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

BRIEF FOR INTERVENORS NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION AND NBC UNIVERSAL, INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. All parties, intervenors, and amici appearing in this court are listed in the Brief for Comcast Corporation.

B. References to the ruling at issue appear in the Brief for Comcast Corporation.

C. Undersigned counsel are not aware of any 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

NCTA has no parent companies and there is no publicly-held company that has a 10% or greater ownership interest in NCTA.

NBCU is owned by National Broadcasting Company Holding, Inc., a wholly owned subsidiary of General Electric Company, and by Vivendi Universal, S.A., a publicly traded company. NBCU has no subsidiaries or affiliates whose listing is required by Rule 26.1. General Electric Company has no parent company and no publicly held company holds 10 percent or more of its stock.

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GLOSSARY

APA	Administrative Procedure Act
Comcast Br.	Brief of Petitioner, *Comcast Corporation v. Federal Communications Commission, et al.*, No. 08-1291 (D.C. Cir. July 27, 2009)
ISPs	Internet service providers, including those providing high-speed cable modem service, wireline (telephone) or wireless broadband, and broadband over power lines
P2P	Peer-to-Peer
Policy Statement	*Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCCR 14986 (2005)
Order	*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 FCCR 13028 (2008)

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Comcast Corporation.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the Federal Communications Commission's Order establishing standards that govern the manner in which Internet service providers manage their broadband networks violate the requirements of the Administrative Procedure Act and fundamental principles of due process because it fails to provide broadband providers adequate notice of what constitutes permissible network management?
2. Did the Federal Communications Commission's Order arbitrarily and capriciously thwart, rather than further, the important interest in removing unlawful content from the Internet?
3. Did the Federal Communications Commission's decision to establish generally applicable standards that govern the manner in which Internet service providers manage their broadband networks in an adjudicatory proceeding rather than a rulemaking violate the Administrative Procedure Act?
4. Does the Federal Communications Commission have the authority under the Communications Act to establish the standards adopted in the *Order* to govern the manner in which Internet service providers manage their broadband networks?

STATEMENT OF FACTS

This case involves a challenge by Comcast Corporation ("Comcast") to an FCC order in which the FCC purported to pass on the lawfulness of Comcast's broadband "network management" practices. Network management refers to practices engaged in by broadband Internet Service Providers ("ISPs") to ensure reliable connections to the Internet, minimize congestion on those connections, and address problems such as spam and viruses. NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90% of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest broadband provider of high-speed Internet access, reaching 92% of U.S. households.

The *Order* held that Comcast's practices were unlawful, required Comcast to cease their use, and asserted continuing jurisdiction over Comcast's network management practices. In the course of "adjudicating" the claims alleged against Comcast, the FCC also purported to establish binding legal norms governing the network management practices of all ISPs, such that those entities are now subject to similar enforcement action. *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 FCCR 13028, ¶¶ 1, 47 (2008) ("*Order*") (JA__, __).

Cable's Provision of Broadband Service. Cable operators began providing high-speed Internet service over their cable networks in 1996. Subscribers used the Internet at that time primarily for e-mail and to view Internet web sites. Consequently, it was sufficient that the broadband capabilities of a cable network could reliably provide uploads and downloads of relatively small amounts of data. Comments of the National Cable & Telecommunications Association, WC Dkt No. 07-52, at 26 (June 15, 2007) (JA __) ("NCTA Initial Comments").

The explosion of bandwidth-intensive Internet content and applications has required cable operators to invest billions of dollars in far more sophisticated broadband networks with far greater capacity. Today's web pages routinely incorporate graphics and other features. *Id*. (JA __). Additionally, in the last few years, downloading (saving to a computer to watch later) and streaming (watching on the computer in real time) of video content has become more prevalent. *Id*. at 27 (JA __). The next steps in this evolution – services offering multiple online video channels and the downloading of video in high-definition format – already have begun. These activities place a tremendous burden on the cable broadband

network. For instance, streaming high-quality video requires as much as 100-200 times the capacity of traditional web browsing. *Id*. at 28 (JA __).

The Increasing Complexity of Broadband Network Management. When Internet usage was limited to email and access to web pages that were largely text, network management requirements were fairly limited. *Id*. at 26 (JA __). As the bandwidth demands of Internet content and usage have grown, however, network management has become more complex. *Id*. at 19-20, 27-29 (JA __ -___, __-__). Every day, cable ISPs must manage their broadband networks so that traffic from simple e-mails to high definition video flows across their networks efficiently, with no visible delay to the subscriber.

Cable ISPs accomplish this using various network management techniques and systems. *Id*. at 24-25 (JA __-__). They also monitor their broadband networks 24 hours a day, 7 days a week for spam, viruses, malware, and other outside attacks on the network, responding to and resolving problem situations so that customers remain unaffected. *See id*. at 35, n. 80 (JA __). As new threats emerge or as network hackers learn ways to avoid network management techniques, cable operators must adjust their approach. Reply Comments of the National Cable & Telecommunications Association, WC Dkt No. 07-52, at 7 (Mar. 8, 2008) (JA__) ("NCTA Reply Comments").

Addressing network congestion is a constant source of particular concern to

broadband providers. Reply Comments of NBC Universal, Inc., WC Dkt No. 07-52, at 4 (Feb. 28, 2008) ("NBCU Reply Comments") (JA __). Cable operators utilize a "shared" network architecture, in which individual subscribers in a neighborhood connect to the Internet through a common transmission facility serving that neighborhood. NCTA Initial Comments at 23 (JA __). As a result, each subscriber's Internet usage can affect the performance of the Internet connections of other subscribers. *Id*. If one customer is using a disproportionate amount of bandwidth, for example, there is less available bandwidth for other customers and those customers will experience slower service. *See* NCTA Reply Comments at 2-3 (JA __-__).

The Network Management Problems Posed by Peer-to-Peer Protocols. Recently, the increasing use of software applications employing "peer-to-peer" or "P2P" protocols has dramatically affected the efficiency of broadband networks. Comments of the National Cable & Telecommunications Association, WC Dkt No. 07-52, at 4-5 (Feb. 13, 2008) ("NCTA Comments") (JA__ - __). P2P users install special software that allows them to connect with each other to search for and download content that is stored on one more other computers that also have installed the software. When a user wants a file, P2P software locates any copies of the file within the P2P network. NBCU Reply Comments at 7-8 (JA __-__). Rather than download that file from one source, however, the software creates

multiple connections with numerous sources that have all or part of the requested file. *Id*. at 8. As parts of the file are received, they are also uploaded to other users who are requesting that file. *Id*. Because files are received from various sources rather than a single source, large files can be downloaded quickly by P2P.

P2P traffic, however, can consume a disproportionately large amount of network resources – far more than any other Internet use. Fewer than five percent of Internet users consume as much as 60 to 70% of all available bandwidth using P2P applications, and P2P consumption of bandwidth by these users can reach as high as 90 to 95% of capacity at peak periods. *See* NBCU Reply Comments at 1, 5, 6, n.11 (JA __, __, __). If even a small fraction of customers is using bandwidth-intensive applications such as P2P at the same time, it can interfere with the ability of the vast majority of all other customers in that area to use the Internet, because often P2P is designed to occupy as much bandwidth as is available. *See* NCTA Comments at 3-4 (JA__- __). This volume of P2P traffic harms the majority of broadband subscribers who do not consume disproportionately large network resources by forcing them to subsidize the heavy consumption by a small fraction of users. *See* NBCU Reply Comments at 6 (JA__).

Because P2P applications are engineered to commandeer the entire amount of capacity available, increasing the capacity of the broadband network alone cannot solve the problem they pose for providers. NCTA Comments at 8 (JA __).

In addition, the costs of such an approach would be astronomical; it is estimated that continually upgrading the network to eliminate all network capacity constraints "would cost . . . about *$9.3 billion annually*." *See* NCTA Reply Comments at 5 (emphasis in original) (JA __). An important part of ISPs' network management practices, therefore, is to ensure that the relatively few customers who utilize bandwidth-heavy applications like P2P do not degrade or otherwise adversely affect broadband Internet service for the vast majority of customers. *See, e.g.*, NCTA Comments at 3-5 (JA__-__); NCTA Reply Comments at 3-4 (JA__-__).

The Use of P2P for Unlawful Downloading of Audio and Video Files. Network management practices are also important because they are vital to combating the well-documented, illegal distribution of copyrighted material on the Internet. There is "overwhelming and undisputed evidence that massive copyright infringement takes place on peer-to-peer file sharing networks" and that "P2P technologies are today used *primarily* to facilitate the exchange of a tidal wave of illegal content." NBCU Reply Comments at 3 (JA__) (emphasis in original). Indeed, *90%* of P2P file sharing consists of copyright-infringing content. *Id.* at 1 (JA __). Further, many consumers may be unaware that the use of P2P protocols can slow down the processing speed of their computers, open up the contents of their hard drives to third parties (including those who download viruses and other

malware), and expose them to potential copyright liability. *Id*. at 9 (JA __). Even supporters of P2P acknowledge that a large percentage of file-sharing is for illegal purposes. *See* Distributed Computing Industry Association Comments, WC Dkt No. 07-52, at 5 (Feb. 13, 2008) (JA __).

Historical Regulatory Treatment of Broadband. In 1996, Congress adopted an explicit approach of minimal regulation of the Internet after finding that the "Internet and other interactive computer services have flourished . . . with a minimum of government regulation." 47 U.S.C. § 230(a)(4). Congress declared it the policy of the United States to "preserve the vibrant and competitive free market" for the Internet, "unfettered by Federal or State regulation." 47 U.S.C. § 230(b). In the following years, the FCC established, in a series of orders, a policy of light regulation for broadband service provided over cable facilities, wireline facilities, power lines, and wireless facilities. *See* Brief of Petitioner at 4-5, *Comcast Corporation v. Federal Communications Commission, et al*., No. 08-1291 (D.C. Cir. July 27, 2009) ("Comcast Br.").

Against the backdrop of this minimally regulatory regime, the FCC released a statement of policy in 2005 offering guidance and insight into its approach to the Internet and broadband service. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCCR 14986 (2005) ("*Policy Statement*"). The *Policy Statement* introduced four "principles" for

consumer Internet expectations that are "subject to reasonable network management." *Id.* ¶¶ 4, 5 n.15. As Comcast describes, the FCC has repeatedly affirmed that the *Policy Statement* is not enforceable. Comcast Br. at 5-7. Indeed, in 2007, the FCC issued a Notice of Inquiry seeking comment on whether it has "the legal authority to enforce the Policy Statement" and reiterated that "[t]he Policy Statement did not contain rules." *Broadband Industry Practices*, Notice of Inquiry, 22 FCCR 7894, ¶ 11 (2007). That proceeding is still pending.

Congressional Consideration of Network Management. Following the issuance of the *Policy Statement*, various bills were introduced that would have given the FCC authority over network management practices. *See, e.g.,* Internet Freedom Preservation Act, S. 215, 110th Cong., § 2 (2008); Network Neutrality Act of 2006, H.R. 5273, 109th Cong. § 4 (2006); Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. § 715 (2006). In each case, following hearings and testimony on the appropriateness of giving the FCC such authority, Congress declined to enact such proposed measures. Similar legislation was recently introduced in the current session of Congress. *See* Internet Freedom Preservation Act of 2009, H.R. 3458, 111th Cong. (2009).

History of This Proceeding. As Comcast describes, in late 2007, Free Press and others filed both a "Formal Complaint" alleging that Comcast's network management practices violated the *Policy Statement* and a Petition for Declaratory

Ruling seeking a declaration that Comcast's practices "violate[] the FCC's [] *Policy Statement*" and are not "reasonable network management." Comcast Br. at 7-10.[1/] In response to a public notice that simply requested comment on these documents, but did not propose either the standard for reviewing the reasonableness of network management practices that was eventually adopted or, indeed, any such standard at all, NCTA and NBCU, among others, filed comments. In August 2008, the FCC released the *Order*.

Remarkably, the *Order* found that the Act provides the FCC ancillary authority to regulate interstate communications "even where the Act *does not apply*," *Order* ¶ 15 (JA __) (emphasis added). It further found that the FCC's ancillary authority to enforce "federal policy" – at bottom, the *Policy Statement* – is "quite clear." *Id*. (JA __). The *Order* also established a new standard of review for evaluating the reasonableness of network management practices, not just for Comcast but for all ISPs. *See id*. ¶ 47 (JA __). It stated that to the extent a provider claims its network management practices are reasonable, "there must be a tight fit between its chosen practices and a significant goal." *Id*. Applying this new standard, the FCC concluded that Comcast's contested network management practices violated "federal Internet policy," and did not constitute "reasonable

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[1/] Vuze, Inc. also filed a Petition for Rulemaking asking the FCC to "determine the parameters of 'reasonable network management' by broadband network operators," *Petition for Rulemaking of Vuze, Inc*., WC Dkt No. 07-52 (filed Nov. 14, 2007) (JA __), but the FCC never took action on that Petition.

network management." *Id*.

Two of the FCC Commissioners dissented, finding that the *Order*'s findings lacked procedural and legal merit. Commissioner McDowell characterized the *Order* as "procedurally and legally deficient." *Id*. at 13090, 13092 (JA __, __). He stated that the FCC does "not have any rules governing Internet network management to enforce." *Id*. at 13089 (JA __). Commissioner Tate also dissented, voicing concern that "[i]f the Commission interferes with the ISPs' ability to manage their networks by imposing a strict legal standard," such regulation might "have a freezing effect on the fight against illegal content" by potentially "stripping them of the important tools they use – and we need." *Id*. at 13086 (JA __).

On September 4, 2008, Comcast filed this petition for review of the FCC's decision. On November 5, 2008, this court granted NCTA and NBCU permission to intervene on behalf of Comcast.

SUMMARY OF ARGUMENT

The legal flaws identified in the *Order* by Comcast have consequences not just for Comcast, but for the entire broadband industry. Cable ISPs have always had significant discretion in designing and deploying network management practices to protect their networks, and they have used that flexibility to accommodate the exponential growth of Internet usage over the past decade. The

Order abruptly departs from this regime, jeopardizing the continued ability of network operators to manage their networks and precluding their ability to do so in a way that avoids potential legal liability for their decisions.

By employing "adjudication" to circumvent the rulemaking requirements of the Administrative Procedure Act ("APA"), the *Order* established the *Policy Statement* as a legal standard that can be used against other ISPs in future enforcement actions. The *Order* also set forth a stringent new test for determining whether a network management practice is "reasonable." Under this test, all ISPs, not just Comcast, must now demonstrate that each of their chosen network management practices at any given time "further[s] a critically important interest" and is "narrowly or carefully tailored to serve that interest." *Order* ¶ 47 (JA __). The *Order* is also impermissibly vague as to how a provider might meet either of these prongs, casting doubt on a wide array of network management practices not at issue in the proceeding and failing to provide any meaningful notice of what is expected of ISPs.

Even in the one area where the *Order* acknowledges that ISPs may permissibly act – to protect the hijacking of their networks by distributors of illegal content – the *Order* still fails to provide any guidance on what practices would be acceptable to achieve that goal. Rather, after conclusorily asserting that such action would be lawful, the *Order* immediately cautions that even in this area,

ISPs' network management practices will be subject to "searching inquiry." *Id.* ¶ 50 (JA __). And that is *all* the *Order* says on this critical issue. Because ISPs do not know where the legal line is with respect to network management involving illegal content, the *Order* has the perverse effect of thwarting, rather than furthering, the interest in reducing pirated content on the Internet. For all these reasons, the *Order* violates the APA and fundamental principles of fair notice and is arbitrary and capricious.

The use of an adjudication, under the highly unusual circumstances of this case, for adopting and implementing industry-wide standards for network management was unlawful because it evaded pending rulemakings. The use of adjudication is especially inappropriate where, as here, critical national policies such as broadband deployment, which requires a clear and stable regulatory scheme, are at stake.

Not only is the *Order* fatally flawed for the above-described reasons, it also exceeded the FCC's authority under the Communications Act. The statutory provisions upon which the *Order* relies do not give the FCC the authority to adopt the standards governing ISPs' broadband network management practices at issue here. In fact, Congress has on numerous occasions in the last few years proposed legislation to confer such authority on the FCC, but has thus far declined to do so.

ARGUMENT

The Supreme Court has summarized the standard of review to be applied in determining the validity of administrative actions under the APA. The court must determine: if final agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; if the agency followed necessary procedural requirements in the promulgation of the order; and if the agency's actions exceed its statutory authority. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971). The *Order* fails on all three counts.

I. THE ORDER VIOLATES THE ADMINISTRATIVE PROCEDURE ACT BECAUSE IT FAILS TO PROVIDE ISPS ADEQUATE NOTICE OF WHAT CONSTITUTES PERMISSIBLE NETWORK MANAGEMENT

As Comcast establishes, the *Order* is procedurally and substantively unlawful because neither the *Policy Statement* nor the statutory provisions that the agency professed to enforce are binding legal norms that governed the conduct at issue in the *Order*. Comcast Br. at 20-30. Moreover, to the extent the *Order* enforced new legal norms against Comcast, it was unlawful because, among other things, the FCC never provided any notice – much less fair notice – of the standards against which it measured the challenged network practice. *Id.* at 37-41 (JA __-__). All ISPs' network management practices are now subject to the *Policy Statement* under the *Order*, resulting in a particular aspect of the fair notice problem presented in this case: the *Order* fails to provide any meaningful

guidance as to what constitutes permissible network management. However promulgated, it is incumbent on the agency to issue rules that "are sufficiently clear to warn a party about what is expected of it." *Trinity Broad. of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000); *see Diamond Roofing Co., Inc. v. OSHA*, 528 F.2d 645, 649 (5th Cir. 1976) (standard must "give [the covered entity] fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents"). The *Order* fails to provide such fair warning.

Until release of the *Order*, the FCC had never adopted any restrictions on network management. *See Order* ¶ 13 (JA__). The *Policy Statement* set forth generalized consumer expectations with regard to Internet service and mentioned network management only in a footnote, *see Policy Statement* ¶ 5 n.15, and only then to acknowledge that "reasonable" network management was permissible, without offering any explanation of what the FCC might consider "reasonable."

The *Order* represents an abrupt departure from this regime. It makes clear that the terms of the *Policy Statement* will now govern the network management practices of all providers, not just Comcast, under the standard of review announced in the *Order*. Under this new standard, ISPs will have the burden of demonstrating that a chosen network management practice at any given time "further[s] a critically important interest" and is "narrowly or carefully tailored to

serve that interest" in order to be considered "reasonable." *Order* ¶ 47 (JA__); *see also id*. ("[t]o the extent that a provider argues that such highly questionable conduct constitutes 'reasonable network management,' there must be a tight fit between its chosen practices and a significant goal.") (JA__). Contrary to the basic administrative law precepts described above, however, the *Order* fails to provide any meaningful notice of what is expected of ISPs and leaves them simply guessing at what may or may not constitute permissible broadband network management practices.

As an initial matter, it is impossible for a provider to determine with any acceptable level of precision what conduct is prescribed by the principles. The principles are framed at an extremely high level of generality and speak in terms of consumer expectations, not of restrictions on regulated entities. As Comcast observed, it is not even clear whose conduct is restricted by the principles. *See* Comcast Br. at 39. It is unclear, for instance, whether the *Order* applies equally to cable ISPs, wireless ISPs and wireline ISPs.

Even assuming that an entity can discern what conduct is prohibited, it must still assess the availability of the reasonable network management exception. The *Order* provides it no ability to do so.

First, it is impossible for a provider to determine what will be considered a "critically important interest." The FCC explicitly refused to offer any guidance or

examples of such interests, going so far as to refuse even to find whether Comcast's stated interest – easing network congestion – met that standard. *Order* ¶ 47 (JA__). The FCC similarly failed to clarify what might be a narrowly tailored solution to easing network congestion, instead asserting in a circular manner that "discriminatory network management is generally an unreasonable response to network congestion," *id.* ¶ 49 n.227 (JA__), and that Comcast "has several available options," listing a variety of approaches, and then concluding that "we do not endorse any of these particular solutions," *id.* ¶ 49 (JA__). Since many network management practices are designed to ensure efficient and rapid flow of traffic over the network, the *Order*'s lack of clarity on these basic points has put every ISP in the untenable position of not knowing whether the practices it uses every day will subject it to an enforcement action.

Second, it is wholly unclear whether providers must apply any network management tool they use to all content and applications equally. The *Order* suggests that one problem with Comcast's approach was that it targeted specific applications such as P2P. *Id.* ¶ 48 (JA __). At the same time, however, the *Order* declines to determine whether "other" conduct that treats applications unequally is reasonable, *id.* ¶ 43 n.202 (JA __), declines to state that "selective interference" is per se unreasonable, *id.* n.208 (JA __), and suggests only that use of the particular technique Comcast used may or may not be generally unreasonable, *id.* n.217 ("We

agree that Comcast's use of Deep Packet Inspection here was unacceptable. However, we make no judgment on the use of this method for other purposes.") (JA __). ISPs, however, employ techniques every day that treat certain content or applications on their broadband networks differently, from blocking spam to preventing hackers from taking over subscribers' computers and using them for unauthorized purposes. As Commissioner McDowell's dissent observes, "the Internet can function only if engineers are allowed to discriminate among different types of traffic . . . [d]iscriminatory conduct, in the network management context, does not necessarily mean anticompetitive conduct." *Order* (McDowell Dissent) at 13092 (JA __).

Moreover, even though the prioritization of voice and video packets – which often require much speedier delivery if voice and video services are to function for the subscriber – was not challenged or at issue in the proceeding, the FCC went out of its way to note that "[w]e specifically do not decide today whether other actual or potential conduct, such as giving real-time communications packets (*e.g.*, [voice over Internet]) higher priority than other packets . . . would violate federal policy," *Order* ¶ 44 n.202 (JA __), thus needlessly creating a potential ambiguity where there was none. It would seem inconceivable that the FCC would seek to ban this practice – as Commissioner McDowell noted, "[f]or us to enjoy online video without interruption or distortion, video bits have to be given priority," *Order*

(McDowell Dissent) at 13093 (JA __) – yet there was no reason for the FCC to call it out in particular.

Third, it is totally unclear from the *Order* whether disclosure to subscribers of specific network management practices is required, and if made, would cure any potential problems of unreasonableness. The *Order* initially states that the FCC "today" declines to adopt disclosure requirements. *Order* ¶ 52 (JA __). But the *Order* then goes on to consider the adequacy of Comcast's disclosure *after* it concludes that the practices at issue did not constitute reasonable network management, states that disclosure is the "hallmark of whether something is reasonable," finds that the lack of disclosure "compounded" the anticompetitive harm of its network management, and requires Comcast to disclose to the public "the details of the network management practices that it intends to deploy." *Id.* ¶¶ 51-54 (JA __-__). It is unclear from these statements whether ISPs that do not make details of their network management practices available are subject to enforcement action.

In short, the *Order* provides broadband ISPs no useful guidance on how to structure their network management practices so as to steer clear of liability. The result of the complete lack of direction in the *Order* is arbitrarily to hobble the industry's ability to deploy and manage broadband networks. While the FCC claims that its ruling will not affect ISPs' ability to utilize necessary network

management techniques, the dissents acknowledge that the open-ended nature of the *Order* creates substantial uncertainty over whether such techniques will be lawful. *Order* (Tate Statement) at 13087 (JA __) (expressing concern that the *Order* "tie[s] the hands of network managers," and may "inadvertently foreclose[] ISPs" from being able to deny access to unlawful content); *Order* (McDowell Dissent) at 13093 (JA __) ("Under the new regulatory rubric of the undefined term 'reasonable network management,' engineers do not know . . . what the government will allow them to do, or not do").

Although the FCC has not yet sought to enforce these standards against any other ISP, the lack of clarity in the *Order* is not an abstract concern. ISPs must make costly decisions every day on what network management tools to deploy, how to structure their customer arrangements, and what, if any, disclosures may be required.[2/] Given the FCC's utter failure to provide meaningful guidance, companies should not have to wait and see if their conduct runs afoul of whatever the FCC next deems to be an impermissible network management practice. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-150 (1967), citing *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 418-19 (1942) (because FCC regulations have "the

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[2/] Barbara Esbin & Adam Marcus, *"The Law Is Whatever the Nobles Do": Undue Process at the FCC*, 17 CommLaw Conspectus *1 (2009), at 107 ("Broadband ISPs need a clear understanding of what network management practices will be acceptable before they spend large sums of money to purchase and deploy network management solutions.").

force of law before their sanctions are invoked as well as after," they are "appropriately the subject of attack" when "*expected* conformity to them causes injury") (emphasis added); *cf. Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1558 (D.C. Cir. 1987), *aff'd La Star Cellular Tele. Co. v. F.C.C,* 899 F.2d 1233 (1990) (noting, in the licensing context, that rather than waiting for enforcement to review an unclear standard, "[i]t is beyond dispute that an applicant should not be placed in the position of going forward with an application without knowledge of requirements established by the Commission, and elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected").

For ISPs to devise and implement broadband network management plans is difficult and complicated, and requires substantial advance planning. *Order* (Copps Statement) at 13079 (JA __) (acknowledging that "network architectures and network practices are fast-changing and complex"). The tools and systems that implement these plans are very costly. The *Order* exposes all broadband providers to second-guessing about the legality of their network management decisions by the government and third parties, with no ability to "identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." *Fabi Constr. Co., Inc. and Pro Mgmt Group v. Secretary of Labor*, 508 F.3d 1077, 1088 (D.C. Circ. 2007), citing *General Elec. Co. v. EPA*, 53 F.3d 1324,

1328-1333 (D.C. Cir. 1995). As such, it runs afoul of the APA and fundamental principles of due process. *Trinity Broad.*, 211 F.3d at 628; *FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 103 (D.C. Cir. 1977) ("there is the need for a clear and definitive interpretation of all agency rules so that the parties upon whom the rules will have an impact will have adequate and proper notice concerning the agency's intentions").

The FCC cannot subject the critical operations of an entire national industry to federal enforcement action without at least defining the basic scope of prohibited conduct. Because the standards set forth in the *Order* do not meet those bedrock requirements of clarity and fair notice, the *Order* is unlawful.

II. BY FAILING TO PROVIDE ANY MEANINGFUL GUIDANCE ON PERMISSIBLE NETWORK MANAGEMENT PRACTICES, THE *ORDER* ARBITRARILY AND CAPRICIOUSLY THWARTS, RATHER THAN FURTHERS, THE IMPORTANT INTEREST IN REMOVING UNLAWFUL CONTENT FROM THE INTERNET

The record before the FCC established that P2P technologies are used today *primarily* to facilitate the exchange of massive amounts of copyright-infringing content on the Internet. The *Order* expressly acknowledges that, because the *Policy Statement* entitles consumers to access only *lawful* Internet content, ISPs may block transmissions of illegal content, such as child pornography, or transmissions that violate copyright law. *Order* ¶ 50 (emphasis in original) (JA __). But even as it clearly acknowledges the need for network management to

address unlawful content, the *Order* simultaneously warns ISPs that any attempt to implement such practices will be viewed as suspect and potentially "anticompetitive." *Id*. By failing to provide any meaningful advance guidance to ISPs as to what practices will be considered reasonable in combating online piracy, the *Order* both violates the fair notice requirements of the APA and fundamental principles of due process, as demonstrated above, and arbitrarily and capriciously thwarts, rather than furthers, the interest of the FCC, ISPs and content creators in reducing the amount of unlawful content on the Internet.[3/]

ISPs have a critical need for the tools and legal authority to address illegal file-sharing on their networks, both to reduce the serious congestion caused by such transmissions and to further the FCC's policy objective of allowing consumers to access only lawful content. Accordingly, network operators must be permitted to manage their networks in a manner that allows them to distinguish legal content from illegal content and to adopt reasonable practices to deal appropriately with the latter.

While acknowledging this need, the *Order* does so in one conclusory sentence and in the next breath warns ISPs that any such practices will be subject

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[3/] *See Order* (Tate Statement) at 13086 ("I would like to address the fact that this order provides minimal substantive discussion about the role network managers have in filtering and guarding their platforms against the growing problem of illegal content distribution, and the potentially adverse effect regulatory prescription can have on stemming its growth.") (JA __).

to a "vigilant" and "searching inquiry" by the FCC. *Id*. This warning, coupled with the absence of any meaningful guidance, creates an environment of such regulatory uncertainty that network operators cannot know in advance which techniques to detect and address illegal content on their networks will satisfy that standard and which will not. This uncertainty, in turn, will discourage content creators and owners from using the Internet to distribute the legal content that consumers want to receive online. Uncertainty over the scope of lawful network management also will suppress activities aimed at other unlawful uses of the Internet, such as the transmission of child pornography and malware.

Moreover, "reasonable" cannot mean "perfect," particularly when the assessment of reasonableness is made after the fact. ISPs who deploy measures to reduce the amount of illegal content transmitted via their networks should not be penalized if these measures block or delay a small amount of non-infringing material. This would be tantamount to telling law enforcement officials that they could not shut down a store whose stock consisted of illegal firearms with a small corner devoted to the sale of postage stamps.[4/]

The FCC claimed to recognize ISPs' need for "flexibility to engage in . . . reasonable network management practices" and cited that need as justification for

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[4/] *Cf. United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824 (2000) (technologies used to block adult content on cable channels are not required "to go perfectly every time").

not adopting "an inflexible framework micromanaging providers' network management practices." *Id*. This flexibility is illusory, however, given the *Order's* lack of guidance and its strict liability standard for wrong "guesses" about which practices are "narrowly tailored" to meet a "critically important interest." *Id*. ¶ 47 (JA __). The technical diversity, complexity and rapidly changing nature of the Internet make it exceedingly difficult for the FCC to make *ex post* assessments of the reasonableness of ISP decisions. Network operators must address changes to the Internet's technology on a daily, hourly and even minute-by-minute basis. These operators are highly motivated and far better positioned than the FCC to identify and deal with the daily changes in and threats to the Internet's complex ecosystem, including the burdens caused by transfers of huge, copyright-infringing files. Content owners likewise are highly motivated to develop effective techniques for identifying infringing material and removing it from the Internet, while offering consumers lawful online alternatives. Working cooperatively, network providers and content creators and owners can use a variety of measures to reduce the level of infringing content on the Internet, but only if ISPs have the legal authority and flexibility to respond to the rapidly changing online environment without constant fear of unfounded enforcement actions. Far from affirming this authority and flexibility, the *Order*, with its vagueness and

threat of harsh punishment, undermines ISPs' ability to keep their networks safe, secure and free of unlawful content.

III. THE ORDER VIOLATES THE APA BECAUSE IT PURPORTS TO ESTABLISH STANDARDS OF GENERAL APPLICABILITY ON A MATTER OF NATIONWIDE IMPORTANCE FOR THE INDUSTRY THROUGH AN ADJUDICATION OF A NON-BINDING POLICY STATEMENT RATHER THAN NOTICE-AND-COMMENT RULEMAKING

As Comcast establishes, 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. *See* Comcast Br. at 30-36. Here, there was no pre-existing law that could be developed via adjudication; to the extent the FCC developed and announced entirely new law, the agency violated the APA by sidestepping pending rulemakings. *See id.*

The ISPs that are now subject to enforcement of the *Policy Statement*, including the limitation on "reasonable" network management, are injured by this unlawful process. *See, e.g., City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181, 1187 (D.C. Cir. 2007); *City of Waukesha v. EPA*, 320 F.3d 228, 234-35 (D.C. Cir. 2003). The FCC made clear that, as to future oversight of ISPs' network management practices, it intended to perpetuate these fundamental procedural

errors by persisting in its adjudicatory approach. *See Order* ¶ 29 n.138 (JA __); *see also* Comcast Br. at 36 n.18.

Adjudication is an especially inappropriate means for the development of industry-wide standards on a critical public policy issue. Broadband deployment is a top national priority, and key to our nation's future development. *See Nominee To Head US Internet Grant Program Vows To Cut Waste*, WALL STREET JOURNAL (July 7, 2009), http://online.wsj.com/article/BT-CO-20090707-710094.html ("[President] Obama has made it a top priority to cover the country with high-speed Internet.").[5/] The FCC calls for all Americans to "have affordable access to robust and reliable broadband products and services." *See FCC Strategic Goals - Broadband*, *at* http://www.fcc.gov/broadband. For cable operators and other broadband ISPs to successfully meet these goals, it is imperative that the FCC establish a clear and stable regulatory scheme that promotes investment and innovation.

In developing such a scheme, adjudication was particularly ill-suited. Rulemaking is "generally a better, fairer and more effective method of implementing a new industrywide policy than is the uneven application of

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[5/] Former President Bush similarly emphasized the need for the federal government to encourage use of and demand for broadband services, to create the "kind of the economic vitality that will occur when broadband is more fully accessible." Remarks of President George W. Bush, 21st Century High-Tech Forum (Jun. 12, 2002).

conditions" in individual proceedings. *Community Tel. of Southern Cal. v. Gottfried*, 459 U.S. 498, 511 (1983); *California Ass'n of the Physically Handicapped, Inc. v. FCC*, 840 F.2d 88, 96-97 (D.C. Cir. 1988) (noting the FCC's "repeated[]" position that adjudications are not the appropriate forum for promulgating certain industry-wide rules due to "the inherent constraints of the adjudicatory process").

Rather than engage in such a process, the FCC established standards that ISPs will be required to meet in the future to justify any network management practice, without soliciting or receiving any comment on the appropriateness of that standard or thoroughly considering the implications of how it would affect the nation's broadband development. Although the FCC issued a public notice on the Free Press Petition for Declaratory Ruling, it never proposed any actual standards of conduct, much less the standard of review or other legal norms adopted in the *Order*. Before the agency created such enormous practical consequences for the industry, a more careful approach was warranted.

The rationale for normally allowing an agency to determine whether to proceed by rulemaking or adjudication is that there may be many situations in which the agency is not ready to announce a hard and fast standard through a rule, and must rely on adjudications to allow a particular standard to evolve. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974). However, this does not give an

agency the authority to evade rulemaking whenever doing so is convenient. As noted above, there simply was no pre-existing law to expand upon. Moreover, adjudication is appropriate when it is not possible for the agency to formulate a "generalized standard" for the industry, *id*., but the FCC has adduced no plausible reason why it could not do so.

The *Order* itself acknowledges that where a standard is "very broad and general in scope and prospective in application," adjudication may not be the appropriate means of proceeding, *Order* ¶ 33 (JA __), but seeks to distinguish that proposition by arguing that the *Order* does not establish any broad or generally applicable standard. *Id*. ¶ 36 (JA __). This argument is unavailing. While the *Order* fails to articulate any general guidance about which network management practices are permissible, there can be no doubt that the *Order* sets forth broad legal standards by which the entire broadband industry's network management practices will be judged in the future. *Id*. ¶ 47 (JA __); *see supra* at 15-16.

The FCC also argues that even if it has adopted broad industry standards, "this factor alone is clearly not sufficient to render an agency's choice of adjudication" inappropriate, *Order* ¶ 36 (JA __), but it cites nothing to support this proposition. More importantly, the courts have disagreed, finding that adjudication may not be used as a tool to avoid the APA's rulemaking requirements. *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."). By using adjudication as a means of avoiding rulemaking under the unique circumstances of this case, the FCC acted contrary to law.

IV. THE FCC HAD NO ANCILLARY AUTHORITY TO ADOPT THE STANDARDS GOVERNING NETWORK MANAGEMENT THAT IT PROMULGATED IN THE ORDER

The FCC has no independent lawmaking authority; it is limited in its actions to execution of only that authority conferred upon it by Congress. *See* Comcast Br. at 20, 41; *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). This Court has looked skeptically upon agency assertion of authority in "new arenas." *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

As Comcast demonstrates, the statutory provisions upon which the *Order* purports to rely do not govern the conduct at issue here and do not confer even "ancillary" authority to enforce broadband network management rules. *See, e.g.*, Comcast Br. at 27-30, 41-54. To the contrary, Congress has noted that the FCC *lacks* the statutory authority under existing law to police the very network management practices that are condemned in the *Order*. While it has considered

legislation to grant the FCC that authority, no such legislation has, as yet, been enacted. The pending Congressional consideration of this issue underscores the point that the FCC cannot stretch the authority conferred upon it by the Communications Act, as it currently reads, to support the action taken in the *Order*.

A. The FCC Has No Ancillary Authority To Adopt The Standards Governing Network Management That It Purported To Enforce In The *Order*.

As Commissioner McDowell noted in his dissent, if the statutory sections cited in the *Order* are read to confer upon the FCC the "ancillary" authority to adopt the standards governing network management that it purported to enforce against Comcast, then the FCC "apparently can do *anything* so long as it frames its actions in terms of promoting the Internet or broadband deployment."[6/] In fact, as Comcast demonstrates, the FCC may act in an area under its general jurisdiction *only* when that action is reasonably ancillary to the effective performance of its "mandated responsibilities," *Am. Library Ass'n*, 406 F.3d at 700, but none of the provisions cited in the *Order* identifies any "mandated responsibility" to regulate in any area to which the authority claimed in the *Order* can be reasonably seen as ancillary. Comcast Br. at 41-54. In addition to Comcast's thorough discussion of

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6/ *Order* (McDowell Dissent) at 13090 (JA __) (emphasis in original). Commissioner McDowell likewise noted that "[t]he Commission . . . overreaches in attempting to justify this order by extension of sections 1, 201, 256, 257, or 604." *Id.*

why the above-cited statutory provisions do not provide the authority that the FCC claims, three other points are worth mentioning.

First, the *Order's* finding that the reference to "cable communications" in section 601(4) of the Communications Act, 47 U.S.C. § 521(4), includes the provision of high-speed Internet service by a cable operator, *see Order* ¶ 21 (JA__), is illogical and wholly at odds with a prior FCC ruling directly on point. The scope of section 601(4), which appears in Title VI of the Communications Act, can reasonably be understood only by reference to the other provisions of Title VI and the definitional provisions thereof, which make clear that Title VI concerns cable *television* programming, which itself solely involves video programming and associated signaling. *See* 47 U.S.C. § 522(6) (defining "cable service" as "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service" and "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service); *see also id*. § 522(20) (defining "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station"). Indeed, the FCC has explicitly held that cable Internet service is not a Title VI service. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCCR 4798, ¶¶ 60, 68 (2002) ("Our determination that cable modem service is not a cable service does not mean

that the cable operator cannot provide the service, just that the service is not subject to Title VI."), and this determination was upheld by the Supreme Court, *Nat'l Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). Therefore, even if section 601(4) contains some independent grant of authority for the FCC to regulate cable operators, that authority does not extend to the adoption of standards governing cable Internet service as opposed to their video service.

Second, the FCC tenuously reasons that a cable operator's limits on file uploading may cause a strain on the systems of other Internet providers that utilize a common carrier DSL model, and therefore that cable network management "may implicate" its Title II authority and section 201 of the Communications Act, 47 U.S.C. § 201. *Order* ¶ 17 (JA__). Even assuming that the factual chain of events that the FCC theorizes might actually occur (the record contains no evidence that this has ever happened or could ever happen), the mere fact that a common carrier might face an increase in overhead costs due to a need to expand its facilities to handle an increase in traffic does not mean that any associated rate increase would be unjust or unreasonable in violation of section 201. To the contrary, a rate increase based on an increase in actual costs would presumptively be reasonable under the FCC's rules. *See, e.g., Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCCR 17989, ¶¶ 6-10 (2007) (summarizing price regulation of different classes of carriers).

Third, the FCC's reliance upon section 256 of the Communications Act, 47 U.S.C. § 256, is misplaced because that provision concerns interconnection between carriers, not the relationship between an ISP and its subscribers. *See* Comcast Br. at 50-51. The *Order* quotes out of context various portions of section 256 and the FCC's *Wireline Broadband Order, Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCCR 14853 (2005), in an attempt to give the impression that section 256 contains some mandate to adopt standards governing an ISP's network management practices if they affect a consumer's ability to "seamlessly" access the Internet. *Order* ¶ 19 (JA __). But the discussion of section 256 in the FCC's *Wireline Broadband Order* makes clear that the provision cannot form the basis for ancillary authority here. There, unlike here, the focus was properly limited to carrier-to-carrier issues such as "interconnectivity," "network reliability," and "interoperability," which are not relevant to an Internet operator's relationship with its own subscribers. *Wireline Broadband Order* ¶ 120. To the extent that the *Order* relies on section 256(c), that section is limited to the development of public telecommunications interconnectivity standards that "promote access" to "information services by subscribers of rural telephone companies." 47 U.S.C. § 256(b)(2)(C). Comcast is not a "rural telephone company," *see id*. § 153(37), and the Comcast customers who the FCC claims

were harmed by the practices at issue are not among the individuals that section 256(b)(2) was meant to protect.

B. Recent Congressional Action Demonstrates That The FCC Currently Lacks Authority To Adopt Standards Governing Network Management.

The fact that Congress over the past few years has repeatedly considered and continues to debate multiple pieces of legislation that would confer authority upon the FCC to adopt standards governing network management – without enacting any of them – makes clear that the FCC has not been granted that authority to date. Indeed, less than two weeks ago, a bill was introduced by senior members of Congress with long experience in telecommunications policy that would essentially codify the principles of the *Policy Statement* and the exception for reasonable network management. Internet Freedom Preservation Act of 2009, H.R. 3458, 111th Cong. § 3 (2009). Such a bill would not be necessary if the FCC already possessed this authority. Bills introduced in prior years likewise sought to confer network management authority on the FCC. *See* Internet Freedom Preservation Act, S. 215, 110th Cong., § 2 (2008); Network Neutrality Act of 2006, H.R. 5273, 109th Cong. § 4 (2006); Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. § 715 (2006).[7/]

[7/] Section 715(a) of H.R. 5252 provided that "The Commission shall have the authority to enforce the Commission's broadband policy statement and the principles incorporated therein." The House Report noted that broadband network

As Commissioner McDowell correctly pointed out, "[i]f Congress had wanted us to regulate Internet network management, it would have said so explicitly in the statute, thus obviating any perceived need to introduce legislation as has occurred during this Congress. In other words, if the FCC already possessed the authority to do this, why have bills been introduced giving us the authority we ostensibly already had?" *Order* (McDowell Dissent) at 13090 (JA _).

The subsequent enactment of legislation conferring specific authority demonstrates that a prior more general enabling provision lacks such a grant of authority. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 142-59 (2000) (Congressional enactment of cigarette sales, labeling, and advertising laws demonstrated that the Food, Drug, & Cosmetics Act did not otherwise confer authority to regulate cigarettes on the FDA); *see also Murphy v. Internal Revenue Serv.*, 493 F.3d 170, 180 (D.C. Cir. 2007), *cert. denied*, 128 S.Ct. 2050 (2008) ataloguing cases holding that later laws can clarify the scope of earlier laws); *Yang v. Cal. Dept. of Soc. Servs.*, 183 F.3d 953, 960-961 (9th Cir. 1999) (legislative history of 1998 amendment expressing intent to extend food stamp benefits to Hmong tribesmen makes clear that the earlier Welfare Reform Act did not include those benefits). The fact that network management legislation has been introduced

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management issues do not fall within the FCC's existing Title II authority. H.R. Rep. No. 109-470, at 5 (1998). It also explained that the bill was meant to confer authority to enforce the "*Policy Statement* and the principles incorporated therein." *Id.* at 26.

and re-introduced over the past three Congresses demonstrates that Congress had not previously delegated authority to the FCC to act in this area. *See, e.g.*, *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 370 n.26 (1946) (reversing agency action and citing the treatment of certain sums paid under the National Labor Relations Act as "wages" in pending legislation, among other factors, as indicative of Congressional intent in the Social Security Act that back pay be considered "wages" in benefit calculations).

CONCLUSION

For the foregoing reasons, NCTA and NBCU respectfully request that the Court grant Comcast's Petition for Review and vacate the *Order*.

Respectfully submitted,

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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 8528 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).

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/s/__*Tara M. Corvo*_____
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CERTIFICATE OF SERVICE

I hereby certify that, on behalf of the National Cable & Telecommunications Association and NBC Universal, Inc., on August 10, 2009, I caused a true and accurate copy of the foregoing document to be served on the following by first class U.S. mail, postage prepaid:

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