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 THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENORS FREE PRESS, PUBLIC KNOWLEDGE, OPEN INTERNET COALITION, CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA, AND VUZE, 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 of Petitioner Comcast Corporation.

B. References to the ruling at issue appear in the brief of Petitioner 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 issued raised in this case other than the private party litigation cases cited in the brief of Respondents Federal Communications Commission and The United States of America.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of this Court, invervenors listed below hereby submit this Corporate Disclosure Statement:

Free Press is a national, nonpartisan, nonprofit organization using education, organizing, and advocacy to increase informed public participation in crucial media policy debates. Free Press has no parent corporations, and no publicly-held company has a 10% or greater ownership in Free Press.

Public Knowledge is a Washington, DC based public interest group working to defend citizens' rights in the emerging digital culture. Through legislative, administrative, legal, and grass-roots efforts, Public Knowledge seeks to guard these rights at all layers of our communications systems. Public Knowledge has no parent corporations, and no publicly-held company has a 10% or greater ownership in Public Knowledge.

The Open Internet Coalition is a non-profit organization that represents consumers, grassroots organizations, trade associations, and businesses that share a common goal—keeping the Internet fast, open, and accessible to all Americans. The Open Internet Coalition has no parent corporations, and no publicly-held company has a 10% or greater ownership in the Open Internet Coalition. Coalition supporters include the following organizations: eBay, Google, IAC, Skype, Educause, American Library Association, and others. A more complete list and more information can be found at www.openinternetcoalition.org.

Consumers Union and Consumer Federation of America are non-profit corporations which do not issue stock. Neither is a subsidiary or affiliate of any publicly owned or publicly traded company.

Vuze, Inc. is a privately held for-profit company located in the State of California. It does not issue publicly traded stock. Vuze is not owned by or affiliated with any publically traded company.

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GLOSSARY

BitTorrent	An open-source protocol that connects one computer to multiple other individual computers simultaneously, to exchange files more efficiently and more quickly by transferring small pieces of data separately rather than entire large files in one piece.
DSL	Digital Subscriber Line. A type of broadband Internet connection over telephone lines.
ISP	Internet Service Provider. A company that provides a service consisting of communications by wire or radio that enables access to the Internet.
P2P	Peer-to-peer. A type of Internet application that allows the sharing of files and enables Internet-based services such as video distribution.
Reset Packet	A signal used to interrupt transmission between two computers on the Internet. These signals can either be generated from the end points in response to error conditions, or can be artificially generated from network routers in response to the presence of certain targeted activity through a process known as “Deep Packet Inspection” or DPI.
TCP	Transfer Control Protocol. An Internet protocol that enables reliable transmission of data over the Internet.

STATUTES AND REGULATIONS

Pertinent statutes are attached hereto.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the FCC reasonably interpreted the Communications Act to confer ancillary jurisdiction on the FCC over Comcast's actions to target and significantly impede the transmissions of consumers and businesses using Comcast's services to access the Internet.
2. Whether the FCC, an agency with the discretion to make policy through adjudication or rulemaking, abused that discretion by considering complaints against Comcast in an adjudication, where Comcast was afforded substantial notice through a seminal Policy Statement, repeated FCC declarations, and in an FCC approval of a Comcast merger, and where Comcast was afforded considerable opportunity to file hundreds of pages of comments and testify in an *en banc* hearing.

Counterstatement of the Case

Intervenors incorporate by reference the government Respondents' Counterstatement. They respectfully present the following additional counterstatement.

Proceedings Before the FCC

The facts giving rise to this case begin with Comcast customer Robert Topolski, who is both an experienced technologist and an aficionado of "barber shop harmony." *See Comments of Robert M. Topolski*, February 25, 2008, at 3 (JA) (*Topolski Comments*). In the early spring of 2007, he experienced difficulty uploading "a rare cache of Tin-Pan-Alley-era 'Wax Cylinder' recordings and other related musical memorabilia (all of which I was authorized to distribute)" *Comments of Robert M. Topolski*, February 25, 2008 at 3 (JA). Topolski, who has "25 years of network experience, both as an amateur and professional computer engineer," *Declaration of Robert Michael Topolski*, attached to *Formal Complaint of Free Press and Public Knowledge*, November 1, 2007 at 1 (JA) (*Free Press et al. Complaint*), was using a peer-to-peer application on two different networks. *Topolski Comments* at 3. Having determined that his uploads on one network were somehow operating incorrectly, while the uploads on the other network appeared unaffected, Topolski conducted a number of tests,

concluding "that Comcast was interfering with uploads involving multiple peer-to-peer applications and protocols." *Ibid.* Topolski found that the interference occurred at all times of day. *Ibid.* He posted his findings on a technology website forum. *Ibid.*

As word spread of the controversy, other technologists verified his account. *See, e.g.*, *Declaration of Peter Eckersley*, attached to *Free Press et al. Complaint*, October 31, 2007 (JA). Increasingly, the problems were being noticed by other Internet users as well. In its *Order*, the FCC identified four specific accounts of these observations in the record. *Comcast Order*, 23 FCC Rcd 13028, 13051 para. 42 (2008) (*Order* or *Comcast Order*) (JA) (referencing two attached declarations by Adam Lynn and Jeffrey Pearlman, and comments filed by David Gerisch and Dean Fox).

In response to initial reports, the Associated Press conducted its own test, using a small data file containing the text of the *King James Bible*. Based on these trials, on October 19, 2007, the Associated Press reported that "Comcast is actively interfering with peer-to-peer networks even if relatively small files are being transferred." *Free Press et al. Complaint* at 26 (JA).

In response to these and other reports, Intervenors Free Press and Public Knowledge filed a complaint with the FCC on November 1, 2007, pursuant to the FCC's express invitation for such complaints against Comcast or others in past

proceedings, along with numerous statements by past FCC Chairmen and Commissioners. *Free Press et al. Complaint* at 25-26 (JA). The complaint documented Comcast's actions, alleging that Comcast

> has been secretly degrading peer-to-peer protocols. [This] undermines innovation and violates the FCC's Internet Policy Statement. … [Additionally] Comcast deceived consumers by repeatedly denying that it was degrading peer-to-peer applications (though it was degrading these applications) and by degrading the applications in ways designed to be secretive, including spoofing and jamming traffic.

Id. at i-ii (JA).

In the complaint, Free Press and Public Knowledge asked the FCC to enjoin Comcast from engaging in such discrimination and to impose a forfeiture. *Id.* at ii.

Free Press and other consumer groups simultaneously filed a separate petition for declaratory ruling. *Petition for Declaratory Ruling of Free Press et al,* November 1, 2007 at 1, (JA) (*Free Press et al. Petition*). They were joined by Intervenors Consumers Union and Consumer Federation of America; as well as by Media Access Project; the Information Society Project at Yale Law School; Charles Nesson, Faculty Co-Director of the Berkman Center for Internet & Society at Harvard Law School; and Barbara van Schewick, Professor at Stanford Law School and Co-Director of the Center for Internet & Society.

In the days following these filings – and until the FCC opened a proceeding in January – over 22,000 individuals submitted complaints concerning Comcast's

"deceptive blocking," urging the FCC to investigate. *Comcast Order*, 23 FCC Rcd at 13032, para. 10 (JA).

The *Petition for Declaratory Ruling* asked the FCC to find that "intentionally degrad[ing] a targeted Internet application" was illegal, violating the principles elucidated in the Internet Policy Statement. *Free Press et al. Petition* at i. (JA). It also asked the FCC to "clarify that secretly degrading an Internet application, while advertising access to the Internet and not prominently notifying consumers, constitutes a deceptive practice." *Id.* at iii. (JA). The *Petition for Declaratory Ruling* noted that the FCC had repeatedly stated its intentions to uphold the principles of the Internet Policy Statement and provided examples of the Chairman's statements in the press and before Congress to the same effect. *Id.* at ii, 15-16 (JA). Indeed, the FCC had stated, in the order adopted simultaneously with the *Internet Policy Statement*: "Should we see evidence that providers of telecommunications for Internet access or IP-enabled services are violating these principles, we will not hesitate to take action to address that conduct." *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14904 (2005). The *Petition* warned that if Comcast's actions did not violate the principles of the *Internet Policy Statement*, providers required to uphold the *Internet Policy Statement* through merger agreements, including AT&T and Verizon, "may be emboldened to engage in such

activity." *Id.* at iii. (JA).

On November 14, 2007, Intervenor Vuze, Inc. filed a petition for rulemaking. *Vuze, Inc. Petition for Rulemaking*, November 14, 2007 (JA) (*Vuze Petition*). Expressing concern that "a mere statement of policy is no longer enough," *id.* at 4 (JA), Vuze "urge[d] the Commission to commence a proceeding to establish rules that ensure that network operators do not block, degrade or unreasonably discriminate...." *Ibid.* In filing its petition, Vuze also made clear that the petition was offered as an alternative to the petition for declaratory ruling and complaint filed by Free Press et al., writing: "By filing its petition for rulemaking, Vuze in no way intends to imply that a complaint is not an appropriate vehicle to bring Comcast's 'traffic shaping' practices before the Commission or that violations of existing Commission rules have not occurred." *Id.* at p. 9, n.13 (JA).

On January 14, 2008, the FCC solicited comment on the *Free Press et al. Petition* and the *Vuze Petition*. *See Comcast Order*, 23 FCC Rcd at 13033, para. 11 n.40 (JA). Because of the extraordinary level of concern that the dispute had created in the community of Internet users, there was a huge response. Many thousands of impassioned commenters called upon the FCC to grant the complaint and the petitions. The collective responses ultimately generated a record at the FCC containing more than 60,000 pages, including detailed submissions from a

wide range of industry participants including telecom service providers, software companies, and state and regional commissions. *Comcast Order*, 23 FCC Rcd at 13068, Statement of Chairman Martin at 4 (JA). To gather expert testimony and also to hear from everyday Internet users, the FCC held two public hearings on the petitions, one in Cambridge, MA, and the other in Palo Alto, CA, where top legal, economic, and technical experts spoke on Comcast's specific practices, *Comcast Order*, 23 FCC Rcd at 13033, para. 11 (JA). Comcast also participated in the first of the two hearings. Because of the popularity of the hearings, large numbers of citizens attempting to attend were turned away for lack of space.

Comcast repeatedly lied and misled the public and the FCC as to its actions and intentions in the course of this extensive proceeding – in the written record, in the hearings, and in the press. As its customers initially started to notice and report problems, Comcast stated that no applications were blocked, and that no traffic was throttled. *Comcast Order*, 23 FCC Rcd at 13030-31, para. 6 (JA -). After engineers conclusively demonstrated this representation to be untrue, Comcast changed its tune, filing in written comments that its blocking only took place at times of congestion. *Comcast Order*, 23 FCC Rcd at 13031-32, para. 9 (JA -). Months after the FCC's public hearings – and after many more months of Comcast's blocking – Comcast finally admitted its blocking occurred constantly, not just at times or in places of congestion. *Ibid.* Comcast admitted that this

practice had been occurring for years – from May 2005, when Comcast began trials of the practices, Letter of Sept. 18, 2008 from Kathryn A. Zachem to Marlene Dortch, att. A at 3 (JA) (Zachem Letter), until late 2008 when Comcast finally admitted publicly that it was conducting the practices and promised to stop. As it turned out, the complainants had underestimated how long Comcast had been engaged in the actions and how frequent they were. Some of these consumers assuredly blamed their applications for the problems, without ever suspecting that Comcast's behavior was the source. The FCC noted, with some understatement, that "Comcast's statements in its comments and response to Free Press's complaint raise troubling questions about Comcast's candor during this proceeding." *Comcast Order*, 23 FCC Rcd at 13032, para. 9 n.31(JA).

After the conclusion of the record-gathering, the FCC issued an order in August of 2008, determining that Comcast had violated federal Internet policy and was not engaging in reasonable network management. Brief of Respondent, *Comcast Corporation v. Federal Communications Commission, et al.*, No. 08-1291, at 13-16 (D.C. Cir. Sep. 21, 2009) (FCC Br.). The order further held that Comcast must demonstrate that it complied with its promise to stop the offensive practices and had switched to a nondiscriminatory network management system. *Id.* The order took action on the Formal Complaint (which was inherently an adjudication treated as an informal complaint under FCC rules); on the Petition for

Declaratory Ruling (another adjudicatory proceeding); and on the thousands of complaints filed by users. *Comcast Order*, 23 FCC Rcd at 13032-33, paras. 10-11 (JA). Although the original complaint had requested that Comcast be forced to pay a fine, the order imposed no financial penalty or other substantial legal detriment. Nevertheless, Comcast chose to appeal the order, to challenge the FCC's jurisdiction over its offering of an Internet access service to retail customers, and to challenge the FCC's authority to conduct an adjudication to resolve a complaint against its practices. These are the issues before the court today.

Peer-to-peer Technology and Reset Packets

Technically, the activity at issue is Comcast's undisclosed use of reset packets to "interfere with its customers' use of peer-to-peer networking applications, including those that use the BitTorrent protocol." *Comcast Order*, 23 FCC Rcd at 13029, para. 2 (JA). Specifically, Comcast was interfering with five different peer-to-peer protocols, Zachem Letter at 8 (JA), though the focus of both the complaint and the FCC proceeding was one of those protocols, BitTorrent. Accordingly, a brief background on "peer-to-peer," "BitTorrent," and "reset" packets may be helpful.

Peer-to-peer technology has become a critical communications platform, and

can best be understood in contrast to "client-server" communications. In "client-server" communications, a user's computer will establish a connection to a single server, which will serve information to that user's computer and to the computers of other users requesting data (the "clients" of the server). For example, when a user accesses Google for a search query, the user's computer acts as a client and Google server serves back pages with search responses. Email also generally functions this way, with clients transmitting emails to email servers, and those servers serving the emails to their destination clients. Clients share data directly only with the servers, and not with other client computers.

Peer-to-peer communications, by contrast, enable communications directly among users; therefore, users act not as "clients" but "peers." For many applications, the tool of peer-to-peer technology provides significant advantages over client-server communications. In a client-server network, data must be stored at the server to allow access to the client computers. By dispensing with the need for a central storage point, peer-to-peer technology allows for rapid, reliable, and persistent storage and transfer of data. For this reason, peer-to-peer technology can significantly conserve resources by reducing inefficient uses of bandwidth to communicate through central servers and by reducing the need for local storage. Naturally, these benefits reflect network effects, as each additional user in the peer-to-peer system increases the potential value of the system for every current user,

through both diversity and redundancy of data. *See generally Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 545 U.S. 913, 919-20 (2005) ("Given these benefits in security, cost, and efficiency, peer-to-peer networks are employed to store and distribute electronic files by universities, government agencies, corporations, and libraries, among others.").

Peer-to-peer protocols are used in a wide variety of legal technologies. For example, Skype provides free computer-to-computer voice and video-conferencing calls, along with low-price computer-to-phone calls using peer-to-peer protocols. Other companies use peer-to-peer protocols to distribute licensed video distribute content from "CBS, MTV, Paramount, 20th Century Fox, the Discovery Channel, BET, Dow Jones, Sony Pictures Television, Sports Illustrated, and sports leagues such as the NHL and MLB." *Vuze Petition* at 9 (JA). These represent *today's* uses. The *future* uses of peer-to-peer could generate significantly more value – unless impeded by Internet access providers.

The BitTorrent protocol connects one computer to multiple other individual computers simultaneously, to exchange files more efficiently and more quickly by transferring small pieces of data separately rather than entire large files in one piece. *Comcast Order*, 23 FCC Rcd at 13029-30, para. 4 (JA) This technique is analogous to the core protocols underlying the Internet – they, too, break messages up into small pieces for transfer along multiple pathways, resulting in greater

efficiency and greater robustness. Among other efficiencies, because most Internet access providers (like Comcast) offer residential connections to the Internet that have greater download speeds than upload speeds, the BitTorrent protocol allows one user to receive pieces of a file from different users in parallel, allowing for more efficient utilization of the download connection without overloading upload connections.

BitTorrent is an open-source protocol, available for free, non-exclusive use and modification by any company or individual who wishes to use it. *Ibid.* Although a private company named BitTorrent, Inc. uses the protocol in its businesses, it has no specific legal rights to the protocol. Academics use BitTorrent to transfer datasets; government agencies use BitTorrent to transmit high-definition images to citizens; software developers use BitTorrent to distribute open source software and security patches; and Vuze, Inc. uses BitTorrent for legal distribution of high-definition streaming video through the Internet. *Vuze Petition* at 6-9 (JA).

To interfere with BitTorrent communications, Comcast "spoofed" reset packets. A "reset packet" is a signal used to communicate an error condition in transmission between two computers on the Internet. Comcast injected "fake" reset packets from within the network that were designed to appear, for each user's computer, to come not from Comcast or anywhere else inside the network, but

directly from the computer at the other end of the transmission. Comcast was "essentially behaving like a telephone operator that interrupts a phone conversation, impersonating the voice of each party to tell the other that 'this call is over, I'm hanging up.'" *Comcast Order*, 23 FCC Rcd at 13051, para. 41 n.181 (JA) (citing to reply comments of the Electronic Frontier Foundation). The FCC concluded that such action consisted of "blocking" transfers and "significantly impeded" users' ability to use software based on the affected peer-to-peer protocols. *Comcast Order*, 23 FCC Rcd at 13053-54, para. 44 (JA).

The Internet Policy Statement and Title I Authority

In 2002, the FCC classified cable modem broadband data service as an "information service" without a separate offering of a "telecommunications service," even though every information service is defined to be provided "via telecommunications." FCC Br. at 5. Because, according to the FCC, only a "telecommunications service," not "telecommunications," is subject to mandatory Title II common carrier regulation, cable modem service would be regulated not through Title II authority but through Title I ancillary authority. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4832 at para. 59 (2002) (classifying cable modem service as an interstate information service), *aff'd, NCTA v. Brand X*, 545 U.S. 967 (2005)

(*Cable Modem Declaratory Ruling*). The court of appeals reviewing the FCC's classification had held that the FCC's classification was not the best reading of the statute. The Supreme Court did not disagree, but overturned the lower court, holding that the FCC needed only to offer a reasonable reading of the statute, not the best reading. *Brand X*, 545 U.S. at 982-83. In so doing, the Supreme Court noted that the FCC retained the ability to impose regulatory duties through ancillary jurisdiction. *Id.* at 996.

The FCC itself has repeatedly assured consumers and companies that it possesses – and is prepared to exercise – its ancillary jurisdiction over facilities-based broadband providers to protect consumers and competition. The NPRM accompanying the *Cable Modem Declaratory Ruling* expressly raised the question of ancillary authority over such services, soliciting comment on "the extent to which we should exercise Title I authority to regulate the facilities-based provision of interstate information services." *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4841-42. When the FCC adopted the declaratory ruling, the Chairman issued a separate statement asserting that:

> The Commission is not left powerless to protect the public interest by classifying cable modem service as an information service. Congress invested the Commission with ample authority under Title I. That provision has been invoked consistently by the Commission to guard against public interest harms and anti-competitive results.

Id. at 4867 (Statement of Chairman Michael K. Powell). Similarly, in extending

the classification of information services to DSL lines, the FCC asserted again: "[I]f the transmission component is not a telecommunications service under the Act, providers of that component are not subject to Title II requirements, except to the extent the Commission imposes similar or identical obligations pursuant to its Title I ancillary jurisdiction." *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14909 at para. 102 (2005), *aff'd, Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d. Cir. 2007) (*Wireline Broadband Order*).

When the FCC released the *Wireline Broadband Order*, it also issued the *Internet Policy Statement*, in which the FCC declared that it interpreted its obligations under federal law to include at least four broad rights for users of Internet access services to the lawful applications, content, and devices of their choice, with the benefit of competition. FCC Br. at 7. In issuing this Policy Statement, the FCC again stated that it retained ancillary authority over facilities-based Internet access service providers, citing the Supreme Court's decision in *NCTA v. Brand X*. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005).

As noted above, in the following years, the FCC and its Chairman repeatedly assured consumers and Internet companies that it would act on a complaint under its Title I authority, should Internet access providers interfere with such consumer

rights. The FCC further emphasized its Title I authority in the 2006 *Adelphia* merger. FCC Br. at 57-58. In approving the merger without specific conditions regarding blocking or degrading content, the FCC expressly stated that "[i]f in the future evidence arises that any company is willfully blocking or degrading Internet content, affected parties may file a complaint with the Commission." *Id.*

The FCC therefore relied on the capability of future exercise of ancillary authority over facilities-based providers of Internet access services in deciding to classify cable modem and DSL as information services and in approving mergers without specific conditions. Consumers and companies also relied on those assertions, as evidenced by the complaints and petitions filed at the FCC when Comcast's actions were uncovered.

Therefore, the FCC followed appropriate procedures in deciding this important case consistently with its previous declared, reasonable interpretations that the Communications Act authorizes the FCC to protect consumers from harms such as those at issue in this case.

Standing of Intervenors

Intervenors' standing is self-evident from the record. Intervenors Free Press and Public Knowledge submitted declarations establishing that they have members who are subscribers to Comcast and other network providers and who employ peer-to-peer technology. *Free Press et al. Complaint* at 2 (JA); *id.*, Declaration

of Adam Lynn (JA); *id.*, Declaration of Jeffrey Pearlman (JA). Intervenors Consumers Union and Consumer Federation of America are similarly situated. *Free Press et al. Petition* at 2, n.4 and n.5 (JA). Intervenor Vuze, Inc. argued that content it seeks to send in conducting business has been blocked and degraded. *Vuze Petition* at 2 (JA). Intervenor Open Internet Coalition filed in the FCC's record seeking comment on the petitions filed by the consumer groups and Vuze. Additionally, many member companies of the Coalition offer for free or for purchase Internet applications and services that are delivered to consumers through facilities-based Internet access services. These companies seek the opportunity to compete fairly on the Internet, without interference or obstruction from the providers of Internet access services, in accordance with the principles of the Internet Policy Statement and the precedent established in the enforcement order. Collectively, Intervenors have raised comparable and compatible issues to those of the Commission. *Comcast Corp. v. FCC*, No. 08-1114, slip op. at 10 (August 28, 2009).

Summary of Argument

The FCC's order should be upheld as within the FCC's jurisdiction and following lawful procedure. We agree with the FCC's arguments, and we write to emphasize certain specific points.

The FCC's assertion of jurisdiction should be upheld. Although Comcast

fails to acknowledge or reference *Chevron*, it is nevertheless the guiding precedent, because this Court recognizes no exception to *Chevron* deference for questions of interpretation that impact jurisdiction. The statutory provisions that serve as the basis for ancillary jurisdiction are ambiguous on their face. Under *Chevron*, the FCC's interpretation of these provisions should be upheld if it is reasonable.

The FCC's interpretation of its authority under the Communications Act is clearly reasonable in light of the statutory language, and in light of Supreme Court and circuit precedent, including this Court's. Well established precedents uphold similar exercises of ancillary jurisdiction by the FCC. Furthermore, the factual context of this order – actions by a facilities-based provider of communications to leverage gatekeeper control of physical facilities – lie at the core of the history of ancillary jurisdiction. Upholding the FCC's jurisdiction here would not extend the doctrine of ancillary jurisdiction, but would rather be fully consistent with precedent.

The arguments of Comcast, its intervenors, and its amici ignore settled law on the applicable standard of review and on the scope of ancillary jurisdiction, sometimes actively and falsely asserting that no cases exist other than those that favor them. Comcast and its amici offer unclear and original standards for ancillary jurisdiction, including "adjunct" services and a "higher standard" for statutory responsibilities, which have no basis in the law and even if applied would

not defeat jurisdiction here.

In addition, the FCC's process here complied with the Administrative Procedure Act, as the FCC had the discretion to choose between adjudication and rulemaking in making policy, rather than solely engaging in rulemaking. The adjudication conducted by the FCC fulfilled all the requirements of the APA. Specifically, the FCC provided Comcast more than enough due process, including ample notice and ample opportunities for written and oral testimony. Through earlier proceedings, the FCC also provided substantial advance notice to Comcast (and to the industry more broadly) of its intention to conduct adjudications through its ancillary jurisdiction in response to complaints concerning illegal activity by Internet access service providers.

ARGUMENT

I. Jurisdiction

The FCC properly asserted jurisdiction, pursuant to the statutory provisions conferring ancillary jurisdiction and existing court precedents. The FCC's exercise of jurisdiction here is well within the scope of past FCC orders that the court upheld while relying on ancillary jurisdiction. Upholding the order is consistent with past precedent, and therefore the court can uphold the order on review without granting *carte blanche* for future regulations. If the court does not uphold ancillary jurisdiction here, it will likely force the FCC to take broader, more "regulatory"

actions that are clearly within the agency's jurisdiction, yet would involve a more substantial intrusion into the market.

A. The FCC's Assertion Of Jurisdiction Should Be Upheld Under The Governing Standard Of *Chevron* Deference.

Chevron deference is the settled, governing standard, for reviewing the FCC's assertion of jurisdiction here. Although we agree that Comcast is estopped from challenging the FCC's jurisdiction, FCC Br. at 27-30, the fundamental legal question of FCC jurisdiction here turns on interpreting the language of the Communications Act of 1934, as amended. Comcast argues that the FCC deserves no deference in its statutory interpretation because Congress did not delegate authority to the FCC. Intervenors suggest that the Court should show deference to un-enacted legislation introduced by a few Congressmen, rather than adopted orders by the expert agency charged with implementing its (enacted) enabling statute. Comcast and its supporters are wrong on both counts.

The FCC's assertion of jurisdiction here derives from interpreting its enabling statute. Under *Chevron*, an agency's interpretation receives no deference when statutory language is plainly clear on its face, but courts defer to a reasonable interpretation by an agency entrusted to administer a statute when the statutory language is not clear on its face. *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984). Here, ancillary jurisdiction derives from multiple statutory provisions

including sections 4(i), 2(b), 201, and 303(r). 47 U.S.C. §§ 154(i), 152(b), 201, 303(r). Section 4(i), most importantly, grants the FCC the power to "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*." (emphasis added) The concepts of "necessary" and "execution of its functions," at least, are ambiguous as to some possible applications, and FCC interpretation of these ambiguous concepts should be evaluated under *Chevron*. In interpreting these words, the FCC has to also interpret its *functions*, which triggers interpretations of other provisions of the Act.

Precedents establish that neither the Supreme Court nor this Circuit recognize an "exception" to *Chevron* deference for questions of statutory interpretation that implicate jurisdiction. In 2008, the D.C. Circuit held directly "[the Federal Energy Regulatory Commission's] interpretation of the scope of its jurisdiction is entitled to *Chevron* deference." *Maine Public Utilities Com'n v. FERC*, 520 F.3d 464, 479 (D.C. Cir. 2008). The *Maine PUC* decision relied on *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281 (D.C. Cir. 1994), in which this court noted that, while the Supreme Court had not formally spoken on the issue and the DC Circuit had not until that case, both courts have deferred to the federal agency in practice. As a result, this Court held that *Chevron* does apply. *Id*. at 1283-84. Since *Oklahoma Natural Gas Co.*, the DC Circuit has consistently

followed this rule.[1] Justice Scalia has called it "settled law" that *Chevron* deference applies even to questions that interpret agency jurisdiction. *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring).

Comcast's argument to the contrary is wrong. Comcast ignores *Chevron* – which is not even cited in Comcast's Table of Authorities – and contends that *de novo* review applies because the FCC has acted outside its delegated authority. Brief of Petitioner, *Comcast Corporation v. Federal Communications Commission, et al.*, No. 08-1291, at 18-19 (D.C. Cir. July 27, 2009) (Comcast Br.). This argument ignores the clear precedent above. Moreover, Comcast's primary citations miss the mark. *Gonzales v. Oregon*, 546 U.S. 243 (2006), is inapplicable because the federal statute at issue delegated interpretative authority to both the Attorney General and the Secretary of Health and Human Services. 546 U.S. at 265. Because the Attorney General interpreted language over which the Secretary had more appropriate delegated authority, *Chevron* deference was not warranted. *Id.* at 268. (Of course, *de novo* review was also not warranted; *Skidmore* deference applied.) *Gonzales* contrasted the statute at issue there with the Communications Act, at issue here; as the Communications Act confers interpretative authority on

[1] *See Public Service Co. of Colorado v. FCC*, 328 F.3d 675, 678 (D.C. Cir. 2003); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 694 (D.C. Cir. 2000); *Public Utilities Comm'n v. FERC*, 143 F.3d 610, 615 (D.C. Cir. 1998); *Wildberger v. FLRA*, 132 F.3d 784, 790 (D.C. Cir. 1998).

one agency, *Chevron* deference would be clear. *Id.* at 258-59 (citing *NCTA v. Brand X*, 545 U.S. 967 (2005)). *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), also cited by Comcast, applied *Chevron* and did not distinguish it. The Court held that the statute at issue was plain on its face (meaning, under *Chevron* itself, no deference is due) and, at any rate, the FCC interpretation was unreasonable (meaning under *Chevron*, the FCC exceeded its discretion). *American Library*, 406 F.3d at 705 ("It does not matter whether the unlawful action arises because the regulations at issue are 'contrary to clear congressional intent' as ascertained through use of the 'traditional tools of statutory construction,' or 'utterly unreasonable and thus impermissible.'") (citation omitted).

Additionally, the subsequent introduction of related legislation does not retroactively modify *enacted* Congressional intent and eliminate the implicit grant of interpretive authority to an agency. Comcast's Intervenors claim the introduction of legislation to impose "net neutrality" rules on Internet access providers indicates that Congress assumes the FCC now lacks jurisdiction over Internet blocking activities of facilities-based service providers. Brief of Intervenors National Cable and Telecommunications Association and NBC Universal, Inc., *Comcast Corporation v. Federal Communications Commission, et al.*, No. 08-1291, at 35-37 (D.C. Cir. Aug. 10, 2009) (Intervenors Br.). As a matter

of judicial precedent, as detailed by the FCC, courts have summarily rejected the notion that un-enacted legislation is a useful, and not a "dangerous" ground for interpreting a previous statute. FCC Br. at 40, n.3. As a practical matter, the Intervenors' argument leads to absurd results, as it enables a single member of Congress to introduce a bill and thereby effect the will of the entire Congress to remove jurisdiction from an administrative agency that has already claimed – repeatedly to companies and consumers, in merger orders and classification orders – to have such jurisdiction.

But, even if judicial precedent supported the Intervenor's absurd argument, the language and apparent intent of three of the four draft bills is not, as intervenors contend, to confer authority on the FCC to act, Intervenors Br. at 35, but to compel the FCC to act in specific ways, generally including far more protections than those included in the FCC's Internet Policy Statement. *See* Internet Freedom Preservation Act of 2009, H.R. 3458, 111th Cong. § 3 (2009) (imposing specific duties on Internet access service providers and requiring the FCC to construct rules to enforce the duties); Internet Freedom Preservation Act, S. 215, 110th Cong. § 2 (2008) (same); Network Neutrality Act of 2006, H.R. 5273, 109th Cong. § 4 (2006) (same). Only the Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. (2006), focuses on jurisdiction, and that bill was introduced by opponents of network neutrality to

limit the FCC's jurisdiction to merely enforcing the principles in the *Internet Policy Statement* through adjudication. As a result, if this bill did not lack the slightest interpretive weight, it would suggest that some Congressmen sought to limit the FCC's perceived broader jurisdiction.

Under *Chevron*, the question is merely whether the FCC's interpretation is reasonable. As discussed by the FCC in the Order and in its brief in this case, the order on review made reasonable interpretations of section 154(i) and other provisions setting out the FCC's functions, and should be upheld under *Chevron*. *Comcast Order*, 23 FCC Rcd at 13033-44, paras. 12-27; FCC Br. at 36-50.

B. The FCC's Use Of Ancillary Jurisdiction In The Order On Review Is Fully Consistent With Precedent, And Falls Well Within Established Limits Of The Doctrine.

The FCC's interpretation fits within established precedents of ancillary jurisdiction. The ancillary jurisdiction standard is typically applied as a two-pronged test. The first prong examines whether the agency has general jurisdiction over the subject matter at issue (deriving from section 1 of the Act). If so, the second examines whether the regulation at issue is "reasonably ancillary" to other statutory provisions (deriving from section 4(i)). *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968). The first prong is not contested here, FCC Br. at 35-36. The second prong is satisfied by the FCC's reasonable interpretations that the *Order* is reasonably ancillary to a wide variety of specific

statutory provisions, including sections 230(b), 201, 256, 257, and 543 of the Communications Act, and section 706(a) of the Telecommunications Act of 1996. FCC Br. at 36-45.

The assertion of jurisdiction here is consistent with a long line of cases in which courts have upheld ancillary jurisdiction. In fact, Comcast's actions in this case fall within the core of activities to which ancillary jurisdiction has traditionally been applied. Historically, the FCC has often exercised ancillary jurisdiction in circumstances where a facilities-based provider of communications has the motive and opportunity to leverage gatekeeper control of physical facilities in ways undermining the FCC's ability to fulfill its responsibilities the Communications Act. That structure underlies several ancillary jurisdiction cases. *See, e.g.*, *Southwestern Cable*, 392 U.S. at 161-62; *United States v. Midwest Video Corp.*, 406 U.S. 649, 650-51 (1972) (*Midwest I*); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1973); *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 199-200 (D.C. Cir. 1982) (*CCIA*). *Brand X* similarly recognizes the Commission's ability to exercise ancillary jurisdiction over practices of facilities-based providers of Internet access services, and this Order was motivated partly by the concern that a facilities-based provider was acting competitively through its control of facilities. FCC Br. 19-20, 30-33.

In presenting their characterization of ancillary jurisdiction, both Comcast and Amici fail to discuss a substantial portion of the history of ancillary jurisdiction. Amici go so far as to wrongly assert that, aside from *Southwestern Cable*, *Midwest Video I* and *II*, and three other cases, "[t]he only other cases in which the courts of appeals have expressly affirmed an exercise of ancillary jurisdiction (and there are only four), are similarly limited." Brief Amicus Curiae of Professors James B. Speta and Glen O. Robinson and the Progress and Freedom Foundation, *Comcast Corporation v. Federal Communications Commission, et al.*, No. 08-1291, at 13 (D.C. Cir. Aug. 10, 2009) (Amicus Br.). Both Comcast and Amici omit eight cases upholding the use of ancillary jurisdiction, six from this Court and two from other courts.[2] These cases, all omitted by briefs on the other

[2] In *Lincoln Tel. Co.*, the court held that section 4(i) of the Communications Act granted authority to the FCC to establish an interim interconnection tariffs collection system, even though section 205(a) on its face did not. Lincoln Tel. Co. v. FCC 659 F.2d 1092, 1107-09 (D.C. Cir. 1981). In Mobile Commc'ns Corp. of Am. v. FCC 77 F.3d 1399, 1404-07 (D.C. Cir. 1996), the FCC asserted ancillary authority under section 4(i) to require payment for a wireless license, and the court upheld this assertion explicitly. In *Nader*, the DC Circuit upheld the FCC's authority under 4(i) as an extension of section 205 to prescribe rates of return. Nader v. FCC, 520 F.2d 182, 203-05 (D.C. Cir. 1975). In *NARUC v. FCC*, the court cited to *Southwestern Cable* to summarily uphold FCC assertion of ancillary authority to preempt state regulation of inside wiring for telephone service. National Assoc. of Regulatory Utility Comm'rs v. FCC, 880 F.2d 422, 429-30 (D.C. Cir. 1989). In *New England Telephone*, the D.C. Circuit upheld the FCC's ancillary authority under section 4(i) to require rate reimbursements. New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1107-08 (D.C. Cir. 1987). In *United Telephone Workers*, the court upheld ancillary authority to impose a tariff on experimental services by Western Union and the Post Office. United Tel.

side (and with Amici explicitly denying their existence), show that the doctrine of ancillary jurisdiction is not an "extraordinary notion," as Amici believe. Amicus Br. at 8. Rather, it is a long-standing, well-supported, well-understood doctrine in the history of FCC regulation. It is also a doctrine long upheld by federal courts, who recognize Congress's broad delegation of jurisdiction to an expert agency to address dynamic communications markets.

C. Comcast And Amici Apply Invalid And Incorrect Standards For Ancillary Jurisdiction.

Comcast and Amici are incorrect in asserting that the order on review fails the second prong of ancillary jurisdiction because the order cites Title I of the Communications Act. Comcast alleges that Title I does not impose "statutorily mandated responsibilities" on the FCC, but only identifies Congressional "purpose." Comcast Br. at 42-45. We agree with the FCC's rejection of this argument in their brief, based largely on the inapplicability of Comcast's primary precedent. FCC Br. at 48-50 (noting that *American Library* was decided on the

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Workers, AFL-CIO v. FCC, 436 F.2d 920, 923-24 (D.C. Cir. 1970). Outside the D.C. Circuit, the 5th Circuit explicitly upheld the FCC's use of ancillary jurisdiction to permit service providers other than Local Exchange Carriers to be providers of open video systems. City of Dallas v. FCC, 165 F.3d 341, 351-52 (5th Cir. 1999). Finally, the 4th Circuit upheld FCC preemption of state regulation of terminal equipment without stated statutory authority, citing to ancillary jurisdiction cases without explicitly invoking the concept. N.C. Utils. Comm'n v. FCC, 552 F.2d 1036, 1051 (4th Cir. 1977).

first prong of the two-part test for ancillary jurisdiction, and therefore the court did not reach the second prong, which is the only debated issue here).

Amici's argument that ancillary jurisdiction only includes "adjunct" services is not supported by precedent, and is inapplicable. Amici contend that all existing precedents upholding ancillary jurisdiction apply only where the regulation concerned a service that was adjunct to a regulated service. Amicus Br. at 11-13. Amici cite no precedent to equate the term "adjunct" with "ancillary" or to define the meaning of "adjunct." Even if the statutory sections regulated through ancillary jurisdiction were services that were physically "adjunct" (whatever that means), that coincidence has no particular legal significance, as the ancillary jurisdiction test is a two-part test derived from the FCC's enabling statute, and "adjunct" is not part of that test. Finally, to the extent that "adjunct" has any substantive meaning, the Internet can support all traditional communications services – including phone and video – thus making it "adjunct" to "regulated" services by offering Internet-based competitors to those services.

In any event, the argument is inapplicable to the order on review, which certainly impacts "a service that Congress explicitly authorized the agency to regulate," Amicus Br. at 13. Specifically, the order on review impacts Internet access services. Although Internet access services are not subject to the higher regulatory burdens of Title II because of the FCC's classification orders, such

services remain communications by wire or radio, and thus unambiguously lie within the FCC's broad subject matter jurisdiction, a fact that Comcast does not contest. Comcast Br. at 42 ("Comcast does not dispute the Commission's subject matter jurisdiction over Internet services."). The Supreme Court in *Brand X* similarly indicated that the Communications Act authorizes the FCC to impose regulatory obligations on Internet access services. FCC Br. at 30-32. Internet access services are therefore services that Congress explicitly authorized the FCC to regulate; that the FCC regulates Internet access services under Title I instead of Title II does not change this authorization.

D. The Commission's Exercise Of Jurisdiction Is Narrower Than Its Primary Alternatives.

In adopting the order on review the FCC acted well within its existing jurisdiction over facilities-based providers. Denying jurisdiction to conduct such activity would render the FCC unable to conduct almost any regulatory activity, whether through future adjudication or future rulemaking, to promote competition and protect consumers in the market for Internet access services. The FCC could do nothing if an ISP blocks traffic on the Internet, even if the ISP denies it and obscures it from its customers to render useless any faint market pressure from consumers changing providers among the few available choices.

The result of such a judicial limitation would require the FCC to engage in more aggressive jurisdictional moves to protect consumers in basic ways – moves that have a much greater potential for transforming the broadband market. Specifically, the FCC may be compelled to reverse its previous classifications – as upheld by the Supreme Court – and place broadband Internet access services under Title II of the Communications Act. Such a re-interpretation would be easily upheld, as the Ninth Circuit considered it to be the most reasonable interpretation of the Act, a conclusion with which the Supreme Court did not disagree, while three Justices found the FCC's actual classification unreasonable. FCC Br. at 5-6. And recently, the Supreme Court has held that changes to FCC regulatory policy receive the same deference as original actions. *FCC v. Fox Television Studios, Inc.*, 129 S.Ct. 1800 (2009).

Some of the intervenors would welcome that reversal and believe it is both the better reading of the statute and the better policy. But the Supreme Court has granted deference to the FCC's decision to classify Internet access services as information services, based partly on the assumption of robust Title I authority for Internet access services. FCC Br. at 31. Effectively forcing the FCC to reverse those decisions by undermining the FCC's and the Supreme Court's assumption would have a large impact on the Internet access market and on the FCC's flexibility.

II. PROCESS

A. The Order On Review Does Not Apply The Internet Policy Statement As A Rule, But Instead Uses The Internet Policy Statement As Sufficient But Not Essential Notice To Conduct An Adjudication.

The *Internet Policy Statement* was properly used to provide notice to the industry of future policymaking activity to be conducted by the FCC, through rulemakings and adjudications. Comcast contends that the FCC applied the *Internet Policy Statement* directly as if it were a rule, and therefore violated the procedural requirements of the APA. Comcast Br. at 20-21. We agree with the FCC that Comcast's characterization is inconsistent with the text of the order on review. FCC Br. at 56-61. To be clear: policy statements are not formally necessary for the FCC to conduct an adjudication to enforce the Communications Act. At best, they provide notice, and the notice requirements of the APA can be met through other means. In the context of this proceeding and prior related proceedings, the FCC provided repeated notice to Comcast that if it engaged in improper behavior with its Internet access services, stating specifically that if Free Press or other public interest groups filed complaints against Comcast, the FCC would hear them. *Comcast Order*, 23 FCC Rcd at 13043-44, para. 27 (JA). The FCC released the *Internet Policy Statement* in 2005 to provide notice to industry as a whole of how the FCC interpreted its obligations under the Communications Act, and how its interpretation of those obligations would guide

its future "policymaking activities," *id.* at 13034, para. 13 (JA), including adjudications, rulemakings, and merger approvals.

The FCC's use of the *Internet Policy Statement* for notice follows in the wake of numerous instances of the application of policy statements in non-rulemaking proceedings, particularly license proceedings. For example, in *Contemporary Media*, the D.C. Circuit upheld FCC use of a 1986 policy statement for its decision in a license proceeding concerning licensee character qualifications. *Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000). In another license proceeding, *Cosmopolitan Broadcasting*, the FCC applied a 1967 policy statement as central to its proceeding. *Cosmopolitan Broadcasting Co. v. FCC*, 581 F.2d 917 (D.C. Cir. 1978). The D.C. Circuit upheld the FCC's use of a 1965 policy statement concerning criteria for consideration in comparative license hearings. *Allied Broadcasting, Inc. v. FCC*, 435 F.2d 68 (D.C. Cir. 1970). Using policy statements to provide notice benefits both the public and regulated entities. Perversely, if the court agrees with Comcast's odd assertion that it lacked notice, the result may be to discourage the use of helpful policy statements that provide notice to consumers and industry and to encourage agencies to move to rulemaking quickly, even before gathering experience and information through monitoring the market and acting through adjudication.

B. The FCC Properly Exercised Its Discretion To Conduct An Adjudication Rather Than A Rulemaking.

The FCC did not abuse discretion in conducting an adjudication. As a general rule, the FCC has discretion to develop policy through an adjudication or a rulemaking. *Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 202 (1947). If the FCC otherwise follows the Administrative Procedure Act, it may conduct an adjudication and issue a sanction against behavior of specific companies when such behavior goes against federal policy established in the Communications Act. Here, the FCC, within its discretion, chose to proceed by adjudication to investigate complaints filed against Comcast for its behavior, after having provided substantial notice to Comcast specifically and to the industry generally.

The FCC's choice of adjudication complied with notice requirements. Comcast asserts that the order on review penalized Comcast without notice in violation of the APA. Comcast Br. at 38-41. Comcast also suggests that the FCC cannot engage in adjudication based on ancillary jurisdiction without first adopting a rule. None of these arguments has merit.

First, the FCC provided adequate notice to Comcast. It did so through specific proceedings, including most notably the merger between Comcast and Adelphia. In the merger order, the FCC expressed clear willingness to investigate behavior by Comcast, and informed Comcast it would look to the *Broadband*

Policy Statement, its previous adjudication in *Madison River*, and the industry at large for "principles against which the conduct of Comcast . . . can be measured." *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp. et al. to Time Warner Cable Inc. et al.*, 21 FCC Rcd 8203, 8298 & n.677 (2006).

Second, the FCC still has the discretion to choose adjudication or rulemaking to make policy whether the FCC's delegated authority is found in Title I of the Act or another Title. Comcast suggests that the FCC cannot conduct an adjudication based on ancillary jurisdiction. Comcast Br. at 30-32 ("[A]n agency's freedom to choose adjudication over rulemaking presupposes a pre-existing statutory or regulatory mandate that the agency could elect to implement.") (emphasis omitted). This Court rejected precisely this argument in *N.Y. State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984). In *N.Y. State Comm'n on Cable Television v. FCC*, the FCC issued a "declaratory ruling and consolidation of precedent," which the court held to be "technically an adjudication under section 5(e) of the Administrative Procedure Act." *Id.* The FCC issued this order under ancillary jurisdiction. The Court in *N.Y. State Comm'n* chose not to remand the order solely because of the formal classification of the decision, as remanding "would be to engage in an empty formality" because the FCC "gave adequate notice and received comments from over 25 interested

parties." *Id*. The same circumstances are true here, where the FCC gave substantial notice and received substantial comments from a substantial number of diverse parties. *See Comcast Order*, 23 FCC Rcd at 13048, para. 36 (JA).

Additionally, the FCC resolved not merely the complaint, but also the *Petition for Declaratory Ruling*. In addition to its inherent discretion to grant a complaint, the FCC has authority to resolve a properly filed *Petition for Declaratory Ruling*, or may act on one under its own motion. *See* 47 U.S.C. §§154(i), 304; 47 C.F.R. §1.2. In *New York State Comm'n*, this Court held specifically that the Commission could resolve a new controversy by issuing a *Declaratory Ruling* under its ancillary authority. *Id.* at 815. *See also Action for Children's Television v. FCC*, 564 F.2d 458, 479 (D.C. Cir. 1977) (no right to formal rulemaking when FCC provided policy statement and prospect of future adjudications).

Given Comcast's willful evasion and deception, Comcast is poorly placed to complain about process. Comcast repeatedly changed its story throughout this proceeding, actively deceived its customers as to the nature of its "network management," and operated in a manner criticized publicly by industry, legal, and technical experts as not only outside the standards of the industry, but destructive to the operation of the Internet. *Comcast Order*, 23 FCC Rcd at 13030-32, paras. 6-9 (JA). Comcast cannot simultaneously deceive the public and the FCC and

then complain that it was not given even more notice and opportunity to attempt to deceive the Commission. *See Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 193 (D.C. Cir.) ("The FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing.").

In the future, the FCC may choose to conduct a rulemaking process on the types of activities at issue in this case. The order on review specifically discussed this future option. *Comcast Order*, 23 FCC Rcd at 13050, para. 40 (JA). Should the FCC issue a rule, beginning with adjudication can still be wise. *See id.* (noting that the *Carterfone* principles were first applied through adjudication and later converted into rules).

C. The Order On Review Does Not Establish Industry-Wide Rules On Network Management Or The Scope Of Reasonable Network Management, Because It Has Direct Legal Impact Only On Comcast, And Only Serves As Precedent For Possible Future Adjudications.

Intervenors erroneously argue that the order on review somehow establishes industry-wide rules. Similarly, Intervenors contend that the order fails to meet the requirements of the APA because it imposes industry-wide rules without providing notice. Intervenors Br. at 14-22, 26-30, They ignore that the order, by its own terms, applies only to Comcast. *Comcast Order*, 23 FCC Rcd at 13059-61, paras. 54-56. The enforcement order enjoined Comcast alone, and only found Comcast liable of a violation of federal law. Only Comcast's network management was

evaluated and found to be unreasonable. In practice, it would be sensible for other Internet access service providers to be aware of the FCC's interpretation of the federal policies of the Communications Act as elaborated in the *Internet Policy Statement* – just as businesses not party to a common law case, but who conduct similar activities to those sanctioned in the final decision, ought to be aware of the precedential value of that decision. Additionally, this is typical of all adjudicatory processes at the FCC (and other agencies), in which the FCC provides notice of its expectations of industry behavior and the legal basis for these expectations, thus allowing the FCC to conduct adjudications to apply its policies and principles on a case-by-case basis. The fact that other Internet access providers should consider themselves on notice that violations of federal law like Comcast's could subject them to subsequent complaints, does not convert a provider-specific adjudication into industry-wide rules.

Similarly, the order's treatment of reasonable network management does not impose industry-wide rules. FCC Br. at 15. To be more clear as to how the term might be interpreted in the future, the FCC gave some additional detail as to its application of the concept of reasonable network management, specifying that the evaluation of network practices would look for discriminatory means and the possibility of overly broad measures. *Comcast Order*, 23 FCC Rcd at 13055-56, para. 47 (JA). This additional detail serves as notice of the FCC's future

intentions and the means of the FCC's policy-making, which is appropriate through adjudication.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Court deny Comcast's Petition for review.

Respectfully submitted,

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Dated: October 5, 2009

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief For Intervenors Free Press, Public Knowledge, Open Internet Coalition, Consumers Union, Consumer Federation Of America, and Vuze, Inc." in the captioned case contains 8,743 words.

/s/ Marvin Ammori

CERTIFICATE OF SERVICE

I, Ryan Terry, hereby certify that, on October 5, 2009, I filed the foregoing **BRIEF FOR INTERVENORS FREE PRESS, PUBLIC KNOWLEDGE, OPEN INTERNET COALITION, CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA, AND VUZE, INC.** electronically with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users, whose names appear without asterisks in the list below, will be served automatically by the CM/ECF system.

According to the Court's records, some of the participants in the case are not CM/ECF users. I certify further that I have directed that paper copies of the Brief be mailed by First-Class Mail to the non-CM/ECF participants, whose names are marked with an asterisk in the list below.

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STATUTES AND REGULATIONS

47 U.S.C. §152(b)

(b) Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V–A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to

> (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or
>
> (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or
>
> (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or
>
> (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C. §154(i)

(i) Duties and powers. The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

47 U.S.C. §201

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. §303(r)

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

47 C.F.R. §1.2

Declaratory rulings. The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.