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, Memorandum Opinion and Order.

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] 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]

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[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.

[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.

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 allegations of misconduct, emphasizing its "authority to promulgate regulations"[8] – regulations not

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[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.").

[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

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 authority[12] or a statutory provision that imposed an "explicit" obligation

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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

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?

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

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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).

[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.

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

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[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.

inappropriate, for the Commission to judge the actions of a private actor by a standard that has generally been reserved 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

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[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, WC Docket No. 07-52 (filed 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").

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 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.