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CLIENT ALERT¹

To: Clients and Friends
From: Sapronov & Associates, P.C.
Date: April 9, 2010
Subject: Federal Communications Commission (“FCC”) v. Comcast: Round Two

I. FCC v. COMCAST: ROUND TWO

On April 6, 2010, the United States Court of Appeals for the District of Columbia Circuit stuck down the FCC’s Order requiring Comcast Corporation to comply with “network neutrality” policies as part of its Internet network management policies. The decision is froth with regulatory (and possibly legislative) that will be discussed in a future alert. For now, the text of the decision is attached, as is our prior alert on how the battle started.

The decision will be discussed, among many other topics, at Law Seminars International’s 15th Annual Telecommunications Conference, April 15-16, Seattle, Washington, (see www.lawseminars.com). David N. Baker, Managing Director of our government affairs affiliate, Sapronov & Butler Government Affairs, will be a speaker. For more information on the decision or the conference please contact us.

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II. FCC V. COMCAST: ROUND ONE: What Started the Battle

In its decision on August 1, 2008, the FCC, ordered Comcast to end alleged discriminatory management practices in operating its broadband Internet network.² The Commission's decision handed a victory to advocates of so-called "network neutrality" in the latest round of an on-going battle that many industry observers believe will determine the future of government regulation of the Internet. This client alert briefly summarizes the FCC's action, including likely future developments concerning this matter, and its implications for the Company.

A. The FCC'S 2008 Comcast Order

The FCC's action was precipitated by complaints from Comcast subscribers who noticed they were experiencing difficulty in using so-called "peer-to-peer" applications, such as BitTorrent, over their Comcast broadband connections.³ Ironically, in March Comcast and BitTorrent reached an agreement concerning Comcast's handling of BitTorrent's traffic,⁴ but the FCC nevertheless continued its investigation into Comcast's traffic management practices. Based on its investigation, the FCC found that "Comcast monitors its customers' connections based not on their destination but on their contents."⁵ The FCC "also found that Comcast's conduct affected Internet users on a widespread basis . . . interfer[ing] with up to three-quarters of all peer-to-peer connections in certain communities."⁶

The FCC "concluded that the end result of Comcast's conduct was the blocking of Internet traffic, which had the effect of substantially impeding consumers' ability to access the content and to use the applications of their choice."⁷ The Commission rejected Comcast's contention that "its practice constitutes reasonable network management."⁸

The Commission's position concerning this matter appears to have been swayed by several factors that cast a negative light on Comcast's practices. First, Comcast was less than forthcoming in describing its practices when initially confronted by press reports of customer problems in using P2P applications.⁹ Second, the FCC believed that "Comcast has an anticompetitive motive to interfere with customers' use of peer-to-peer applications."¹⁰ The Commission was also disturbed by Comcast's failure to disclose its

² Unless otherwise noted, this memorandum is based on our analysis of FCC's News Release, *Commission Orders Comcast to End Discriminatory Network Management Practices*, August 1, 2008 ("News Release"). As of the date above, the FCC has not yet released the text of its order.

³ Although they have many legitimate uses, peer-to-peer, or P2P, applications are often used by Internet subscribers to illegally download copyrighted video, music and other materials.

⁴ See Comcast Press Release, *Comcast and BitTorrent Form Collaboration to Address Network Management, Network Architecture and Content Distribution*, March 27, 2008, available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=740>.

⁵ *News Release*, p. 2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1.

¹⁰ *Id.* at 2.

practices to consumers. As a result, “many consumers experiencing difficulty using only certain applications would not place blame on Comcast, where it belonged, but rather on the applications themselves, thus further disadvantaging those applications in the competitive marketplace.”

The Commission did not levy any fines or forfeitures on Comcast. Instead, in announcing “its intention to exercise its authority to oversee federal Internet policy”, the FCC is requiring Comcast to comply with the following plan within 30 days of release of the Commission’s order:¹¹

- Disclose the details of its discriminatory network management practices to the Commission;
- Submit a compliance plan describing how it intends to stop these discriminatory management practices by the end of the year; and
- Disclose to customers and the Commission the network management practices that will replace the discriminatory practices.

The Commission’s action has unleashed a storm of criticism and comments on the government’s role in regulating the Internet and on FCC Chairman Martin’s motives in aggressively pursuing this matter against Comcast.¹² (It is noteworthy that the FCC’s order was adopted by a 3 to 2 vote, with only the two Democratic members of the Commission joining with Republican Martin in supporting the action.) There has also been much speculation as to what will be Comcast’s next step. Many analysts, including ourselves, believe that Comcast will have a strong case if it decides, as it probably will, to appeal the FCC’s order. Among possible other issues, Comcast will probably argue that the FCC asserted its authority in this matter based, in part, on provisions of the Communications Act, such as those contained in Title II governing common carriers, that are not applicable to Comcast, and on its previously announced Internet policy¹³ which was not adopted pursuant to the notice and comment procedures that are generally required before the FCC prescribes binding rules and policies.

More to follow.

¹¹ *Id.* at 3.

¹² See, e.g., *Was The FCC Comcast Investigation A Farce? Editorial: More than meets the eye to Martin's 'consumer advocacy'*, Broadband, DSLreports.com, July 31, 2008, available at <http://www.dslreports.com/shownews/Was-The-FCC-Comcast-Investigation-A-Farce-96597>

¹³ *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, FCC 05-151 (released September 25, 2005).