absence of express statutory requirements, properly prescribed rules, or other previously-imposed requirements (e.g., license requirements, merger conditions). There are no such pre-existing requirements here.

No credible claims of statutory violations have been presented by anyone in this proceeding. While some have invoked assorted provisions of law that they claim are sources of some sort of authority, no one has plausibly argued that any explicit statutory standard has been violated (as occurred in *Madison River*). Contrary to your reference at the hearing to Section 201 as a legal basis for imposing an injunction on Comcast, the Commission left no doubt in the *Cable Modem Declaratory Ruling* that cable's high-speed Internet service is *not* a common carrier service. Any attempt to justify an injunction on Comcast based on a statutory provision that is explicitly limited to common carriers would violate the Communications Act and be arbitrary and capricious.

Nor are there any applicable rules or other previously-imposed requirements that can be said to have been violated. The Petition for Declaratory Ruling on which the Commission has sought comment in this docket alleges that Comcast has "violated" the *Internet Policy Statement*.

But it is settled law that policy statements do not create binding legal obligations. It was universally understood, as the contemporaneous statements of you, Commissioner Copps, and then-Wireline Competition Bureau Chief Navin all explicitly recognized, that the *Internet Policy Statement* did not create enforceable rules. Indeed, the *Internet Policy Statement* expressly disclaimed any such intent.

Even if the Commission had latitude to simultaneously create and enforce legal obligations on the fly, doing so here would be acting in contravention of congressional guidance and agency precedent.

Congress established, and the Commission has consistently followed, a policy favoring competition over regulation, choosing explicitly to rely on the genius of the free marketplace rather than the heavy hand of regulation. As referenced by Commissioner McDowell in his opening statement at the hearing, Congress in Section 230 called for an Internet unfettered by State or Federal regulation. It is the clear intent of Congress that the Internet not be regulated, and the Commission cannot now take enforcement actions that are so clearly contrary to congressional intent.

In addition, the Commission is bound by the Administrative Procedure Act ("APA") not to act in an arbitrary and capricious manner. Consistent with the deregulatory policy established by Congress, the Commission has repeatedly declined to impose any form of regulation on high-speed cable Internet, and -- after wisely clarifying that cable modem service is not a common carrier service, but an integrated, interstate, information service -- the Commission extended that deregulatory approach to DSL, wireless broadband, and broadband over power lines. The APA does not permit the Commission to switch abruptly from an explicit policy of relying on market forces to a new regime in which the decisions that Internet service providers make in real-time in a dynamic marketplace are subject to governmental second-guessing and disruption.

Agencies have some discretion to change course, but not without full exploration and explanation of the reasons for doing so. Given the enormous success of unregulated markets in fostering aggressive investment in and deployment of broadband facilities (and the Commission's repeated acknowledgements of the importance of deregulation in promoting that investment and deployment), the Commission would face a heavy burden of explaining why it now finds it necessary to adopt an interventionist approach. That is a burden the agency may be able to overcome if that is the collective will of its members after notice-and-comment *rulemaking*, but in the absence of a statutory requirement, rule, or other previously-imposed requirement the Commission cannot meet this burden in any other way.

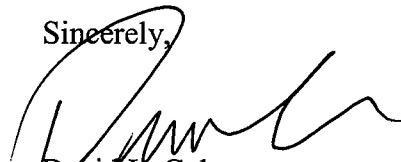
For all these reasons, there is no basis upon which the Commission could lawfully adopt any sort of prospective injunction in the current setting. I might add that all of these reasons -- plus others that we have previously detailed -- would apply to any purported assessment of monetary forfeitures based on prior conduct.

On a related matter, because you referred during the hearing to a "formal complaint," I want to note that the Free Press document that is styled as such is not a "Formal Complaint" in any legally cognizable sense. The only "Formal Complaint" procedures referenced in the Commission's rules are those that apply to common carriers, and Comcast's high-speed Internet service is not a common carrier service. The Commission has several sets of other complaint rules, and the Free Press "complaint" does not properly invoke -- nor comply with -- any of those rules. More significantly, consistent with the discussion above, the "complaint" does not identify any provision of the Communications Act or any Commission rule that Comcast has allegedly violated; the "complaint" alleges that Comcast's actions were inconsistent with the *Internet Policy Statement* which, as discussed above, did not create binding, enforceable rules.

Despite the importance of clarifying these legal issues (and I appreciate your allowing me the time to consider your question more fully and respond in the thoughtful manner that it deserves), I do not wish this letter to obscure the main points of my testimony: Comcast is and intends to remain a leader in broadband investment and deployment; Comcast ensures a superior experience for all of our customers; we manage our network accordingly; we do not block customer's access to any Internet content, applications, or services; we communicate appropriately with our customers; and we comply fully with the principles in the Commission's *Internet Policy Statement*. The congressional policy and agency practice of relying on the marketplace instead of regulation to maximize consumer welfare has been proven by experience (including the Comcast customer experience) to be enormously successful. Bearing these facts in mind should obviate the need for the Commission to test its legal authority.

Thank you again for the opportunity to appear before the Commission and to provide this more complete answer to your question.

Sincerely,



David L. Cohen
Executive Vice President

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Ms. Marlene H. Dortch, Secretary (for inclusion in the record of WC Docket No. 07-52)