

**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.