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.

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[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

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[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).

Section 230 of the Act. Section 230 states that it is the "policy of the United States" to "promote the 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;

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[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").

hence, this Order does nothing to prevent providers from, for example, restricting access to child 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 alterative 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.