

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**WASHINGTON, DC 20554**

In the Matter of	)	
	)	
Free Press et al. Petition for	)	WC Docket No. 07-52
Declaratory Ruling	)	
	)	
Broadband Industry Practices	)	
_____	)	

To: The Commission

**WRITTEN *EX PARTE* COMMENTS OF  
MEDIA ACCESS PROJECT  
ON COMCAST WAIVER OF JURISDICTIONAL ARGUMENTS  
AGAINST COMMISSION AUTHORITY  
TO ADJUDICATE COMPLAINT**

Media Access Project files this written *ex parte* with regard to Comcast’s continued arguments against Commission jurisdiction to adjudicate the complaint filed by Free Press, *et al.*

Two years ago, in the Commission’s *Adelphia Order*,<sup>1</sup> Comcast received explicit notice of the Commission’s assertion of jurisdiction and its intent to adjudicate complaints “[i]f in the future evidence arises that any company is willfully blocking or degrading Internet content.” At 8298. The Commission clearly set forth its jurisdictional theory, invoked the *Madison River* adjudication as relevant precedent, and warned Comcast explicitly that the *Policy Statement* “contains principles against which the conduct of Comcast, Time Warner, and other broadband service providers can be measured.” *Id.* at 82889-89 & n.677.

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<sup>1</sup>See *Applications for Consent to the Assignment And/or Transfer of Control of Licenses; Adelphia Communications Corporation, (And Subsidiaries, Debtors-in-possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees; Adelphia Communications Corporation, (And Subsidiaries, Debtors-in-possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, 21 FCCRcd 8203 (2006) (“*Adelphia Order*”).

Because Comcast was a party to the *Adelphia* adjudication, it received explicit notice of the Commission’s jurisdictional assertion and intent to proceed by adjudication more than two years ago. By not seeking reconsideration or review in a timely fashion, Comcast waived any challenge to the Commission’s jurisdiction or choice of procedure. *See Comcast Corp. v. FCC*, 526 F.3d 763, 769-70 (D.C. Cir. 2008) (failure to challenge waiver decisions waived right to object to “inconsistent” treatment); *Tribune Co. v. FCC*, 133 F.3d 61 (D.C. Cir. 1998).

Further, because Free Press was a party at interest in the adjudication of the merger,<sup>2</sup> it had a right to rely upon the Commission’s statement of jurisdiction and to respond to the Commission’s express invitation to file specific enforcement complaints. The Commission’s decision to repeat this jurisdictional assertion and invitation to file complaints against ISPs that “willfully block[] or degrade[]” created further precedent upon which Free Press rightfully relied. For the Commission to suddenly reverse itself and declare that it either lacked authority or would not entertain complaints of precisely the nature it explicitly invited and relied upon in previous adjudications would be arbitrary and unsupported by the evidence – the more so as Comcast expressly agreed to be bound by this process in the *Adelphia Order*.

To summarize, in the *Adelphia Order*, an adjudication under Sections 214 and 310(d) and therefore a “policy making activity,” the Commission gave a complete roadmap of how it would proceed in the event anyone discovered evidence of an ISP “willfully blocking or degrading” any internet application or content. The Commission announced its general jurisdiction, explained why

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<sup>2</sup>As the Commission noted, Free Press filed a timely *Petition to Deny* and had standing to raise the issues it presented to the Commission. *Id.* at 8216. As the Commission expressly relied on its assertion of authority and intent to proceed by rulemaking in rejecting Free Press’ arguments for conditions, Free Press has both uniquely powerful interests in this case and standing to challenge an arbitrary reversal by the Commission in the instant complaint.

it would not issue general rules, and invited parties to file *Madison River*-type complaints in the event that new incidents occurred. Comcast not only received actual notice as a participant in the proceeding, but the Commission explicitly and repeatedly named Comcast as subject to the decision to proceed by adjudication of *Madison River*-type complaints and explicitly listed peer-to-peer as an application subject to this policy. Comcast is therefore foreclosed from raising any challenge to the Commission's exercise of authority or choice of adjudicatory procedure.

### **ARGUMENT**

Comcast has argued repeatedly that the Commission has no jurisdiction to adjudicate complaints with regard to the blocking or degrading of content by ISPs. As described below, the Commission has already announced in previous adjudications that the Commission has authority to require that ISPs operate in a "neutral manner," and that it will permit interested parties to file complaints against ISPs that "block or degrade internet content." Because Comcast and Free Press were both parties to the adjudication in which the Commission announced this policy two years ago, Comcast cannot now object to this exercise of Commission jurisdiction.

#### **I. THE COMMISSION HAS ALREADY DETERMINED THROUGH ADJUDICATION THAT IT HAS THE POWER TO ENFORCE THE PRINCIPLES EMBODIED IN THE POLICY STATEMENT.**

The Commission adopted the *Policy Statement* in August 2005. Citing its responsibilities under Section 230 of the Communications Act and Section 706 of the Telecommunications Act of 1996, the Commission set forth four principles to serve as "guidance and insight" that the Commission intended to "incorporate . . . into its ongoing policymaking activities." 20 FCCRcd 14986, 14987-88 (2005). Apparently unsure what rules would best "preserve and promote the vibrant and open character of the Internet" while promoting "creation, adoption and use of Internet broadband content,

applications, services,” the Commission declined to adopt specific rules. *Id.*, at 1488 & n.15. The Commission placed parties on notice, however, that it would “incorporate the above principles into its ongoing policymaking activities.”

Almost immediately, the Commission began to clarify its intent through the process of adjudication. In its orders approving the acquisition of AT&T by SBC, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCCRcd 18290 (2005) (“*SBC/AT&T*”), and its simultaneous order approving the acquisition of MCI by Verizon, *Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, 20 FCCRcd 18433 (2005) (“*Verizon/MCI*”), the Commission explicitly invoked and relied upon the *Policy Statement*, albeit in the form of a voluntary commitment. As the Commission stated in both orders:

Finally, we take further comfort in the Applicants' commitment to conduct business in a manner that comports with the principles set forth in the Commission's September 23, 2005 *Policy Statement* designed to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers. Because we find that this commitment will serve the public interest, we accept it and adopt it as a condition of our merger approval.

*SBC/AT&T*, 20 FCCRcd at 18368; *Verizon/MCI*, 20 FCCRcd at 18509.

Understandably, so soon after the issuance of the *Policy Statement* itself, the Commission hesitated to elaborate further. It would wait for subsequent adjudications for the Commission to further clarify its jurisdiction and elaborate on how it intended to “incorporate the [*Policy Statement*] into its ongoing policymaking activities.”

## **II. THE ADELPHIA ORDER AND THE FURTHER ELABORATION OF COMMISSION JURISDICTION AND PROCEDURE UNDER THE *POLICY STATEMENT*.**

The Commission next considered the problem of ISPs potentially blocking or degrading content in the context of the transaction between Comcast, Time Warner, and the bankrupt Adelphia

Communications Corp. In its *Petition to Deny*, Media Access Project, on behalf of Free Press,<sup>3</sup> raised concerns that Comcast and Time Warner would block or degrade internet content, either for economic or political reasons. *Adelphia Order*, 21 FCC Rcd at 8295-96. Free Press observed that Comcast had blocked time-sensitive emails from the anti-war organizations “AfterDowningSt.Org,” and therefore requested explicit conditions to address the danger of blocking. Free Press also described the possible incentive for Comcast to block or degrade rival content – and explicitly identified peer-to-peer applications as an application at risk if the Commission failed to act. *Id.*, at 8297-89.

Comcast did not deny that the Commission had authority to impose such a condition. Instead, Comcast argued that market forces would prevent it from blocking in violation of consumer preferences, and that the incident involving AfterDowningSt.org resulted from its efforts to restrict unsolicited emails (“spam”) not from any deliberate effort to restrict political speech or degrade access to content. *Id.* Comcast further argued that it needed flexibility to address “issues related to copyright protection, peer-to-peer applications, spam, and identity theft” in a neutral manner. *Id.*, at 8296.

The Commission agreed with Comcast that it would not “adopt rules at this time,” accepted Comcast’s explanation, and stated its expectation that competition would prove effective in preventing any deliberate blocking or degrading of content. Recognizing, however, that its prediction might prove erroneous, the Commission explicitly relied on the ability of Free Press and others to bring specific complaints if evidence of willful blocking or degrading emerged later:

There is, other than this, no record evidence indicating that Comcast or Time Warner has willfully blocked a web page or other Internet content, service, or application via its high speed Internet platforms. Commenters and petitioners do not offer evidence

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<sup>3</sup>MAP filed the *Petition to Deny* on behalf of a number of organizations, including Free Press. Because Free Press was the lead Petitioner, and because Free Press is also the lead complainant in this case, MAP refers to the Petitioners simply as “Free Press.”

that Time Warner and Comcast are likely to discriminate against Internet content, services, or applications after the proposed transactions are complete; nor do they explain how the changes in ownership resulting from the transactions could increase Time Warner's or Comcast's incentive to do so. ***If in the future evidence arises that any company is willfully blocking or degrading Internet content, affected parties may file a complaint with the Commission.***

21 FCCRcd at 8298 (emphasis added, footnotes omitted). The Commission cited *Madison River*, 20 FCCRcd 4295 (2005), both as authority and as an example of the type of enforcement complaint it would entertain. *Adelphia Order*, 21 FCCRcd at 8298 & n.677.

The Commission thus could not have more explicitly placed Comcast – a party to the adjudicatory proceeding – on notice that it would entertain complaints of the same type as it did in *Madison River* in the event Free Press, or any other party, found evidence that it “willfully block[ed] or degrad[ed] Internet content.” Indeed, as the context makes clear, the Commission relied on its intent to proceed by adjudication of individual complaints rather than by imposing general rules or even specific merger conditions. As a party to the *Order*, Comcast received actual notice of this statement of Commission intent, and had opportunity to seek reconsideration or judicial review. Comcast did neither, and therefore voluntarily accepted the Commission’s assertion of jurisdiction and stated intent to proceed on a case-by-case basis by entertaining complaints patterned after *Madison River*.

The Commission supported this unambiguous notice that it intended to resolve complaints about the blocking or degrading of internet content or applications by applying the *Madison River* framework with a clear statement of jurisdiction and an explanation of the role of the *Policy Statement*:

The Commission also has recently adopted a *Policy Statement* on broadband access to the Internet. ***This statement reflects the Commission's view that it has the jurisdiction necessary to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral***

*manner*. To ensure that broadband networks are widely deployed, open, affordable, and accessible, the Commission adopted four principles embodied in that *Policy Statement*. . . . The Commission held out the possibility of codifying the *Policy Statement's* principles where circumstances warrant in order to foster the creation, adoption, and use of Internet broadband content, applications, services, and attachments, and to ensure consumers benefit from the innovation that comes from competition. Accordingly, the Commission chose not to adopt rules in the *Policy Statement*. This statement contains principles ***against which the conduct of Comcast, Time Warner, and other broadband service providers can be measured.***

21 FCCRcd at 8299 (emphasis added).

Again, Comcast, a party to the dispute and actually named by the Commission as subject to the Commission's jurisdiction, could not have received more explicit notice in the way in which the Commission would use the *Policy Statement* to guide any subsequent complaint by Free Press, the other explicitly named party to the adjudication, or anyone else that Comcast had engaged in "willful[] blocking or degrading" of any content or application.

Nor did this "transform the policy statement into rules" as Comcast continues to insist. Rather, as the Commission explained, the *Policy Statement* merely provided guidance to "Comcast, Time Warner, and other broadband service providers" on what behavior the Commission would find unacceptable. This use of policy statements is utterly consistent with Commission precedent and comports with all aspects of the Administrative Procedures Act. *See Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000) (*Character Policy Statement* not unduly vague and provides suitable guidance for adjudications as "[g]iven the myriad forms of criminal misconduct . . . [t]he Commission cannot be required to foresee the variety of criminal behavior in which licensees or their owners may partake"). And, in any event, as with the assertion of jurisdiction, the time for Comcast to raise such a procedural argument has long since passed.

Finally, further reenforcing both Comcast's notice and Free Press' rational reliance, the

Commission reaffirmed its assertion of jurisdiction and its intent to use a *Madison River*-type complaint process to ensure that ISPs operate in a “neutral manner” in the adjudication of the acquisition of BellSouth by AT&T, another merger proceeding to which Free Press was a party. *See AT&T and BellSouth Corp.*, 22 FCCRcd 5662, 5726 (2007). Using nearly identical language and once again invoking the precedent of *Madison River*, the Commission stated again it would entertain complaints from “affected parties” in the event that future evidence emerged that “any company is willfully blocking or degrading” any internet content or application. Similarly, the Commission reaffirmed its assertion of jurisdiction, and explained that it would use the *Policy Statement* as “principles against which the conduct of the merged entity and other broadband service providers can be measured.” *Id.*

### **III. COMCAST WAIVED ITS JURISDICTIONAL ARGUMENTS WHEN IT FAILED TO OBJECT IN AN ADJUDICATION IN WHICH IT WAS A PARTY.**

It has been two years since Comcast received actual notice of the Commission’s jurisdictional theory, its express intent to entertain future complaints, and its proposed use of the *Policy Statement* as guidance “against which the conduct of Comcast, TimeWarner, and other broadband service providers can be measured.” Comcast is bound by that decision. It cannot now claim any surprise that the Commission now seeks to exercise that jurisdiction and proposes to act on precisely the sort of complaint the Commission twice invited Free Press to file should evidence of willful blocking or degrading come to light.

More importantly, as explained by the D.C. Circuit in *Tribune Co. v. FCC*, 133 F.3d 61 (D.C. Cir. 1998), Comcast has explicitly waived its right to challenge the Commission’s jurisdiction and decision to act via adjudication by failing to challenge the assertion of jurisdiction and the decision

to proceed via adjudication rather than by a general rulemaking. As explained in *Tribune*:

It may not be apparent when an applicant wishes to challenge a condition whether factual evidence is needed or not. And even if only legal or policy arguments are presented, it surely is not inappropriate for the Commission to insist that the arguments be presented first to an ALJ, who would then present to the Commission a recommended decision.

*Id.* at 67.

Comcast, was a party to the adjudication in which the Commission announced its jurisdiction and determination to adjudicate complaints that alleged Comcast engaged in “willful[] blocking or degrading” of any internet content or application. It could either have sought reconsideration or, if it believed reconsideration futile, appealed the decision to the courts. But, having failed to do either, Comcast cannot now challenge the Commission’s assertion of jurisdiction because it failed to exhaust its administrative remedies when it had the chance. *Id.* at 70 (“Tribune could have protected itself by seeking reconsideration” or by filing a *Petition for Rulemaking* to address newspaper cross-ownership and waiver policy).

### **III. FREE PRESS IS ENTITLED TO RELY ON THE COMMISSION’S ANNOUNCEMENT OF POLICY IN THE ADELPHIA ORDER.**

Importantly, as a party to the adjudication in the *Adelphia Order*, Free Press is entitled to rely upon the Commission’s express statement of jurisdiction and invitation to file a *Madison River*-type complaint in the event it found new evidence that Comcast (or any other provider) engaged in willful blocking or degradation of internet content or any application. In evaluating whether to seek reconsideration or judicial review of the Commission’s denial of its *Petition for Denial* – which the Commission explicitly found as timely filed, procedurally correct, stating a cognizable interest, and thus making Free Press an interested party – Free Press relied on this statement of jurisdiction and

express invitation to return in the event circumstances warranted. The Commission reassured Free Press again, as a party in interest in the *AT&T/BellSouth Order*, that the Commission would, guided by the principles of the *Policy Statement*, address any specific incidents of blocking or degrading content or applications under the same framework as it addressed the blocking of voice-over-IP calls in the *Madison River* complaint.<sup>4</sup>

Comcast has introduced no argument as to why the Commission should suddenly take an about-face and reverse the previous policy on which Free Press and others explicitly relied. To the contrary, Comcast has instead devoted much effort to persuading the Commission that the Commission has never asserted jurisdiction to resolve complaints about blocking or degrading content, never explicitly invited Free Press or others to file such complaints, never explained the role of the *Policy Statement* in the adjudication of these complaints, and cannot now proceed without an additional notice and comment rulemaking (if then). On the basis of this record, however, it is Free Press, rather than Comcast, which would be entitled to raise concerns under the Administrative Procedure Act that refusal to address the complaint the Commission twice invited Free Press to file – and on the basis of which Free Press declined to seek reconsideration or appeal – would be arbitrary and capricious.

## CONCLUSION

The time has long passed when Comcast could challenge either the jurisdiction of the Commission or the applicability of such complaints to Comcast. Because Comcast received explicit notice in a proceeding to which it was a named party, it cannot claim any procedural unfairness or lack of

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<sup>4</sup>Arguably, even if the Commission has no other source of authority, it can enforce Free Press' right to file complaints as a merger condition under its authority pursuant to Sections 214 and 310(d). Because the Commission has adequate alternate authority, however, and because Comcast has waived its right to challenge the Commission's assertion of jurisdiction and decision to entertain complaints such as the one at issue here, the Commission need not rely solely on this justification.

notice. Comcast could have sought reconsideration, or appealed if it had reasonable grounds to assume reconsideration futile. Comcast's failure to do so forecloses Comcast from raising these arguments here, where Free Press has explicitly relied upon the Commission's assertion of jurisdiction and invitation to file the very complaint at issue.

Respectfully submitted,

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