

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

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

To: The Commission

**REPLY TO COMCAST’S ARGUMENT WITH REGARD  
TO *CBS v FCC***

Media Access Project, on behalf of Free Press, *et al.*, files these further written *ex parte* comments in response to the written *ex parte* filed by Comcast on July 24, 2008.<sup>1</sup>

Nothing in the Third Circuit’s decision in *CBS v. FCC*, No. 06-3575 (3d Cir., July 21, 2008) has relevance to the pending complaint in this proceeding, and the Commission should reject Comcast’s efforts to transform a garden-variety reversal involving a completely different statute and factual circumstance into a barrier to resolving the issues presented to the Commission here. Nothing in *CBS v. FCC* alters the fact that adjudication and application of the policy statement in this case are consistent with 80 years of practice going back to the first adjudications by the Federal Radio Commission. *See Federal Radio Commission v. Nelson Bros.*, 289 U.S. 266

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<sup>1</sup>Because the *ex parte* relied upon *CBS v. FCC*, No. 06-3575 (3d Cir. July 21, 2008), the General Counsel contacted Media Access Project, counsel to Free Press, to request that Free Press file a reply to the July 24 *ex parte*, and to address any other issues as may seem relevant in light of *CBS v. FCC* or that may assist the Commission in resolution of the Complaint.

(1933) (affirming resolution of policy via adjudication and with reference to policy statement). Nor does *CBS v. FCC* support Comcast's efforts to restrict well established Title I authority, or to claim "surprise" that the Commission might do that which it explicitly told Comcast it would do – entertain complaints if Free Press or any other party presented evidence of "willfully blocking or degrading" internet content.

Finally, the Commission should simply ignore Comcast's increasingly strident efforts to introduce procedural errors through what can only be described as strained and egregious reading of Free Press' responses to Comcast's pleadings. Free Press has not wavered from its original theory simply by responding to Comcast's insistence on a lack of authority. Nor has it conceded the applicability of Section 312 merely by discussing the consequences of applying it as Comcast has requested, nor abandoned past argument merely by refusing to repeat the same points *ad nauseum*, or made any of the other "concessions" with which Comcast's counsel continue to lard their responsive pleadings. While Free Press would be the last to deny Comcast the opportunity to pursue the legal strategy of its choice,<sup>2</sup> Free Press sees little value in wearying the Commission with a meticulous point-by-point rebuttal, which will only summon another repetitive filing by Comcast. After thousands of pages of briefing and three public hearings, all that needs to be said has surely been said. The time has come to draw this proceeding to a close, and for the Commission to render its judgement.

## SUMMARY

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<sup>2</sup>*But see Comcast v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008).

The Commission explicitly stated in the *Cable Modem Declaratory Ruling*, the *Wireline Broadband Framework Order*, and the *Internet Policy Statement* that the Commission asserted jurisdiction over broadband services pursuant to Title I, and would not hesitate to impose obligations under relevant sections of Title II of the Communications Act “necessary to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner.” *Internet Policy Statement*, 20 FCCRcd 14986, 14988 (2005). Nothing in *CBS v. FCC* contradicts this. To the contrary, the court in *CBS v. FCC* **affirmed** that the Commission had the discretion to announce policy, or even change its previous policy *via* adjudication. Slip Op. at 14. Nor has Comcast demonstrated that the Commission lacks authority to make a reasoned determination in this case.

**A. Comcast’s Argument With Regard to Authority Conflicts With Supreme Court and D.C. Circuit Precedent.**

Comcast’s repeated mantra that the use of the words “statutorily mandated responsibility” by the D.C. Circuit in *American Library Association v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) somehow limits Title I as a source of authority fails because, as the D.C. Circuit has previously found, Section 1 of the Communications Act is a **statute**, which mandates “statutory responsibilities” on the Commission, thus making the responsibilities of Section 1 “statutorily mandated responsibilities.” *Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 213 & n.80 (D.C. Cir. 1982) (Affirming use of ancillary authority, noting that “[o]ne of those responsibilities is to assure a nationwide system of wire communications services at reasonable prices”

and citing Section 1). Thus, Comcast’s effort to distinguish *Alliance for Community v. FCC* because Section 1 cannot supply the needed “statutory responsibility,” *July 24 Ex Parte* at 2, must also fail, as Comcast offers no explanation why the Commission may use Sections 201 and 202 to enforce responsibilities enumerated in Section 621, but not responsibilities mandated in Section 1 or in other statutes cited by Free Press.

Further, Comcast’s argument that the Commission may use this authority only in the context of a general “informal” notice and comment rulemaking was directly addressed and rejected in *NY State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984). Applying the expansive formulation of *Capital Cities Cable, Inc., v. Crisp*, 467 U.S. 691, 699-700 (1984), the D.C. Circuit rejected Petitioners’ argument that the Commission was required to act by rulemaking rather than adjudication when exercising Title I authority. *NY State Commission*, 749 F.2d at 815. Nothing in *CBS v. FCC* provides authority to support Comcast’s argument here.

**B. Nothing In *CBS v. FCC* Supports Comcast’s Position On The Use of the *Internet Policy Statement*.**

Comcast’s argument that the Commission may not “enforce” the *Internet Policy Statement* because to do so would transform the policy into a rule fundamentally misunderstands what it means for the Commission to “enforce” the *Internet Policy Statement*, as Free Press has demanded. For over 80 years, the Commission has relied on policy statements to inform and guide both the industries it regulates and its own adjudicatory process. Free Press has demanded the Commission enforce the *Internet Policy Statement* in precisely the same manner in which the Commission has enforced

the *1960 Report and Statement of Policy Res: Commission En Banc Programming*; the *1965 Policy Statement on Comparative Hearings*, the *1986 Character Policy Statement*, or any of the numerous other policy statements the Commission has adopted over the years – by applying the policy statement in a relevant adjudication.

Contrary to the arguments of Comcast, the court’s opinion in *CBS v. FCC* provides support for the position advanced here by Free Press. The *CBS* court found that the Commission had arbitrarily and with insufficient warning **failed** to apply the 2001 Policy Statement providing guidance on indecency. *Slip Op.* at 16. There, the court found the Commission had expressly rejected three decades of precedent that “fleeting” images did not constitute indecency, including the guidance provided in the *2001 Industry Guidance on Indecency*, without providing reasoned explanation or even acknowledgment of this radical departure. *Id.* Here, by contrast, the Commission has progressed steadily from an assertion of jurisdiction, to an invitation to file a complaint for “willfully blocking or degrading content” to actually adjudicating a complaint with regard to “willfully blocking or degrading content.” It is difficult to think of a more reasoned and rational evolution.

Similarly, Comcast’s position that actually adjudicating a complaint would somehow be an abandonment of a “policy of restraint” similar to that which the Commission practiced with regard to indecency enforcement must be rejected as inconsistent with the facts of this case and creating an absurd result. Unlike the three decade old policy with regard to “reasonable restraint” in the enforcement of indecency, the Commission’s stated policy here was that it would not adopt formal rules (which

Comcast argues are a pre-requisite to an adjudication), but would instead proceed by adjudicating complaints.<sup>3</sup> The Commission now faces a case of first impression under the very procedures it announced it would use, albeit one similar to two previous cases it has adjudicated. *See Adelfia Transaction Order*, 21 FCCRcd 8203, 8296-99 (accepting Comcast’s argument that blocking not “willful,” but inviting filing of future complaints in the event of evidence of future willful blocking or degrading of content); *Madison River*, 20 FCCRcd 4295 (2005) (deliberate blocking of application).

By Comcast’s logic, the Commission could never use adjudication to announce policy because every case of first impression, no matter how similar and despite prior warning, would constitute a “departure” from the “policy of restraint” of never enforcing a case. This is an absurd result, as the courts have consistently held that the Commission has authority to announce or change policy via adjudications. *CBS v.*

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<sup>3</sup>*See AT&T and BellSouth Corp.*, 22 FCCRcd 5662, 5726 (2007); *Applications for Consent to the Assignment And/or Transfer of Control of Licenses; Adelfia Communications Corporation, (And Subsidiaries, Debtors-in-possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees; Adelfia 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, 8298-99 (2006) (“*Adelfia Transaction Order*”).

*FCC*, Slip op. at 14; *NY State Commission*, 749 F.2d at 815. Comcast’s argument that the policy of “restraint” in *CBS v. FCC* applies here must therefore be rejected.

**C. *CBS v. FCC* Does Not Support Comcast’s Claim of “Surprise.”**

Finally, Comcast argues that the Third Circuit’s decision reenforces its reliance on *Trinity Broadcasting of Florida, Inc., v. FCC*, 211 F.3d 618 (D.C. Cir. 2000). *Comcast July 24 ex Parte* at 16-17. Neither *Trinity Broadcasting* nor *CBS v. FCC* has bearing on this case because Comcast received more than sufficient notice that the Commission would consider behavior of the sort engaged in here would constitute “willfully blocking or degrading” content or applications, subject to Commission sanction. In *Trinity*, the court found the Commission’s past articulation of the minority control rule with reference to minority/majority boards unclear, confusing and contradictory on a highly technical point. In *CBS v. FCC*, the court found the FCC had clearly reversed previous policy without prior warning. Here, however, the Commission provided more than adequate warning as to what would constitute “willfully blocking and degrading content,” both with regard to the guidance in the *Internet Policy Statement* and in the context of the *Adelphia Transaction Order*, where the Commission invited Free Press and others to file complaints such as this if evidence of willful blocking or degrading surfaced. Courts have found sufficient notice under circumstances far less favorable to the FCC. *See Allied Broadcasting, Inc., v. FCC*, 435 F.2d 68 (D.C. Cir. 1970) (notice through general policy statement on diversification that cable systems could qualify as “mass media” despite uncertain regulatory status). Whatever merit might exist in an argument with regard to

surprise in a marginal case, it clearly does not apply here. *See Contemporary Media, Inc., v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000) (observing in the context of enforcement of *Charcter Policy Statement* that “whatever the issue with respect to what crimes might be regarded as being on the boundary of ‘egregiousness,’ the reasonableness of the FCC’s decision in the instant case is clear”).<sup>4</sup>

## ARGUMENT

### I. THE COMMISSION REPEATEDLY ASSERTED JURISDICTION UNDER TITLE I TO PUNISH ANY PROVIDER “WILLFULLY BLOCKING OR DEGRADING” CONTENT OR APPLICATIONS.

Contrary to Comcast’s continued assertions in the *July 24 ex parte* and elsewhere, Free Press’ citation of additional supplemental authority in response to Comcast’s repeated arguments that the FCC lacks authority have not created any procedural issues. As a necessary prelude to resolving Comcast’s arguments as to the

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<sup>4</sup>Free Press also notes that even if Comcast lacked notice and could not be “punished” with a forfeiture, the Commission would still have authority to resolve the complaint and prohibit Comcast from further blocking or degrading p2p applications. *Trinity*, 211 F.3d at 628 (affirming Commission interpretation of rule at issue and noting “[w]ere we simply reviewing the Commission’s interpretation of its regulation, our task would be at an end”); *Accord Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC.2d 420 (1968) (declaring tariff prohibiting all foreign devices retroactively void as inherently unreasonable and prejudicial under Sections 201(b) and 202(a)).

value of *CBS v. FCC* as relevant new authority, Free Press will again recount the fairly straightforward path by which the parties arrived at this juncture.

Beginning with the *Cable Modem Declaratory Ruling*, 17 FCCRcd 4798 (2002), the Commission asserted jurisdiction over broadband services under its Title I “ancillary authority.” *Id.* at 4841-42. As the Commission explained:

Federal courts have long recognized the Commission's authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to existing Commission statutory authority. This authority stems from several provisions of the Communications Act. Section 1 of the Act charges the Commission with \_execut[ing] and enforc[ing] the provisions of this Act,\_ provisions which extend \_to all interstate and foreign communication by wire or radio ... and ... all persons engaged within the United States in such communication. Moreover, section 4(i) provides that \_[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions. The Commission's authority pursuant to Title I, however, is not \_unrestrained\_ and may only be exercised provided such action is “necessary to ensure the achievement of the Commission's statutory responsibilities.”

*Id.* (citations omitted). Noting that the Commission had previously “asserted ancillary jurisdiction over information services (then called ‘enhanced services’) in the *Computer Inquiries*,” and that it had tentatively reached the conclusion in the companion *Notice of Proposed Rulemaking* proposing to reclassify DSL and other “wireline” services that broadband access constituted an interstate communication subject to ancillary jurisdiction under the *Computer Inquiries* precedent, the Commission directly asserted that it had authority under its ancillary jurisdiction to regulate cable broadband access. *Id.* at 4842. The Commission sought comment both on “whether the

Commission should *exercise* its Title I authority” (emphasis added), and solicited comment “on any explicit statutory provisions, including expressions of congressional goals, that would be furthered by the Commission's exercise of ancillary jurisdiction.” The Commission explicitly sought comment on whether it should act to advance the goals of Sections 1 and Section 230 of the Act, and Section 706 of the Telecommunications Act. *Id.* In doing so, however, the Commission never wavered from its position that its actual jurisdiction and authority flowed from Title I ancillary authority originating in Sections 1 and 4(i) of the Act.

Ultimately, the Supreme Court affirmed both the Commission’s reclassification and assertion of Title I authority in *Brand X*. In the interim, the Commission had occasion to revisit the question of its authority, notably in the *Free World Dial Up* and *Madison River* cases, and continued to assert Title I authority over broadband applications and concern over potential blocking of broadband content or applications. Accordingly, when the Commission reclassified both wireline broadband access and its underlying telecommunications component as information services, the Commission explicitly found that it had subject matter jurisdiction over all broadband access providers pursuant to its Title I authority. *Framework for Wireline Broadband*, 20 FCCRcd 14853, 14913-14 (2005). Although the Commission enlarged upon the number of statutory goals exercise of this authority advanced, the Commission remained unambiguous in its assertion that Title I provided both an independent source of authority and a list of statutory goals that the Commission should advance.

Simultaneously, it issued the *Internet Policy Statement*, 20 FCCRcd 14986

(2005).<sup>5</sup> Again, the Commission unambiguously asserted its jurisdiction under Title I:

The Communications Act charges the Commission with “regulating interstate and foreign commerce in communication by wire and radio.” The Communications Act regulates telecommunications carriers, as common carriers, under Title II. Information service providers, “by contrast, are not subject to mandatory common-carrier regulation under Title II.” The Commission, however, “has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications.” As a result, the Commission has jurisdiction necessary to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner.

*Id.* at 14987-88 (citations omitted). In doing so, the Commission *explicitly* noted the *Madison River* enforcement adjudication as an exercise of Title I ancillary jurisdiction.

*Id.* at 14988 n.12. The *Internet Policy Statement* also asserted the Commission’s authority “to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers” and its responsibility “to preserve and promote the vibrant and open character of the Internet ....To foster creation, adoption and use of Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition,” language echoing various sections of the Communications Act identified in the *Framework for Wireline Broadband*.

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<sup>5</sup>Of relevance to the jurisdiction in this proceeding, the *Internet Policy Statement* bears the caption of both the *Framework for Wireline Broadband* and the *Cable Modem Declaratory Ruling*, and clearly derives from the explicit *Further Notice* in CS Docket No. 02-52.

The Commission explained in both the *Cable Modem Order* and the *Wireline Framework* that it anticipated that market forces would prevent any danger to the “neutral... vibrant and open character of the Internet” and therefore declined to adopt formal rules. *Id.* at n.15. The Commission did, however, state it intended to apply the principles in “ongoing policy activities.” Although the reference to *Madison River* indicated a willingness to entertain formal complaints, the *Internet Policy Statement* did not outline any formal procedures.

The Commission elected to announce how it would act under its Title I authority to fulfill the responsibilities and advance the goals identified in the *Internet Policy Statement* through a formal adjudication. *Applications of Comcast, Time Warner, and Adelphia*, 21 FCCRcd 8203 (2006) (“*Adelphia Order*”). There, Free Press brought evidence that Comcast engaged in deliberate blocking of emails and requested the Commission enforce the principles set forth in the *Internet Policy Statement* by denying the merger or imposing conditions. In its defense, Comcast did not deny that it had blocked the emails, but maintained that this blocking had occurred by accident and without Comcast’s knowledge as incidental to its management of unsolicited email (“spam”). *Id.* at 8295-99.

The Commission accepted Comcast’s explanation and denied Free Press’ *Petition*. *Id.* at 8298. In response to this first reported case of possible blocking, however, the Commission clarified how it would exercise its authority. In the future, Free Press or any other party would have leave to file a *Madison River*-type formal complaint against any party willfully blocking or degrading content. *Id.* at 8298-99.

The Commission further explained that the *Internet Policy Statement* provided “principles against which the conduct of Comcast, Time Warner and other ISPs can be measured.” *Id.* at 8299.

## II. TITLE I AUTHORITY FUNCTIONS LIKE ANY OTHER AUTHORITY.

Perhaps aware that the bulk of Commission practice soundly refutes a critical thesis, Comcast vehemently argues that even if the Commission might otherwise have the discretion to proceed by adjudication informed by policy statements, it cannot do so in the context of Title I authority. Indeed, Comcast appears unwilling to admit that the Commission even *has* independent authority to act pursuant to Title I, as if Title I were somehow not “real” authority in its own right. *July 24 Ex Parte* at 4-7. Comcast finds support for this in *CBS v. FCC*, arguing that the court’s discussion of relevant statutes emphasizes the need for a “real” statute other than Section 1. *July 24 Ex Parte* at 14.

The argument that Title I is somehow a lesser or defective authority, incapable of supporting the exercise of anything so filled with *gravitas* as a formal adjudication, is contradicted both in general and in specific by existing case law. In *Capital Cities Cable, Inc., v. Crisp*, 467 U.S. 691 (1984), a unanimous Supreme Court explained:

the Commission ha[s] been given “broad responsibilities” to regulate all aspects of interstate communication by wire or radio by virtue of §2(a) of the Communications Act of 1934 . . . the Commission’s authority extends to *all regulatory actions* “necessary to ensure the achievement of the Commission’s statutory responsibilities.”

*Id.* at 700 (citations omitted) (emphasis added). The D.C. Circuit applied this understanding when it rejected the precise argument Comcast raises here in *New York*

*State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

Affirming a Commission decision to preempt state authority pursuant to its Title I ancillary powers, the court wrote:

Petitioners claim that the Commission abused its discretion by failing to engage in a rulemaking proceeding pursuant to 5 U.S.C. §553 (1982). The Commission labeled its action a “declaratory ruling and consolidation of precedent,” technically an adjudication under Section 5(e) of the Administrative Procedure Act, 5 U.S.C. §554(e)...The decision whether to proceed by rulemaking or adjudication lies within the Commission’s discretion. This is true regardless of whether the decision may affect agency policy and have general prospective application. We find no abuse of discretion in the Commission’s choice of procedures.

*Id.* at 815 (citations omitted).

In other words, the Supreme Court has already stated that Title I authority is ‘real’ authority under which the Commission may take “all regulatory actions necessary.” The D.C. Circuit, explicitly applying *Capital Cities Cable*, see *NY State Commission*, 749 F.2d at 808, declared that the Commission may, at its discretion, proceed either by informal notice and comment rulemaking or formal adjudications.

Comcast has attempted to evade this and all contrary precedent by an almost religious belief that the use of the phrase “statutorily mandated responsibilities” in various cases, most notably *American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), somehow nullifies not merely any other descriptive phrases (such as “responsibilities” or “goals”),<sup>6</sup> but eliminates Section 1 of the Act as an independent source of authority. As previously explained, Comcast misreads *ALA*’s holding. The

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<sup>6</sup>See *Ex Parte Letter of John Blevins Regarding The Commission’s Ancillary Jurisdiction*, Docket No. 07-52 (filed July 17, 2008).

broadcast flag was “ancillary to nothing” not because the Commission relied on ancillary authority, but because “Title I does not authorize the Commission to regulate receiver apparatus *after a transmission is complete.*” *Id.* at 692 (emphasis added).

More tellingly, however, Comcast overlooks the fact that the D.C. Circuit has already found that Section 1 is a “statute” and that the responsibilities enumerated in Section 1 are “statutory responsibilities” that Congress has “mandated.” *Computer and Communication Industry Association v. FCC*, 693 F.2d 198, 213 & n.80 (D.C. Cir. 1982) (“*CCIA*”). Even if the “statutorily mandated” language genuinely restricted Commission authority, and even if all the other statutory responsibilities cited by the Commission in the *Cable Modem Declaratory Ruling* and the *Wireline Framework Order* for some reason did not apply, and all the other statutes cited by Free Press and others were excluded, Comcast could not evade the explicit finding of the D.C. Circuit that Section 1 of the provides responsibilities mandated by statute.<sup>7</sup>

Comcast also seeks to distinguish *CCIA* by arguing that the nexus between regulating the Title I service and its impact on Title II rates was “obvious.” *July 24 Ex Parte* at 7. In doing so, Comcast focuses exclusively on the portion of the decision discussing the reclassification of customer premise equipment (CPE), and ignores the

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<sup>7</sup>Comcast argues that the statutorily mandated responsibilities under Section 1 are not “the genuine motivation for FCC action on the complaint.” *Ex Parte* at 7. Given how broadly the courts have interpreted the goals and responsibilities of Section 1, this statement – cited without authority – appears difficult to justify.

discussion of the Commission’s reclassification of all “enhanced service” providers as covered by Title I. But while Comcast may wish to draw such a distinction, the *CCIA* court did not distinguish between the purportedly “obvious” nexus of CPE and the issue of “enhanced services” – the direct ancestor of the decisions culminating in the *Cable Modem Declaratory Ruling* and the *Wireline Framework Order*. See *CCIA*, 693 F.2d at 209-11. Rather, taking both together, the *CCIA* court affirmed the reclassification *only* because the Commission did not “attempt[] to end Title II regulation without substituting other regulatory tools.” *Id.* at 211. “In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing *which* jurisdictional base and *which* regulatory tools will be most effective in advancing the Congressional objective.” *Id.*

The Commission deserves the same deference here. Comcast cannot evade the precedent on reclassification by pretending that the court applied it only to the reclassification of CPE. The Commission’s decision to rely on the more flexible Title I regime rather than Title II in this descendant of *CCIA* deserves the same deference.

### **III.II. THE COMMISSION’S USE OF ENFORCEMENT AND THE *INTERNET POLICY STATEMENT* AND ADJUDICATIONS CONFORMS WITH 80 YEARS OF COMMISSION PRACTICE.**

Comcast’s effort to portray adjudication of the complaint as somehow “enforcement” of the policy statement in violation of the norms of due process fundamentally mischaracterizes the lengthy history of FCC adjudication and its enforcement of policy statements. *CBS v. FCC* provides no support for Comcast’s

assertion. To the contrary, it provides support for Free Press' position that enforcement of the *Internet Policy Statement* is consistent with longstanding Commission practice. Since Congress authorized the Federal Radio Commission to grant or renew licenses only on where such action would serve the public interest, convenience, and necessity, the Commission has announced policy through adjudications. *See Federal Radio Commission v. Nelson Bros.*, 289 U.S. 266 (1933). To assist regulated entities and guide its adjudications, the Commission issued various policy statements and guides. *See, e.g. Report and Statement of Programming Policy*, 44 FCC 2303 (1960); *Public Service Responsibilities of Broadcast Licensees* ("Blue Book") 55-56 (1947).

As Free Press has repeatedly explained, these policy statements do not require formal notice and comment rulemaking, and do not – of themselves – have the force of law. *See Written Ex Parte of Free Press*, Docket No. 07-52 (filed June 12, 2008). Indeed, where a policy statement provides an inflexible set of rules from which Commission adjudicators do not readily depart, the court will consider the document a rule regardless of its name and require notice and comment. *See United States Telephone Association v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). On the other hand, a failure to enforce the policy set forth in a policy statement can result in reversal as arbitrary and capricious, unless the Commission explains why it has departed from its stated policy. *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (describing "hard look" doctrine). And while policy statements are, by their nature, general in scope, they provide sufficient general

guidance to put regulated entities on notice of the consequence of their actions. *Allied Broadcasting, Inc., v. FCC*, 435 F.2d 68 (D.C. Cir. 1970) . Even where the policy is vague, the court will defer to the Commission’s judgment to refine the relevant standards through a process of adjudications. *Contemporary Media, Inc., v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000).

The Commission’s development of the *Internet Policy Statement* and its invitation to Free Press to file a complaint to enforce the principles announced in the policy statement follow long-standing practice, rather than the unprecedented power grab or procedurally suspect process suggested by Comcast. Similarly, the request to enforce the policy statement is well understood, after 80 years of FCC practice to mean “conduct an adjudication informed by the policy announced in the policy statement,” not, as Comcast would have it, an *ultra vires* attempt to give policy the force of law. The reliance of the court in *CBS v. FCC* on the *2001 Industry Guidance on Indecency Enforcement* reenforces this very point. It was because the court found that the Commission had inexplicably departed from the *2001 Industry Guidance* that the court found the FCC’s action arbitrary and capricious.

Two examples from this lengthy history should suffice. In 1965, the Commission issued its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC.2d 393 (1965). The *1965 Policy Statement* contained the general principle that adjudicators in broadcast license comparative hearings should favor “a maximum diffusion of control of mass communications media.” A year later, an administrative law judge interpreted this statement to include a material interest in an as yet unbuilt cable system, and

awarded the AM license in question to a rival applicant, a disposition affirmed by the Commission. *Allied Broadcasting, Inc., v. FCC*, 435 F.2d 68 (D.C. Cir. 1970). The disappointed applicant challenged this decision, arguing that it could not possibly have known that an interest in an unbuilt cable system would qualify as a “medium of mass communication” at a time when it remained unclear whether cable systems were subject to Commission jurisdiction – let alone “a medium of mass communication.”

The court affirmed the FCC, finding that the *1965 Policy Statement* provided sufficient notice. The court found that by emphasizing the importance of diversification of control of the “mass media” as “a factor of primary significance,” and reference to additional local interests having the greatest significance were sufficient to warn the applicants that the “general terms” of the *1965 Policy Statement* could include cable systems. The notice provided by the “general terms” and the broad statement of the importance of diversification in the *1965 Policy Statement* compares most unfavorably with the Commission’s detailed description of subscriber rights and its emphasis on the importance of maintaining a “neutral” internet and preserving its “open and vibrant character” in the *Internet Policy Statement*. Combined with the Commission’s explanation in the *Adelphia Order* that the *Internet Policy Statement* constituted “principles, against which the conduct of Comcast...can be measured,” the Commission’s conduct here falls well within the range of practice approved by the courts.

The development of the Commission’s policy statement on children’s television obligations. *See Action for Children’s Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977).

After several years of inquiry, volumes of public comment, several days of hearings, and the collection of substantial evidence, the Commission elected to adopt a policy statement on the obligations of broadcasters to provide programming for children rather than adopt rules setting minimum standards and prohibiting practices explicitly found harmful by the Commission. Instead, the Commission determined it would rely on industry self-regulation, but would “closely examine commercial activities in programs designed for children on a case-by-case basis” and not hesitate to take whatever “further action may be required . . . to ensure that in a manner consistent with their public service obligations.” *Id.* at 467. The Court found the Commission’s approach reasonable and affirmed the use of adjudication guided by policy statement instead of rules. *Id.* at 479-80. In doing so, it emphasized the broad discretion vested in the agency to select what vehicle it would use to announce policy. *Id.*

Finally, the Commission’s actions in the *Cartefone* adjudication and subsequent line of cases demonstrates the absurdity of Comcast’s argument that policy and adjudication may only follow a rulemaking. In *Carterfone*, the Commission applied a principle announced by a federal district court in an antitrust case. Using the adjudication to effect a substantial change in policy, the Commission declared that the underlying policy announced in *Hush-a-Phone* required it to render the tariff prohibiting network attachments that do not harm the network retroactively void *ab initio*. This policy and adjudication did not follow a rulemaking, despite the fact that it reversed many years of settled policy. To the contrary, it was only after the

Commission had attempted to define the principle of open networks through adjudication did the Commission finally adopt rules through informal notice and comment rulemaking. Comcast's insistence that the Commission can only proceed from informal rulemaking to formal adjudication to policy statement may resonate with those unfamiliar with Commission practice, but even a brief survey of the relevant precedents soundly refutes this argument.

Finally, Comcast's suggestion that adjudication of the pending complaint would conflict with a past policy of "restraint" similar to the policy of restraint the court found applicable in *CBS v. FCC* flies in the face of the *CBS* court's extensive finds and would produce an absurd result. In *CBS*, the court observed that for three decades, the Commission itself had emphasized that its policy was one of "restraint" and that therefore fleeting utterances would not constitute indecency subject to fine. This three decades of policy included specific discussion of cases in which the Commission had explicitly held that fleeting utterances and images were not actionable. Indeed, as the *CBS* court noted, the Commission itself acknowledged the radical change in its policy in its *Golden Globe* decision.

Comcast can point to no similar "policy of restraint" here. To the contrary, the Commission has consistently asserted jurisdiction and expressed its willingness to act through adjudication rather than through the adoption of rules. As previously described, the Commission's determination to resolve complaints emerged steadily and in response to reasoned decisionmaking. First, the Commission asserted jurisdiction in the *Cable Modem Declaratory Ruling*. Next, the Commission issued the *Wireline*

*Framework Order* and the *Internet Policy Statement*, in which it provided further discussion of its authority, announced an intent to keep the internet “neutral” and “open” and provided suitable industry guidance. Finally, when confronted in the context of a merger adjudication with evidence of possible blocking, the Commission announced that it would entertain complaints from Free Press or any other party against Comcast or any other broadband ISP in the event a party discovered evidence of an ISP wilfully blocking or degrading content. The adjudication of this complaint is the logical end point for this series of rational and well-supported previous adjudications. Indeed, it would be an arbitrary reversal to grant Comcast’s request and refuse to hear the complaint for want of jurisdiction.

Indeed, the only way in which Comcast can claim the Commission is abandoning a “policy of restraint” is that this case is one of first impression under the procedures the Commission described in the *Adelphia Transaction Order* and in the *AT&T/BellSouth Order*. But this would produce an absurd result, in that it would make every adjudication a departure from a “policy of restraint.” Nor, in fact, is this even a significant departure from the Commission’s previous adjudications. The Commission resolved a similar complaint, albeit in a manner favorable to Comcast, in the *Adelphia Transaction Order*, and resolved a complaint with regard to the blocking of an internet application in *Madison River*. Accordingly, the resolution of this complaint does not depart from a “policy of restraint” even under Comcast’s proposed standard.

#### IV. COMCAST CANNOT CLAIM “SUPRISE” AT THE COMMISSION’S

## ENFORCEMENT OF THE POLICY STATEMENT.

Finally, because Comcast had actual notice that the Commission would exercise its Title I authority through *Madison River*-type complaints, Comcast cannot claim surprise. Comcast seeks to negate this explicit notice by claiming that the *Adelphia Order* “does not provide – contrary to MAP’s latest contention – notice of any binding legal norm regarding broadband network management.” *July 24 Ex Parte* at 11. Comcast persists in this hand-waving using phrases such as “binding legal norms” and “statement of future intent” which amount to nothing more than a reiteration of its supposed preference for rules rather than adjudication. But while Comcast may prefer general rules to rulemaking by adjudication, “[a]dministrative rulemaking does not ordinarily comprehend any rights in private parties to compel an agency to institute such proceedings or promulgate rules.” *Action for Children’s Television v. FCC*, 564 F.2d 458, 479 (D.C. Cir., 1977).

It remains only to be seen whether the Commission’s twice repeated invitation to parties with evidence of willful blocking or degrading of content to file complaints gave Comcast sufficient notice that its behavior here might qualify as “wilfully blocking or degrading.” Taken together, the facts indicate that Comcast received far more notice than the court found necessary in *Allied Broadcasting* discussed above. In addition to the explicit warnings Comcast received directly, and the fact that the Commission announced it would entertain complaints after considering Free Press’ first complaint that Comcast had blocked emails, Comcast had every reason to know that a decision to target a particular application could be considered “wilfully blocking and degrading”

and thus the proper subject of a complaint. Comcast need not, of course, have known that the Commission would reject its “reasonable network management” defense to be on notice that its behavior is proper subject of a complaint. It is enough that Comcast, or any other ISP for that matter, had more than sufficient notice that the Commission intended to “ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner” by inviting complaints by anyone with evidence that Comcast or any other ISP engaged in “wilfully blocking or degrading” content or application in violation of the principles announced in the policy statement.

Finally, the Commission is entitled to consider Comcast’s own conduct when evaluating whether Comcast considered its actions the proper subject of a complaint. The Commission may consider that Comcast engaged in extensive denials that it targeted BitTorrent when allegations first began to appear in the press. Even after the Associated Press confirmed that Comcast targeted BitTorrent, Comcast went to extensive lengths to deceive its customers with regard to its supposedly permissible “network management practices.” This deceptive conduct included, apparently, circulating an internal memorandum to line staff instructing them to lie to customers if asked about the Associated Press stories. Only after further denial became impossible did Comcast grudgingly admit to “delaying” bittorrent traffic at times of “peak congestion,” characterizations of its practices that strain credulity.

Taken together, it is hard to imagine any other explanation for this repeated deceptive conduct other than the most simple – that Comcast knew its behavior

constituted “wilfully blocking and degrading” internet content and applications subject to a complaint before the Commission. If the Commission’s policy has any meaning whatsoever, it must surely apply to Comcast’s behavior here. *See Contemporary Media, Inc., v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000) (observing in the context of enforcement of Charter Policy Statement that “whatever the issue with respect to what crimes might be regarded as being on the boundary of ‘egregiousness,’ the reasonableness of the FCC’s decision in the instant case is clear”).

Comcast’s reliance on *CBS v. FCC* and *Trinity Broadcasting* is therefore misplaced. This is not a case where the Commission has inexplicably reversed course after 30 years, or where previous Commission statements made it difficult for a licensee operating in good faith to tell that its conduct violated a Commission rule. Comcast was directly and unambiguously warned that conduct of this nature would not be tolerated. For months, Comcast has sought to delay the day of reckoning by alternately denying that it did anything wrong and denying the Commission has authority to act, while simultaneously reassuring the Commission that it will modify its practices and resolve everything through industry self-regulation. But the Commission made clear that self-regulation would only continue subject to the safety net of Commission action needed to ensure a neutral internet. The time for such action has now arrived. Consistent with nearly five years of Commission adjudications, the Commission must find for Free Press and grant the pending complaint.

Finally, as counsel for Free Press observed at the Commission’s hearing in Stanford, the Commission has before it both the complaint and the *Petition for*

*Declaratory Ruling*.<sup>8</sup> None of Comcast’s arguments with regard to “surprise” apply to a declaratory ruling, and the Commission may certainly announce policy through an adjudication of a petition for declaratory ruling as well as through adjudication of a formal complaint. *See NY State Commission*, 749 F.2d at 815.

## CONCLUSION

In the nine months since Free Press first filed its complaint and companion *Petition for Declaratory Ruling*, the Commission has received thousands of pages of legal filings, received the written and oral testimony of numerous experts, and held three hearings relevant to this proceeding. As the day of reckoning approaches, Comcast’s filings have become increasingly aggressive in its efforts to claim all manner of procedural errors that would prohibit the Commission from reaching the merits of the complaint or resolving the *Petition*. Free Press therefore clarifies one last time that it has not introduced new theories by rebutting Comcast’s arguments, has not abandoned any arguments it may not have discussed in this particular pleading, has not “conceded” or “admitted” or any other gross mischaracterization of its filings suggested by Comcast.

With this last round of briefing on the issue of the possible implications of the new authority in *CBS v. FCC*, surely all that needs to be said has been said. No doubt Comcast will insist on yet another round of tit-for-tat, and will once again lard its comments with purported procedural errors and supposed concessions. This

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<sup>8</sup>*See* Testimony of Harold Feld, Senior Vice President, Media Access Project.

Commission, however, should put an end to this apparently inexhaustible effort to delay the day of judgement or distract the Commission with procedural red herrings. As Free Press' counsel observed more than three months ago in Stanford, "it is enough."

WHEREFORE, the Commission should find for Free Press on the complaint, and grant the companion *Petition for Declaratory Ruling*.

Respectfully submitted,

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July 28, 2008