STATEMENT OF
COMMISSIONER MICHAEL J. COPPS, APPROVING

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; Memorandum Opinion and Order, FCC 08-183 (Aug. 1, 2008)

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.