Comcast Corporation
2001 Pennsylvania Ave., NW
Suite 500
Washington, DC 20006
202.379.7100 Tel
202.466.7718 Fax
www.comcast.com

July 21, 2008

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

In light of recent press reports describing potential Commission enforcement action on Free Press' self-styled "Formal Complaint" regarding Comcast's broadband network management practices,[1] as well as another *ex parte* filing by Free Press relating to the Complaint,[2] we respectfully submit this letter to re-emphasize the fundamental legal flaw in Free Press' demand: there simply is no law, and no lawful basis to promulgate any new legal standard, to be enforced in response to the Complaint.

Neither the *Internet Policy Statement* ("*Policy Statement*")[3] nor any statutory provision cited by Free Press creates any binding legal norms for private parties, or confers any substantive regulatory power on the FCC regarding broadband network management or anything to which the regulation of such management as sought by Free Press could be reasonably ancillary.[4] For

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1 *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications* (Nov. 1, 2007) ("Free Press Complaint" or "Complaint"). Free Press also filed a Petition for Declaratory Ruling, *Petition of Free Press et al. for Declaratory Ruling That Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management*" (Nov. 1, 2007) ("Free Press Petition" or "Petition"), and the arguments contained herein apply equally to any adjudicatory action by the Commission in response to that filing.

2 Letter from Marvin Ammori, Free Press, to Marlene H. Dortch, FCC, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, WC Docket No. 07-52, at 2 (July 17, 2008) ("Free Press July 17 *Ex Parte*").

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

4 *See* Response of Comcast Corporation, WC Docket No. 07-52, at 5-12, 13 & n.91, 31-41 (filed July 10, 2008) ("Response"). As explained *infra* at page 6, we do not preclude the possibility that the Commission could

instance, the policy statements set forth by Congress in Section 230(b) of the Communications Act (the "Act")[5] and Section 706(a) of the Telecommunications Act of 1996,[6] upon which Free Press now focuses,[7] confer no rights or enforceable duties on subscribers or broadband providers, and do not expand the agency's statutory authority in any way. Preambles and statutory statements of "policy" (which have come to replace preambles in federal legislation[8]) "no doubt contribute[] to a general understanding of a statute, but [they are] not an operative part of the statute and [do] not enlarge or confer powers on administrative agencies or officers."[9] Put simply, "[t]he declaration of policy . . . is not part of the substantive portion of the statute."[10]

The absence of any potentially applicable law prevents the Commission from taking *any* action on the Complaint – whether that be to impose a new reporting requirement,[11] to adopt a new standard of review,[12] to assign a new burden of proof,[13] or anything else – other than dismissal. As we discussed in our July 10 Response, the fact that there is no relevant law is fatal to the Complaint, from both a procedural and substantive standpoint.[14] Procedurally, the FCC's

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lawfully adopt a specific rule in this area through a properly noticed rulemaking, but that is not what Free Press has proposed.

5 47 U.S.C. § 230(b) (entitled "Policy" and describing "the policy of the United States").

6 *Id.* § 157 note (incorporating Section 706 of the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, § 706, 110 Stat. 56, 153, into the Communications Act); *id.* § 157(a) (describing "the policy of the United States").

7 Free Press July 17 *Ex Parte* at 6; *see also Groups Expect Comcast to Settle, Avoiding Bit Torrent Ruling*, Comm. Daily, July 14, 2008, at 6 (mentioning "section 706") ("July 14 Comm. Daily").

8 1A Norman J. Singer, Sutherland on Statutes and Statutory Construction § 20:12 (6th ed. 2002) ("In place of a preamble it has become common, particularly in federal legislation, to include a policy section which states the general objectives of the act so that administrators and courts may know its purposes.").

9 *Ass'n of Am. R.R.s v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *see also Yazoo & M.V.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889) ("[A]s the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity or [sic] resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up."); *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 569 (D.C. Cir. 2002) ("The preamble to a rule is not more binding than a preamble to a statute.").

10 1A Singer, *supra* note 8, § 20:12.

11 *See, e.g.*, Saul Hansell, *F.C.C. Chief Would Bar Comcast from Imposing Web Restrictions*, N.Y. Times, July 12, 2008, at C1; July 14 Comm. Daily, *supra* note 7, at 6.

12 *The Future of the Internet: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 110th Cong. 7 (2008) (written statement of Kevin J. Martin, Chairman, FCC) ("I believe that we should evaluate the practices with heightened scrutiny, with the network operator bearing the burden of demonstrating that the particular practice furthered an important interest, and that it was narrowly tailored to serve that interest."), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281690A1.pdf ("Martin Testimony").

13 *Id.*; *see* Free Press July 17 *Ex Parte* at 2 (suggesting that "Comcast should . . . have the strict burden of demonstrating why it would engage in discrimination"); Hansell, *supra* note 11 (quoting Chairman Martin as saying that Comcast would have the burden "'to show that what they are doing is reasonable'").

14 *See* Response at 12-17, 26-45.

discretion to take adjudicatory action – as it would if acting in response to the Complaint – exists *only* where there are pre-existing legal obligations that the agency is merely refining or interpreting.[15] This is equally true for all of the statutory vehicles authorizing remedies that we have previously discussed,[16] and also for Section 403 of the Communications Act, which Free Press cites in its most recent filing.[17] That provision, by its plain terms, limits permissible FCC inquiries to matters "concerning which complaint *is authorized to be made*, to or before the Commission *by any provision of this [Act]*, or concerning which any question may arise *under any of the provisions of this [Act]*, or relating to the enforcement *of any of the provisions of this [Act]*."[18] Here, of course, there is no provision of the Act that authorizes Free Press' Complaint, under which Free Press' claims arise, or that could be enforced against Comcast. Substantively, it is well-settled that, whether in exercising express or ancillary authority, "[t]he FCC . . . 'literally has no power to act . . . unless and until Congress confers power upon it.'"[19] Indeed, courts have repeatedly rejected as "entirely untenable under well-established case law" any suggestion that the opposite – *i.e.*, that the agency may act unless Congress has expressly *withheld* such power – is true.[20]

The D.C. Circuit's decision in *CBS, Inc. v. FCC*[21] provides, by comparison, an apt illustration of the problem here. There, the court upheld the Commission's use of ancillary authority, in an adjudicatory context, to take the relatively small step of applying Section 312(a)(7) of the Act to broadcast networks in addition to the individual broadcast stations to which the provision expressly applied. This modest expansion of the class of entities to which a pre-existing statutory mandate applied, however, raised neither the procedural nor the substantive problems that afflict the Complaint. The key difference was *the existence of Section 312(a)(7)*, in which Congress clearly and expressly provided that the agency "may revoke any station license or construction permit" 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 . . .

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15 *Id.* at 12-17.

16 *See id.* at 20-22.

17 *See* Free Press July 17 *Ex Parte* at 6 & n.10.

18 47 U.S.C. § 403 (emphases added).

19 *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)); *see also* Response at 26-27.

20 *Am. Library Ass'n*, 406 F.3d at 706 (internal quotation marks omitted); *see also id.* at 705-06 ("'[T]he [agency]'s position seems to be that the disputed regulations are permissible because the statute does not expressly foreclose the construction advanced by the agency. We reject this position as entirely untenable under well-established case law.'" (quoting *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003)); *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 805-06 (D.C. Cir. 2002) ("The FCC's position seems to be that the adoption of rules mandating video description is permissible because Congress did not expressly foreclose that possibility. This is an entirely untenable position."); *see also Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.").

21 629 F.2d 1 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981).

by a legally qualified candidate for Federal elective office on behalf of his candidacy."[22] Unlike the *Policy Statement* or any statutory provision cited by Free Press, Section 312(a)(7) created a pre-existing right for third parties, imposed a binding obligation on broadcasters, and conferred substantive regulatory power on the FCC. In other words, there *was* law to enforce in that case, and all the Commission did was to expand the statute's reach slightly to cover broadcast networks in order to avoid – as the D.C. Circuit put it – "robb[ing]" the right afforded by the statute "of much of its intended significance."[23] The same simply could not be said of action in response to Free Press' Complaint based on any of the statutory provisions cited by Free Press, as none of them confer any rights on third parties, create any binding norms that apply to any parties, or even arguably require Free Press' desired broadband network management regulation in order to be effectively implemented by the agency.

As we also discussed in our Response, the absence of any enforceable law in connection with the Complaint reveals a total lack of notice, inconsistent with principles of fundamental fairness under the Due Process Clause of the Constitution[24] and the Administrative Procedure Act ("APA"). Any action taken in response to that filing would be "imposed in an area not previously regulated or subject to regulation at all – an area that the FCC has historically and consciously left *unregulated* and which Congress has explicitly commanded remain so."[25] A pronouncement in the context of the Complaint that *contravened* both express deregulatory statutory policies and prior Commission statements regarding the import of those policies – the latter of which indicated knowledge on the part of the agency that there were no binding norms and that the *absence* of regulation was furthering those statutory policies[26] – would render the lack of notice here particularly problematic.

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22 47 U.S.C. § 312(a)(7).

23 *CBS*, 629 F.2d at 26.

24 U.S. Const. amend. V.

25 Response at 16.

26 *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Third Report, 17 FCC Rcd 2844, 2897 (¶ 133) (2002) ("We believe that a minimal regulatory framework will promote competition and thus encourage investment in advanced telecommunications capability."); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion*, Second Report, 15 FCC Rcd 20913, 21004 (¶ 246) (2000) ("[W]e believe that competition, not regulation, holds the key to stimulating further deployment of advanced telecommunications capability."); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, First Report, 14 FCC Rcd 2398, 2405 (¶ 18) (1999) ("In no respect are we considering regulating the Internet. Rather, . . . we seek to reduce barriers to competition . . . ."); *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11525 (¶ 47) (1998) ("Title II regulation of [information service] providers . . . . would be inconsistent with the deregulatory and procompetitive goals of the 1996 Act."); *see also* Brief of Respondent at 9, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007) (No. 05-4769) ("Congress anticipated that the deregulatory framework established by the 1996 Act would hasten the development of cutting-edge telecommunications technologies by removing regulatory impediments to innovation and investment. Consistent with that objective, section 706 of the statute directs the FCC and state regulatory commissions to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . .' regulatory methods 'that remove barriers to infrastructure

Free Press' contention that the *Policy Statement* provides sufficient notice to satisfy constitutional due process requirements fails for the several reasons set forth in our Response.[27] The fact that individual Commissioners may have asserted in the press or other such "fora" that the *Policy Statement* is enforceable[28] (setting aside the consistency of those assertions with their prior statements on the issue) does not make it so; the law requires the promulgation of a valid, binding legal norm pursuant to proper procedures, which, as we have previously shown, has not occurred here. Moreover, neither the four "principles" of the *Policy Statement* nor any existing legal norm provide fair notice of a disclosure requirement,[29] heightened standard of review, or burden of proof that have been suggested. Regarding the issue of disclosure, Free Press' assertion that the FCC has authority to impose a regulation here addressing allegedly deceptive practices[30] is meritless. As we have explained, "the Commission does not have free-ranging statutory authority to promulgate rules that address allegedly deceptive practices."[31] Regarding the announcement of a standard of review or burden of proof, the mere fact that *some* standard or burden has been articulated by a court or agency *some*where in *some* context[32] does not provide adequate notice that the principle might be lifted from an entirely unrelated milieu and used to apply a previously non-existent rule to Comcast's network management practices in response to the Complaint, much less provide any legal basis for that arbitrary transposition. As we have

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investment.'" (quoting 1996 Act, § 706, 110 Stat. at 153)); Brief for the Federal Petitioners at 29-30, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (Nos. 04-277, 04-281) ("Congress recognized in the 1996 Act that the Internet was then 'flourish[ing]' under 'a minimum of government regulation,' 47 U.S.C. 230(a)(4), and declared that the Internet should, to the extent possible, remain 'unfettered by Federal and State regulation,' 47 U.S.C. 230(b)(2). Consistent with that guidance, the Commission has determined that establishing a 'minimal regulatory environment' for broadband services will most effectively further the statutorily grounded policy of 'encourag[ing] ubiquitous availability of broadband to all Americans.'" (citations omitted)); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3074 (2002) (Martin, Comm'r, concurring) ("Placing additional financial burdens on broadband providers only creates barriers to deployment. Such burdens raise costs and decrease demand for broadband, constraining the flow of capital investment and chilling innovation. Thus, I have repeatedly advocated that all levels government should exercise self-restraint in placing financial burdens on broadband.").

[27] Response at 18-19.

[28] *See* Free Press July 17 *Ex Parte* at 4.

[29] Indeed, even though the four Internet freedoms set forth by Chairman Powell in 2004 included the principle that "consumers should receive meaningful information regarding their service plans," the *Policy Statement* (which is based on those four freedoms) does not include a similar principle. *Compare Policy Statement*, 20 FCC Rcd 14986, *with* Remarks of Michael K. Powell, Chairman, FCC, at the Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," at 5-6 (Feb. 8, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

[30] Free Press Complaint at 22.

[31] Comments of Comcast Corporation, WC Docket No. 07-52, at 50 (filed Feb. 12, 2008) ("Comcast Comments").

[32] *See* Martin Testimony at 7 (suggesting that network management practices be reviewed "[i]n a manner similar to the way in which restrictions on speech are analyzed"); *cf. Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (explaining that a content-neutral government regulation affecting speech must "advance[] important governmental interests unrelated to the suppression of free speech and . . . not burden substantially more speech than necessary to further those interests").

also explained, any decision to place the burden of proving the absence of a "violation" on a network operator and that resulted in the issuance of an injunction would not only lack any existing legal basis, but also would violate the Communications Act and the bedrock legal maxim *necessitas probandi incumbit ei qui agit* – "the necessity of proof lies with he who complains."[33]

Because there is no applicable law here, and the FCC has no authority to promulgate and enforce a new standard in an adjudication, the correct legal response to the Complaint is for the agency to dismiss it for failure to state any cognizable claim. As we concluded in our Response, "[i]f the agency wishes to pursue the issues raised by the Complaint . . . , it should consider them instead in the proper procedural vehicles, which include pending rulemaking and notice of inquiry proceedings."[34] Free Press should not be permitted to "end-run . . . the Commission's rulemaking process," as "[t]here is widespread agreement that developing policies of general applicability through the rulemaking process is much more effective and raises fewer Due Process concerns."[35] Indeed, courts have held that an agency *may not* use adjudication "to bypass a pending rulemaking proceeding."[36]

Whether the FCC were to proceed by adjudication or rulemaking, however, it is clear that the standards applied in response to the Complaint would in fact be "rules" within the meaning of the APA.[37] Thus, in addition to any notice required by the Due Process Clause, the agency must also satisfy the notice requirements of the APA, which includes the obligation to issue a proper NPRM.[38] As discussed above, the *Policy Statement* does not provide sufficient notice for due process purposes, and it certainly fails to satisfy the requirements of the APA. The *Policy Statement* does not propose to adopt rules and indeed expressly notes that it does not promulgate any rules.[39]

The Commission cannot simply point to notices issued in various other proceedings to cure this defect.[40] Indeed, none of the agency's pending proceedings provide sufficient notice under the APA for the adoption of any broadband network management standard. In the *Cable*

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[33] Response at 25 n.183.

[34] *Id.* at 46.

[35] Comcast Comments at 44.

[36] *Union Flights, Inc. v. Adm'r, Fed. Aviation Admin.*, 957 F.2d 685, 689 (9th Cir. 1992) (citing *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1981)).

[37] *See* Response at 23-25; *see also Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000) ("In determining whether an agency action constituted adjudication or rulemaking, we look to the product of the agency action.").

[38] *See* 5 U.S.C. § 553(b).

[39] *Policy Statement*, 20 FCC Rcd at 14988 n.12 (¶ 4 n.12).

[40] *See* July 14 Comm. Daily, *supra* note 7, at 6 (noting that Chairman Martin's proposed order "will respond to the record developed by a petition for rulemaking and a petition for declaratory ruling filed by Vuze and Free Press").

Internet Declaratory Ruling and NPRM, issued in 2002, the FCC sought comment primarily on whether to require cable broadband providers to provide multiple Internet service provider access to their transmission networks.[41] And in the *Wireline Broadband Report and NPRM*, issued in 2005, the Commission raised several specific areas of possible regulation – CPNI, slamming, truth-in-billing, network outage reporting, Section 214 discontinuance, and Section 254(g) rate averaging.[42] Neither of these NPRMs included the "terms or substance of [a] proposed rule" on reasonable network management – which is what Free Press seeks – as required under the APA.[43] Nor could such a rule constitute a "logical outgrowth" of either NPRM. That doctrine applies only where an NPRM would have "fairly apprise[d]" interested parties of the final rule.[44] It is inapposite here because the APA does not permit "an unexpressed intention [to] convert a final rule into a 'logical outgrowth' that the public should have anticipated."[45] The D.C. Circuit has made plain that "[i]nterested parties cannot be expected to divine [an agency's] unspoken thoughts."[46]

The only pending FCC proceeding that even raises the question of network management practices is the 2007 *Broadband Industry Practices NOI*,[47] which on its face does not purport to satisfy the notice requirements for rulemaking under the APA. The Commission deliberately chose to issue a "Notice of Inquiry" in lieu of an NPRM.[48] Thus, the agency did not publish the NOI in the Federal Register, as an NPRM must be,[49] and it did not propose in the NOI to promulgate any rules. The FCC generally inquired about current practices in the broadband market, in order "to enhance [its] understanding of the nature of the market for broadband and related services,"[50] and asked only about the challenges that might arise "*[i]f* the Commission

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41 *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4839-54 (¶¶ 72-112) (2002) ("*Cable Internet 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).

42 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report & Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14929-35 (¶¶ 146-59) (2005) ("*Wireline Broadband Report and NPRM*").

43 *See* 5 U.S.C. § 553(b)(3).

44 *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 291 (3d Cir. 1977).

45 *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991).

46 *Id.*

47 *Broadband Industry Practices*, Notice of Inquiry, 22 FCC Rcd 7894 (2007) ("*Broadband Industry Practices NOI*").

48 Indeed, Commissioner Copps concurred separately to state that he would have preferred "at least a Notice of Proposed Rulemaking." *Id.* at 7903 (Copps, Comm'r, concurring).

49 5 U.S.C. § 553(b) ("General notice of proposed rule making shall be published in the Federal Register . . . ."). Even where the D.C. Circuit has looked past the label on a document to conclude that a notice sufficed as an NPRM, the notice had been published in the Federal Register. *See U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 40 (D.C. Cir. 2005).

50 *Broadband Industry Practices NOI*, 22 FCC Rcd at 7894 (¶ 1).

were to promulgate rules in th[e] area."[51] Similarly, it would be absurd to suggest that the Public Notice[52] seeking comment on Free Press' Petition raised these issues in a manner compliant with the rulemaking requirements under the APA. Like the *Broadband Industry Practices NOI*, the Public Notice was not published in the Federal Register and clearly failed to propose any rules. The Public Notice sought comment only on the question whether "degrading peer-to-peer traffic violates the FCC's Internet Policy Statement."[53]

Please let me know if you have any questions.

Sincerely,

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

cc: Amy Bender
Scott Bergmann
Matthew Berry
Amy Blankenship
Catherine Bohigian
Scott M. Deutchman
Daniel Gonzalez
John W. Hunter
Christopher Killion
Ajit Pai
Dana Shaffer

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[51] *Id.* at 7898 (¶ 11) (emphasis added).

[52] *Comment Sought on Petition for Declaratory Ruling Regarding Internet Mgmt. Policies*, Public Notice, 23 FCC Rcd 340 (2008) ("Public Notice").

[53] *Id.* at 340 (internal quotation marks omitted).