

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, File No. EB-08-IH-1518; *Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* WC Docket No. 07-52

This is a landmark decision for the FCC—a meaningful stride forward on the road to guaranteed openness of the Internet. It's taken a while for us to get here, but that doesn't detract from the historic importance of what the Commission does today. We recognize that protecting Internet openness is like protecting the Internet's immune system, safeguarding it from bugs and infections that could slow its circulation, make it sick, maybe even kill it.

Let's be clear about what today's *Order* does and does not accomplish. We *do* recognize that unreasonably impeding the performance of an Internet application (like peer-to-peer file sharing)—and not just outright blocking a particular website or program—violates the FCC's Internet policies. We *do* require that Internet providers inform their customers when they make important technical decisions that change how the Internet works. And we *do* give consumers who feel their Internet experience is being unreasonably interfered with a right to seek help at the Commission. We do *not*, however, prohibit carriers from reasonably managing their networks. And we do *not* prevent engineers—either now or in the future—from coming up with new and better ways to serve their customers.

In short, today's decision strikes a careful balance. The story of how we got here is instructive. Back in 2003, before most people ever heard the words "network neutrality," I gave a speech suggesting that the Internet as we know it could be dying. Some thought it was perhaps something of a controversial claim at the time. But it was premised on my belief that if a few large companies controlled the on-ramp to the Internet, they could distort the development of technology, opportunities for entrepreneurs and the choices available to consumers. I predicted that technologies to allow such interference were already appearing, with more to come. And I said we should act then to guarantee the openness of the Net. At that time, the Commission was more interested in re-categorizing telecommunications services as information services and eliminating many of the social and economic responsibilities of broadband service providers. I urged my colleagues to at least adopt an Internet Policy Statement that contained the basic rights of Internet end-users to access lawful content, run applications and services, connect devices to the network and enjoy the benefits of competition. They did that and it was a good step forward, for sure—but the proof was always going to be in the pudding.

Network operators assured us nothing untoward was going on, but it wasn't long before we heard rumblings that maybe things weren't running so openly and smoothly. Examples of alleged interference were cited. Then, in November 2007, leading public interest organizations and advocates filed with the Commission a specific Complaint and a Petition for a Declaratory Ruling. They alleged that one company, Comcast, was degrading peer-to-peer protocols that consumers were utilizing to share large files such as movies and television programs.

The FCC was suddenly at a crossroads. Down one path was a Commission committed to preserve and honor the openness of the Internet by breathing life into our Internet Policy Statement. Down the other road was a Commission that, while celebrating the Internet, refused to apply its principles and sat idly by while broadband providers amassed the power and technical ability to dictate where we can go and what we can do on the Internet. Today we choose the open road.

We began by taking the allegations and our responsibility to foster an open Internet seriously. Then we took the time to gather, analyze and assess the evidence. We heard from the leading engineers

and experts in the field and received 6,500 comments from a broad array of interested parties. The Commission ventured beyond the Beltway and conducted two *en banc* hearings that included numerous expert witnesses and extensive opportunity for public testimony. This process allowed us to better understand what in fact the case involved and who was impacted by the practices in question. We did the requisite analysis and a majority today moves forward.

Here, Comcast deployed equipment using deep packet inspection to identify peer-to-peer uploads. Comcast determined when to send reset packets to terminate a user's connection in order to manage its network. The practice limited consumers' ability to access the lawful Internet content of their choice. And, as the Commission correctly concludes, it was discriminatory and not carefully tailored to address the company's concerns about network congestion. (In fact, it prevented peer-to-peer customers from making uploads regardless of whether there was network congestion at that time.) Further, Comcast's level of disclosure to its customers was clearly inadequate. As the Order finds, no one could reasonably have known, prior to filing of the Complaint, that peer-to-peer protocols were being discriminated against on Comcast's network.

The Communications Act, as amended, gives the Commission ample authority to act on this Complaint, and today's Order sets out in detail the legal framework for this authority. I would also point out that the Commission is free to address these issues through either adjudication or a rulemaking. Surely no one can credibly claim that this process has not provided the parties ample opportunity to present their cases.

Let me emphasize again the cautious and well-considered approach the majority takes in this proceeding about the future of the Internet. We recognize that network architectures and network practices are fast-changing and complex. We understand that Comcast and all the other Internet service providers have real network management challenges to overcome. And we appreciate that establishing a rigid rule prohibiting all discriminatory network practices would go too far. There are network management practices that most experts agree are reasonable and that are important to the development of new technologies and Internet services. I also emphasize that discrimination is not *per se* wrong. It is *unreasonable* discrimination that is wrong. Unreasonable discrimination flies in the face of the Internet's genius and threatens the most open, dynamic and opportunity-creating technology devised in modern times.

We know that the technological capacity to impede the openness of the Internet already exists. It's a slam dunk that as technology evolves, we will see new tools coming online that could be used for purposes of unreasonable discrimination. We also understand that some may see commercial opportunity in applying such technological impediments. History tells us that when technical capacity and commercial incentive exist side-by-side, it's a good bet that someone will try to use them to their own advantage. I'm not making a moral judgment here; it's just the stuff of history.

So the trick is to find the fine line between reasonable management techniques that allow the Net to flourish and unreasonable practices that distort and deny its potential. I believe, and I have long advocated, a case-by-case analysis of the facts in particular cases brought before the Commission, based on a clear policy of "reasonable network management only." Today's Order follows this path. The standard set forth in our decision is a careful balance that establishes a high threshold for demonstrating that a discriminatory network management practice is reasonable, while recognizing that there are times when such practices may indeed be both reasonable and necessary. In doing this, we don't hamstring technology. But at the same time we say to the public that there is a place, the FCC, where you can come to have allegations of network neutrality violations heard and acted upon.

My friend and colleague Commissioner McDowell published a thoughtful op-ed on this topic in the *Washington Post* earlier this week. We may respectfully disagree on some of it, but he was certainly correct that "regardless of what the ruling stipulates, the issue of what constitutes appropriate Internet

network management will be debated for some time.” The question I have, though, is the same as it was five years ago. Will the Internet evolve out in the open, via standards groups, and with consumers empowered to utilize the tremendous wonders of the dynamic Internet, and with all stakeholders having input into how the future of this technology will evolve? Or will network operators bring the Internet under their control for their own purposes—which may not always be the public’s purposes? Will network operators deal with legitimate network problems in a way that is sensitive to effects on the rest of the Internet? Or will they be permitted to maximize their own interests? Until the FCC opened this inquiry, important decisions about the future of the Internet were being made in a black box where the American people had precious little opportunity to peek. After today they will hopefully be able to see things in a little brighter light.

It is brighter because we have made a strong statement—based upon the four principles and rooted in our authority under the Communications Act—that network operators must not manage traffic in an unreasonably discriminatory manner. As a practical matter, we are moving closer to taking a step I have long called for: to expressly incorporate a fifth principle of non-discrimination into our existing Internet Policy Statement.

While today’s *Order* represents important movement forward, it is not a full substitute for the fifth principle that I believe we must adopt. A clearly-stated commitment of non-discrimination would make clear that the Commission is not having a one-night stand with net neutrality, but an affair of the heart and a commitment for life. That’s what something so precious as this technology deserves. A fifth principle will provide the needed reminder to all—long after the details of this case become blurry history—that the Commission’s policy of network openness is ongoing and its remedies are always available. It’s a pretty safe bet there will be other complaints about non-discrimination coming to the Commission. A fifth principle would reassure those bringing such complaints that they will receive the same kind of Commission attention that the Comcast complainants received. A fifth principle should also, in my opinion, apply to wireless as well as to wireline networks. In sum, formal Commission adoption of a fifth principle of Internet openness would proclaim and sustain Internet users’ right to all the freedom that network openness provides.

Mr. Chairman, thank you for your leadership on this matter. Thanks to the Bureau and to our Office of General Counsel for their good diligence, thanks to my colleagues for working so hard on this, and thanks to the many interested stakeholders who provided information to us. I look forward to working with my colleagues, with the many Members of Congress who have expressed interest in this issue, and—most of all—with the users and innovators of the Net as together we work to unlock its vast potential.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management"*, Memorandum Opinion and Order, File No. EB-08-IH-1518, WC Docket No. 07-52

Three years ago, the Commission adopted its *Internet Policy Statement*,¹ articulating enduring principles to encourage broadband deployment and preserve the open and interconnected nature of the Internet. Today, I am pleased that we build on that critical step with this landmark decision to enforce Federal law and the principles behind the *Internet Policy Statement*. I am confident that today's decision will reassure consumers that they will continue to enjoy freedom on the Internet.

Consumers have come to expect — and will continue to demand — the open and neutral character that has always been the hallmark of the Internet. Broadband is redefining many aspects of the way we live. In an age when traditional media markets are dominated by a handful of giant conglomerates, there is optimism about the rise of broadband as an outlet for creative expression and democracy. The Internet can restore decentralized and entrepreneurial voices to the media landscape that are reflective of the best aspects of the American tradition. This Order is a vital step towards maintaining the potential and promise that the Internet holds for enriching our economic, cultural and social well-being.

This decision is seminal because, for the first time, we interpret the specific provisions of the *Internet Policy Statement* and follow through on our repeated promises to act on allegations of misconduct.² At the same time, it is also a narrow decision, grounded firmly in the facts of the case before us. To that point, rarely has this Commission conducted such intensive fact-finding. We have witnessed nine months of filings and two hearings to glean testimony from providers, legal experts, engineers, entrepreneurs, scholars, consumer advocates, and many others. We have heard from thousands of individual consumers who have filed comments with us.

¹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CC Docket Nos. 02-33, 01-337, 98-10, 95-20, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

² *See, e.g., Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, WC Docket No. 04-242, 05-271, CC Docket Nos. 95-20, 98-10, 01-337, 02-33, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Internet Access Order*).

A careful review of the record before us leads inexorably to the conclusion that there has been a violation of Federal Internet policy. The actions in question had the clear effect of impeding consumers' ability to use particular file sharing applications. This Order takes the next step of determining whether this approach fits within the *Internet Policy Statement's* provision for "reasonable network management," and rightly concludes that it is not sufficiently targeted to fit that exception.

In reaching this conclusion, I appreciate the challenges that providers face in developing reasonable network management policies. Through meetings with many providers, I have heard concern about the impact of peer-to-peer applications on their networks. The Order acknowledges that broadband providers will need to continue to manage their networks. It also acknowledges that different approaches may be appropriate for different technologies.

Yet, the record here shows Comcast's approach to be over-inclusive and ill targeted to the purported goal.³ I found particularly compelling the wide, even if not unanimous, consensus among network engineers that these actions strayed from accepted Internet standards and norms. Moreover, the problem was compounded by Comcast's lack of adequate disclosure policies and the inaccurate response to initial public questions. Considering all the factors, and balancing the competing goals set out in the *Internet Policy Statement*, the Commission appropriately finds the conduct to be unreasonable.

Going forward, this decision sets out a marker, making clear to providers that discriminatory network management practices must be carefully tailored and not unreasonable. As providers craft their network management practices, the Order sends a strong signal about the importance of engaging industry standard setting bodies, such as the Internet Engineering Task Force, the Internet Architecture Board, and the Internet Society, which offer the best forum for resolving network management issues. It is certainly preferable for facilities-based providers and applications providers to work collaboratively, in an open and transparent manner, without the need for governmental intervention. To the extent that engineers can work out these issues among themselves, it obviates the need for Commission action. I am pleased such an effort is now underway among these engineering bodies to tackle the issues raised by peer-to-peer traffic, and that Comcast is an active participant in those discussions. The Order makes clear, though, that the Commission will not abdicate its role in preserving and promoting the open and interconnected nature of the Internet. That open platform has been the basis for unprecedented innovation and I am confident that the approach we take today will, in the end, lead to the greatest opportunities for continued innovation.

We have heard concerns about the Commission's legal authority to act in this case and about the procedural choice of a legal vehicle. Having carefully reviewed the legal arguments, I conclude that the Commission is on solid footing. Our analysis starts with the strong finding of the Supreme Court which, in upholding the FCC's very decision to adopt a looser regulatory framework for broadband Internet access, observed that "the Commission has jurisdiction to impose additional obligations on [information service providers] under its Title I ancillary jurisdiction to regulate interstate and foreign communications"⁴ Following this direction from the Supreme Court, the Order sets out the Commission's legal authority under Title I of the Act, explaining that preventing unreasonable network discrimination directly furthers the goal of making broadband Internet access both "rapid" and "efficient."

The Order also includes a detailed and well-reasoned analysis of our considerable additional legal authority for this decision. Notably, the Order is firmly based on the Congressional policies set forth in Section 230 of the Act. Section 230 states that it is the "policy of the United States" to "promote the

³ I note that while the Order describes several alternatives that may be better tailored to meet Comcast's purported goal, it stops short of specifically endorsing any particular approach. In this respect, I withhold judgment on the impact of such practices on consumers.

⁴ *National Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 996 (2005).

continued development of the Internet” and to “encourage the development of technologies which maximize user control over what information is received by individuals . . . who use the Internet. . . .”⁵ Indeed, the Commission directly advanced these very statutory goals in adopting the *Internet Policy Statement* and confirming that “consumers are entitled to access the lawful Internet content of their choice” and to “run applications and use services of their choice.” Were there any doubt, the Order also finds that resolving this complaint is ancillary to our authority under Sections 201, 256, 257, 601, and 706 of the Act.

As the Order correctly concludes, taking action against discriminatory practices advances federal law by encouraging the efficiency of the public Internet, ensuring reasonable charges, and promoting competition, pursuant to Section 1. It encourages the deployment of advanced services, pursuant to Section 706. It ensures the reasonableness of charges incurred by preventing providers from shifting costs to customers who purchase DSL as a common carrier service, pursuant to Section 201. It promotes the flow of information across public telecommunications networks, pursuant to Section 256. It eliminates barriers to entry for entrepreneurs, pursuant to Section 257. And, it improves individuals’ ability to access a diverse array of content over the Internet, pursuant to Sections 257 and 601.

Having determined that the Commission has more than adequate statutory authority to address this issue, we have clear discretion about whether to act through rulemaking or adjudication.⁶ Recent Commission practices, and my clear preference, would have been to address this issue through the adoption of rules. Although I have urged the Commission to adopt rules to address concerns about network discrimination, the Commission’s decision to resolve this case through adjudication rests on firm legal ground. It is consistent with the Commission’s long history in which we have often issued major policy decisions in the process of adjudications, as have other Federal agencies.

More recently, the Commission has issued repeated statements on this issue. For example, in the *Wireline Broadband Internet Access Order* the Commission made clear that “[s]hould we see evidence that providers of telecommunications for Internet access of IP-enabled services are violating these principles, we will not hesitate to address that conduct.”⁷ Similarly, the Commission in the *Comcast-Adelphia-Time Warner Merger Order* specifically warned the applicants — including the provider subject to this action — 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.”⁸

In many ways, today’s approach should ameliorate the concerns of critics who have argued that protecting Internet freedom will lead to overbroad mandates that cannot anticipate changes in technology. First, it makes clear that the protections of the *Internet Policy Statement* extend only to lawful content; hence, this Order does nothing to prevent providers from, for example, restricting access to child

⁵ 47 U.S.C. § 230(b)(1), (3).

⁶ See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (*Chenery*); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292 (1974).

⁷ *Wireline Broadband Internet Access Order*, 20 FCC Rcd at 14907, para. 96.

⁸ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees, Comcast Corporation, Transferor, to Time Warner Inc., Transferee, Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8298, para. 220 (2006) (*Adelphia/Time Warner/Comcast Order*). See also *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry, 22 FCC Rcd 7894, 7896, para. 4 (2007) (*Broadband Industry Practices Notice*) (concluding that “[t]he Commission, under Title I of the Communications Act, has the ability to adopt and enforce the net neutrality principles it announced in the Internet Policy Statement”).

pornography or content that violates copyright law. Second, here we limit our findings to the narrow issues before us. Third, we choose a path that preserves the Commission's flexibility to consider alternative approaches and technologies. Even many opponents of legislation and rules in this area have supported a case-by-case approach like the one adopted today. Finally, through this adjudication, we have followed a thorough and open process: seeking comment from all parties, conducting open hearings, gathering information and analysis from all sides. Although I support taking this action, I do appreciate my colleagues' willingness to craft this item in a way that preserves the Commission's ability to adopt rules at a later date, which was critical to my support of the item.

It is apparent that some parties want the Commission to have no role at all. Such an approach, however, is not consistent with Federal law and Internet policy and would abdicate our critical role in fulfilling Congress' objectives. As this Order acknowledges, we must make it a priority to ensure that the Internet remains open and that the broadband market remains competitive.

For all these reasons, I approve this Order.

Finally, I would like to thank the Office of General Counsel and the staffs of our Enforcement and Wireline Competition Bureaus for their hard work in developing this case and bolstering our legal analysis. As the process went on, this Order improved greatly. And I appreciate the input of the many citizens who attended and participated in our public hearings on this issue. The level of participation was remarkable and fitting for an issue of this importance.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Re: *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Memorandum Opinion and Order* (WC Docket No. 07-52)

Today's Order reiterates the fact that "reasonable minds truly can differ." I viewed this proceeding as a normal enforcement review, regarding a particular complaint within the confines of the specific circumstances presented, using a "case by case" analysis; not the pronouncement of a "monumental decision."

My general philosophy that guides my decision-making is that prior to government pursuing regulatory remedies in the name of the public interest, we should first carefully consider what the private sector is doing to enhance, expand and enrich consumers' options, and proceed with caution unless and until there is a clear, legal basis for government intrusion into private business — or in this case, engineering — decisions. Therefore, I plan to associate myself and this statement with the procedural and substantive legal arguments of Commissioner Robert McDowell. Presently, we are benefiting from over \$100 billion in broadband investment, robust industry competition and cooperation and unprecedented consumer options in this dynamic multi-platform marketplace. Thus, regulatory action in this instance should yield.

However, while the Commission should refrain from regulating the digital marketplace, we do have an important function in protecting the consumer interest. In fact, rather than concentrating on 10% of the traffic by 5% of the heaviest bandwidth users, we should be ensuring that the 95% of ordinary subscribers are not negatively impacted as they use their internet for their child's homework, shopping, getting news, sending emails and watching TV and YouTube. Rather than assuming the role of "world wide web enforcer," perhaps the best way for the FCC to fulfill our duties under *Internet Policy Statement* would be to assume the role of mediator or arbitrator, helping to facilitate agreements among the various sectors of the broadband internet industry to create an experience that benefits all users, rather than issuing broad mandates to protect the few.

Most significantly in the present case, it is important to note that the FCC played a key role in helping to resolve the Comcast-BitTorrent controversy we are considering today.

In this particular case, the Commission undertook numerous efforts to fulfill that role, including the initiation of two public proceedings, and the holding of well-attended and educational public hearings at Stanford, Harvard, and Carnegie Mellon Universities.

In the wake of these efforts, the two parties announced on March 27 an agreement to collaborate in managing web traffic and to work together to address network management and content distribution. First, Comcast announced that it will migrate by year-end 2008 to a capacity management technique that is protocol agnostic. Second, the two companies also agreed to work with other ISPs, technology companies, and the Internet Engineering Task Force to explore and develop new distribution technologies for delivery of media content. It is also important to note that BitTorrent acknowledged the need of ISP's to manage their networks during times of peak congestion.

Outside of the agreement, other progress is being made. This spring, Comcast and Pando Networks, Inc. announced plans to lead an industry-wide effort to develop a P2P Users' Bill of Rights. This effort is now seeing implementation under the Distributed Computing Industry Association, which is focused on developing best practices to ensure an optimum online consumer experience. Additionally, the P4P Working Group, which includes Comcast, other major U.S. broadband providers, and applications companies, continues to work together and participate in trials focused on maximizing consumers'

broadband experience.

Clearly these efforts in mitigation of the underlying issues of concern were facilitated by the Commission's focus and attention. As a trained mediator, I believe that resolving matters in this fashion is *the best way to serve the public interest and thus ensure an open internet for all consumers, not just the petitioning few.*

I also must stress the importance of disclosure and transparency for all customers of internet service providers. Throughout our public hearings concerns were raised regarding the lack of information being provided by ISPs to their customers. It seems that there was a "communication gap" between Comcast and its consumers in regard to how subscribers received information on network management and what their service expectations were. Clearly, the consumer disclosure documents that Comcast used were not adequate notification of its practices. As someone who has spent most of my career looking out for the best interests of the consumer, this concerns me. With the explosive growth enjoyed by broadband internet providers and its resulting increase in the competitive landscape, consumers must be able to both know and understand what they are getting and paying for.

ISP's must do better. Comcast's recent revision of its user policy and the posting of network management "frequently asked questions" on its website illustrate their recognition of the need for improvement. The company is now alerting customers that it may, on a limited basis, temporarily delay certain P2P traffic when that traffic has, or is projected to have, an adverse effect on other customers' use of the service. Comcast's efforts to improve its disclosures is another positive result emanating from the Commission's oversight role, further mitigating the need for additional government action. Other arms of government are also spotlighting consumer disclosure from the FTC to Congress so there is great impetus for even more improvement by the private sector without a government mandate.

The FCC has an important function in protecting the consumer, and we must remain vigilant to ensure that the private sector is responsible to their concerns. We can use our role as public servants, educators and the "bully pulpit" to shine a light on companies that fall short and hold their feet to the fire and prompt industry to action. With corporate revenues rising and customer satisfaction scores falling, companies offering broadband service must make disclosure and transparency a priority.

Lastly, but of immense importance to thousands of creators, researchers, content producers and artists across this entire country, I would like to address the fact that this order provides minimal substantive discussion about the role network managers have in filtering and guarding their platforms against the growing problem of illegal content distribution, and the potentially adverse effect regulatory prescription can have on stemming its growth.

As my colleagues on the Commission know, a long-time concern of mine has been fighting the proliferation of online child pornography and unauthorized illegal downloads of creative content. In fact, next week I will be traveling to Tennessee to attend the launch of a partnership between Connected Nation and iKeepSafe. Connected Nation provides computers to children across the state of Tennessee and iKeepSafe provides DVDs and other educational materials to teach children about the risks associated with internet use and how they can protect themselves online — yet another example of a positive market and industry driven public-private partnership to address a very real problem: child online safety.

While I may be the only Commissioner raising these concerns, certainly many Attorneys General, the National Coalition for Missing and Exploited Children and even leaders in other countries share these concerns. If the Commission interferes with the ISPs ability to manage their networks by imposing a strict legal standard, will such regulation have a freezing effect on the fight against illegal content? By requiring ISPs to "carefully tailor" their network management practices, I am concerned that we will potentially be stripping them of the important tools they use — and we need — to purge their platforms of illegal content which negatively impacts every type of intellectual property, from software to

pharmaceuticals to of course, songwriters and motion pictures.

Further, as some in the content industry have rightly highlighted, all four principles enumerated in the FCC's Internet Policy Statement relate *only* to the protection of lawful content. None of these principles protects unlawful conduct. Thus "any remedy that inadvertently forecloses ISPs from pursuing and denying access to unlawful content would be inconsistent with the clear line between lawful and unlawful content drawn in the FCC's policy."¹ Most parents would surely agree. The main point is that even if the Commission *does not intend* to frustrate network managers' attempts to guard against illegal content, the mandate of regulation in this order can potentially reverse many of the significant strides the private sector has made and continues to make to address this critically important issue. With the U.S. Chamber of Commerce reporting that piracy negatively costs the U.S. economy up to \$250 billion a year, this hardly seems like the right path to follow.

Through innovative technology, unique public private partnerships and collaborative solutions — like another recent agreement between the National Center for Missing and Exploited Children and the cable industry to identify, block and ultimately report illegal activity to law enforcement — network managers are making great strides *without* regulatory interference from the government.

Finally, it is important to highlight that effective network management plays a key role in protecting customers from spam, phishing, computer viruses and worms, Trojan horses, and denial of service attacks. If we tie the hands of network managers, there is a good chance this type of malware could neither be identified nor contained before affecting users. If we are truly looking to improve the consumer online experience, avoid network congestion and protect privacy, it does not seem prudent to block internet service providers' ability to purge their platforms of these technological plagues.

I applaud the Chairman for focusing the Commission's and the public's attention on this issue, and for using it as a vehicle for hearings around the country over the past year. In addition to educating ourselves, I believe these forums have served an important role in outreach and education of the public as they navigate this ever-changing technological revolution. Through these efforts, the Commission has been able to shine a light on particular practices and consumer concerns, and the private sector has responded. Had we continued down our generally deregulatory path regarding information services, we would have not taken the more interventionist approach adopted in this item, which is unnecessary given the industry-wide actions already underway, as well as the specific, ameliorating steps taken by the company to address the allegations in the complaint at hand. Therefore, I respectfully dissent.

¹ Comments of the Recording Industry Association of America, In the Matter of the Petition of Vuze, Inc. for Rulemaking to Establish Rules Governing Network Management Practices By Broadband Network Operators, p8.

**DISSENTING STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

RE: *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52

First, I'd like to thank the public interest groups who brought this matter to our attention for doing so. I'd also like to thank the Chairman for having us all focus on this case. Shining a spotlight on these issues has helped raise awareness and spark a debate which has been constructive, at times.

All of us can agree on a few things. The Internet should remain open and free. Our policies, and the policies of all governments everywhere, should promote such freedom. We can also agree that network operators could do a better job of educating consumers regarding the limitations of their networks and how those networks need to be managed to keep the Internet functioning. We have seen a lot of improvement in that area in the past couple of months due, in part, to this proceeding.

I also hope we can agree that applications providers could do a better job of designing software that works more efficiently on networks that were designed and built sometimes decades ago. The providers of certain peer-to-peer (P2P) applications, for example, could do a better job of making consumers aware that their applications require consumers' computers to work 24 by 7 in ways that can tie up their computing power and reduce broadband speeds for themselves and their neighbors.

I think we can also agree — and in this I concur in Commissioner Tate's statement — that it is tremendously important for network operators to be authorized to guard against unlawful Internet content such as child pornography, for the Commission to act as a mediator rather than a regulator when appropriate, and for network operators to adequately disclose their terms of service.

In that spirit, I am concerned that we are witnessing a deepening division between some in the application industry and some network operators. Both sectors are indispensable to our burgeoning Internet economy. History teaches us that we are all better off if we reject the rhetoric of the extremes on both sides and resolve technological disputes through collaboration and negotiation. Looking back through the long lens of time, it is obvious that the Internet is the greatest free-market success story of all time precisely because conflicts were resolved in this manner. Continued escalation of rhetoric serves no one well, least of all American consumers.

With those introductory remarks, it is time to move on to decide the matter at hand. Independent administrative agencies are interesting creatures. We are not part of the executive, legislative or judicial branches of government, yet we have quasi-executive, -legislative and -judicial powers. It is primarily our quasi-judicial powers we are exercising today. Accordingly, we are compelled by statute to examine the procedural issues before us as well as to weigh the facts against the current state of the law. Commissioner Tate and I received the current version of the order at 7 p.m. last night, with about half of its content added or modified. As a result, even after my office reviewed this new draft into the wee hours of the morning, I can only render a partial analysis.

As a procedural matter, what we have before us today is an order regarding a pleading that was filed as a "formal complaint." Our rules mandate that formal complaints apply only to common carriers.¹

¹ See 47 USC § 208 ("...complaining of anything done or omitted to be done by any common carrier subject to this Act..."); 47 C.F.R. § 1.711.

As the Supreme Court held in the *Brand X* case,² and as the Commission has held on numerous occasions since, cable modem service is not common carriage but, rather, an information service under Title I of the Act.³

If the complaint survives this first step, we should next look to see if we have jurisdiction to enforce our rules. I agree that we do have jurisdiction, in general, over these areas.⁴ However, we do not have any rules governing Internet network management to enforce. Since the Supreme Court's decision in *Brand X*, we have been busy taking broadband services out of the common carriage realm of Title II and classifying them as largely *unregulated* Title I information services.⁵ It does not take a law degree to understand that once we did that, the rules of Title II would no longer apply to broadband services.

Furthermore, the Commission did not intend for the Internet Policy Statement to serve as enforceable rules but, rather, as a statement of general policy guidelines.⁶ Based on their remarks at the time, at least two of my colleagues in the majority agreed.⁷ Indeed, in the *Wireline Broadband Order*, released the same day, the Commission clearly contemplated initiating a rulemaking in response to

² *National Cable & Telecoms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (*Brand X*).

³ *Id.*, 545 U.S. at 968. I also note that the format and content of the complaint were deficient in a number of ways, including a failure to cite to any sections "of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated." See 47 C.F.R. § 1.721(a)(4). Additionally, our rules require dismissal in instances such as this one where a "document purporting to be a formal complaint . . . does not state a cause of action under the Communications Act." 47 C.F.R. § 1.728(a). The complaint does not state a cause of action under the Communications Act because the Commission does not, in this case, have the authority to act in the absence of relevant rules.

⁴ See *Brand X*, 545 U.S. at 976, 996.

⁵ See, e.g., *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, WC Docket Nos. 04-242, 05-271, CC Docket Nos. 95-20, 98-10, 01-337, 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*), *petitions for review denied, Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

⁶ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CC Docket Nos. 02-33, 01-337, 98-10, 95-20, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

⁷ See Chairman Kevin J. Martin, Comments On Commission Policy Statement, News Release (rel. Aug. 5, 2005) ("While policy statements do not establish rules nor are they enforceable documents, today's statement does reflect core beliefs that each member of this Commission holds regarding how broadband Internet access should function."); *Wireline Broadband Order*, 20 FCC Rcd at 14980, Statement of Michael J. Copps, Concurring ("While I would have preferred a rule that we could use to bring enforcement action, this is a critical step. And with violations of our policy, I will take the next step and push for Commission action.").

allegations of misconduct, emphasizing its “authority to promulgate regulations”⁸ – regulations not written at that time, or today. Such intentions were, I thought, reinforced in 2007 when I voted to adopt the *Broadband Industry Practices Notice*, the first step in a *rulemaking* proceeding designed to determine whether rules governing network management practices were necessary.⁹ As I stated at that time, we were taking “a sensible, thoughtful and reasonable step that should give the Commission a factual record upon which to make a reasoned determination whether additional action is justified or not, pursuant to the Commission’s ancillary jurisdiction to regulate interstate and foreign communications.”¹⁰ The additional action I contemplated was the logical move from an NOI to an NPRM — not an unprecedented, and likely unsustainable, jump to rulemaking by adjudication. Like it or not, no notice of proposed rulemaking, with a chance for public comment, was ever issued. Nothing regulating Internet network governance has been codified in the Code of Federal Regulations. In short, we have no rules to enforce. This matter would have had a better chance on appeal if we had put the horse before the cart and conducted a rulemaking, issued rules and *then* enforced them.

The majority’s view of its ability to adjudicate this matter solely pursuant to ancillary authority is legally deficient as well. Under the analysis set forth in the order, the Commission apparently can do *anything* so long as it frames its actions in terms of promoting the Internet or broadband deployment. The fact that the D.C. Circuit has affirmed the Commission’s exercise of ancillary authority in very different adjudicatory proceedings and in the absence of regulations is, in my view, unpersuasive.¹¹ The Commission in those cases was acting pursuant to a provision of the statute that provides the Commission express grant of authority¹² or a statutory provision that imposed an “explicit” obligation on a class of entities that legislative history indicated was intended to be covered by the statute.¹³ In this case, none of the sections of the Act identified in the order impose explicit and relevant obligations on Comcast, or any other broadband network operator. The Commission likewise overreaches in attempting to justify this order by extension of sections 1, 201, 256, 257 or 604. The majority presents no convincing argument that its regulation of a broadband network operator’s management practices is “reasonably ancillary to the effective performance of the Commission’s various responsibilities” under those sections of the Act.¹⁴ Thus, in the absence of rules, neither the general policy goals set forth in sections 230 and 706 of the Act nor the attempt to extend our authority in sections 1, 201, 256, 257 or 604 provide enough of a legal basis for us to act. If Congress had wanted us to regulate Internet network management, it would have said so explicitly in the statute, thus obviating any perceived need to introduce legislation as has occurred during this Congress. In other words, if the FCC already possessed the authority to do this, why have bills been introduced giving us the authority we ostensibly already had?

⁸ See *Wireline Broadband Order*, 20 FCC Rcd at 14904 n. 287 (“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 the effective performance of the Commission’s various responsibilities”).

⁹ *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry, 22 FCC Rcd 7894 (Apr. 16, 2007) (*Broadband Industry Practices Notice*).

¹⁰ See *id.*, 22 FCC Rcd at 7909, Statement of Robert M. McDowell.

¹¹ See Order n. 163.

¹² See, e.g., *New York State Comm’n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (*New York State Comm’n on Cable Television*). *New York State Comm’n on Cable Television* noted that the Commission based its authority on the federal interest in “the unfettered development of interstate transmission of satellite signals,” which in turn was found to flow from Title III of the Act. See *id.* at 808 (citing *Earth Satellite Communications, Inc.*, Declaratory Ruling, 95 FCC 2d 1223 at paras. 15-16 (1983)).

¹³ *CBS, Inc. v. FCC*, 629 F.2d 1, 26 (1980).

¹⁴ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

For the same reasons, the majority's arguments that the *Adelphia/Time Warner/Comcast Order* somehow constituted notice of the Commission's intent to adjudicate the Policy Statement,¹⁵ and that Comcast's consummation of the merger approved in the *Adelphia/Time Warner/Comcast Order* constituted a waiver of its right to challenge such an adjudication,¹⁶ fail. The Commission can not possibly be seen to have given notice to Comcast (or any other party) of a preference to adjudicate the Policy Statement because the Commission lacks the authority to adjudicate the matter in the absence of rules.

Further, although it relies heavily on the Supreme Court's description of an agency's adjudicatory authority in *Chenery II*, the majority ignores that same court's admonition to avoid adjudications that may have a "retroactive effect."¹⁷

Additionally, today's order relies on the *Madison River* consent decree of 2005 to justify today's actions.¹⁸ The *Madison River* case differs in significant ways from what we have before us. For starters, none of the parties involved settled their differences "out of court" as Comcast and BitTorrent have done here. No arguments regarding network congestion and management were at play, as they are here. And most importantly, the Commission clearly relied on its Title II jurisdiction over Madison River, a rural local exchange carrier, rather than whatever ancillary jurisdiction it might have had under Title I.¹⁹

Perhaps most puzzling of all is the Commission's use of a "strict scrutiny" type standard to strike down the actions of a private party engaged in management of its network. The majority is too clever to call its standard of review "strict scrutiny," and with good reason. It is unprecedented, and inappropriate, for the Commission to judge the actions of a private actor by a standard that has generally been reserved

¹⁵ Order at para. 35 (citing *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees, Comcast Corporation, Transferor, to Time Warner Inc., Transferee, Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8298, para. 220 (2006) (*Adelphia/Time Warner/Comcast Order*)).

¹⁶ See Order at para. 27.

¹⁷ Further, "such retroactivity must be balanced against the mischief of producing a result which is contrary to statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (*Chenery II*). See also *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 n. 12 (1984) (recognizing that "an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests"). The D.C. Circuit, the court to which this order most likely will be appealed, has identified five non-exclusive factors useful for determining when the retroactive effect of an adjudicatory decision is invalid. See *Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) ("(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.") The majority's application of the criteria described by the 9th Circuit in *Pfaff* is thus arguably inappropriate and, I believe, incorrect. See Order at paras. 33-36 (citing *Pfaff v. U.S. Dep't of House. & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996)).

¹⁸ *Madison River Communications, LLC and Affiliated Companies*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (2005) (*Madison River*).

¹⁹ *Id.*, 20 FCC Rcd at 4296, para. 1 ("The Investigation was undertaken pursuant to sections 4(i), 4(j), 218, and 403 of the Communications Act."). It is also worth noting that the consent decree did "not constitute either an adjudication on the merits or a factual or legal finding regarding any compliance or noncompliance with the requirements of the Act and the Commission's orders and rules." *Id.*, 20 FCC Rcd. at 4298, para. 10.

for determining whether the *government* has trampled on the fundamental constitutional rights of *individuals*. The Commission certainly has never used it to restrain private parties in their interactions with other private parties. Using a strict scrutiny standard in this context, especially one wearing a transparent disguise, is sure to doom this order on appeal.

Even if the complaint was not procedurally deficient and we had rules to enforce, the next step would be to look at the strength of the evidence. The truth is, the FCC does not know what Comcast did or did not do. The evidence in the record is thin and conflicting. All we have to rely on are the apparently unsigned declarations of three individuals representing the complainant's view, some press reports, and the conflicting declaration of a Comcast employee.²⁰ The rest of the record consists purely of differing opinions and conjecture. As the majority embarks on a regulatory journey into the realm of the unknowable, the evidentiary basis of its starting point is tremendously weak, to the point of being almost non-existent. In a proceeding of this magnitude, I do not understand why, in the absence of strong evidence, the Commission did not conduct its own factual investigation under its enforcement powers. The Commission regularly takes such steps in other contexts that, while important, do not have the sweeping effect of today's decision.²¹

Additionally, the majority does not address the issue of motive. The allegations before us boil down to a suspicion that Comcast was motivated not by a need to manage its network, but by a desire to discriminate against BitTorrent and similar technologies for anticompetitive reasons. If Comcast intended to harm its competitors, would it not have targeted other online video providers? Americans download more than eleven billion Internet videos per month, yet the record contains no evidence that Comcast is interfering with sites like YouTube which do not use pipe-clogging P2P software. The record also does not speak to the fact that other prominent video sites, such as Joost, use more efficient P2P software that does not cause the same congestion problems as BitTorrent. As a result of their use of software that works better on existing networks, virtually no network management is needed. The majority's silence on this key exculpatory point is deafening.

Finally, even if this case were not procedurally and legally deficient in so many regards, we must address whether the policies the majority is adopting today are in the public interest. And the answer is no. Ironically, today's action by the FCC may actually result in *slower* online speeds for 95 percent of America's Internet consumers. That is because, up until this point, engineers made engineering decisions, not unelected bureaucrats. Although I have a tremendous amount of respect for each of my colleagues, none of us has an engineering degree.

As a result, the practical effect of today's order requires *all* network operators – cable, telcos and wireless providers – to treat all Internet traffic equally. That sounds good if you say it fast. But the reality is that the Internet can function only if engineers are allowed to *discriminate* among different types of traffic. Now, the word “discriminate” carries with it extremely negative connotations, but to network engineers it means “network management.” Discriminatory conduct, in the network management context, does not necessarily mean anticompetitive conduct. And this is where a lot of the misunderstandings

²⁰ The only signed declaration in either File No. EB-08-IH-1518 or WC Docket 07-52 is that of a Comcast employee. See Declaration of Mitch Bowling, Senior Vice President & General Manager of Online Services and Operations, Comcast Cable Communications, LLC, filed with Letter from Kathryn A. Zachem, Vice President, Regulatory Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (July 21, 2008).

²¹ See e.g., *Zaria*, Order to Show Cause, Notice of Opportunity for Hearing and Hearing Designation Order, EB Docket No. 03-152, 18 FCC Rcd 14938 (2003) (Commission field offices conducted investigations to determine veracity of allegations made in informal objections to broadcast license renewal applications); *New Jersey Broadband, LP and New Jersey Broadband, LLC*, File Number EB-05-PA-12621, Consent Decree, 21 FCC Rcd 12466, 12468 (Enf. Bur. 2006) (Enforcement Bureau investigation of potential violations of the Act and Commission rules included “inspections” and “direction finding measurements”).

come into play. As human beings, we do not tolerate delay or interference when it comes to certain kinds of applications. For instance, we expect our online movies to be clear and not distorted by competing data coming over the same Internet connection. For us to enjoy online video without interruption or distortion, video bits have to be given priority over, say, email bits. But now that all traffic must be treated equally, that is going to change. The new regime is tantamount to a congested downtown area without stoplights. Gridlock is likely to result.

The majority is creating regulatory uncertainty for engineers. Under the new regulatory rubric of the undefined term "reasonable network management," engineers do not know if they are allowed to manage your Internet experience so you can watch online video without distortion, pops, and hisses. Similarly, they now do not know what the government will allow them to do, or not do, to manage the growing flood of peer-to-peer applications. Here's the problem: If you use cable modem or wireless broadband services, you may not know it, but you share bandwidth with your neighbor. That's just the nature of these networks, many of which were built long before P2P became popular. If your neighbor uses more bandwidth, that leaves less for you to use. This is especially true when your neighbor uses peer-to-peer applications. Many P2P applications consume as much bandwidth as they can find. In fact, only five percent of all Internet consumers are using 90 percent of the bandwidth due to P2P. Some estimate that seventy-five percent of the world's Internet traffic is P2P. As a result of increased P2P usage, many consumers' "last mile" Internet connections are getting clogged. These electronic traffic jams slow down the Internet for the vast majority of consumers who do not use P2P software to watch videos on YouTube or surf the Web. In short, this flood of data has created a tyranny by a minority. By depriving engineers of the freedom to manage these surges of information flow by having to treat all traffic equally as the result of today's order, the Information Superhighway could quickly become the Information Parking Lot. The regulatory law of unintended consequences is sure to prevail.

While we at the FCC are trying to spur more competitive build-out of vital last-mile facilities, especially fiber and wireless platforms, this congestion problem will not be resolved merely by building fatter and faster pipes. In fact, according to Japan's government, P2P congestion is creating similar network management problems there even though that country advertises broadband speeds far in excess of ours.

The Internet has faced several congestion "crises" like the current one over the years. Each time, groups comprised of engineers, academics, software developers, Internet infrastructure builders and others have worked together to fix the problems of the day. Over time, some of these groups have become more formalized such as the Internet Society, the Internet Engineering Task Force and the Internet Architecture Board. These groups have remained largely self-governing, self-funded and non-profit – with volunteers acting in their own capacities and not on behalf of their employers. No government owns or regulates these groups; rather, governments can act as observers and collaborative partners. The Internet has been governed in a bottom-up "wiki" manner rather than a top-down government-knows-best style. The Internet has flourished as a result.

For quite some time now, these and other groups have been working on the P2P congestion problem, and they have been producing positive results. Since the Internet's inception, similar work has progressed without a government mandate or regulatory framework. Now that era had ended.

For the first time, today our government is choosing regulation over collaboration when it comes to Internet governance. The majority has thrust politicians and bureaucrats into engineering decisions. It will be interesting to see how the FCC will handle its newly created power because, as an institution, we are incapable of deciding any issue in the nanoseconds of Internet time. Furthermore, asking our government to make these decisions will mean that every two to four years the ground rules could change depending on election results. Internet engineers will find it difficult, if not impossible, to operate in a climate like that. Today's action is raising many questions across the globe. Is the next step for the FCC to mandate that network owners must ask the government for permission before serving their customers

by managing surges of information flow? As a result of today's actions, Internet lawyers around the country are likely advising their clients to do just that. Will the FCC be able to handle *that* case load? Will other countries like China follow suit and be able to regulate American companies' network management practices, with effects that could be felt here? How do we know where to draw the line given that the Internet is an interconnected global network of networks? Given the Internet's interconnectivity, are we now starting a global race to the lowest common denominator of maximum government regulation all in the name, ironically, of Internet *freedom*? Keep in mind that societies that regulate the Internet less tend to be more democratic, while regimes that regulate it more tend to be less democratic.

I am being asked these and many other questions, and I don't have answers to them. No one does. But two things are for sure, this debate will continue, and the FCC has generated more questions than it has answered.

A better model for the majority to have adopted today would have been to allow the long-standing and time-tested collaborative Internet governance groups to continue to produce the fine work they have successfully put forth for years. If they find themselves unable to agree (which has never happened – not even in this case before us), then the government should examine the situation and act accordingly. Perhaps the FCC could have created a new role for itself by spotlighting complaints of potentially nefarious network practices and conveying them to the IETF for collaborative review and action. Sometimes merely shining sunlight on controversies can produce amazingly beneficial effects.

In that vein, some have argued that without the complaint, the Comcast/BitTorrent matter would never have been settled last March. They may be correct. In the law, we call this a litigation strategy. Courts encourage litigants to settle their disputes before trial. Once settled, courts dismiss cases as part of a policy to encourage future settlements. Here the majority is doing the opposite. Even though Comcast and BitTorrent settled and pled for no further "government intervention," the majority has gone forward with this adjudication. The net effect punishes those that settle and discourages future settlements.

So today, for the first time in Internet history, we say "goodbye" to the era of collaboration that served the Internet community and consumers so well for so long; and we say "hello" to unneeded regulation and all of its unintended consequences. Accordingly, I respectfully dissent.