Concurring Statement of Commissioner Jon Leibowitz
Regarding the Staff Report:
"Broadband Connectivity Competition Policy"

Let me begin by commending the staff for this Report, which continues the process of identifying guiding principles for our growing Internet consumer protection and competition missions that was begun last October with our Municipal Broadband study. Critically, today's Report forms a type of a preview of how the FTC will view conduct by broadband providers in the absence of a net neutrality rule. The Report notes that consumers strongly prefer the current open state of the Internet, and provides a commendably unvarnished view of the extent to which the consumer protection and antitrust laws will satisfy those preferences. In my view, the Report demonstrates that while our consumer protection authority may be adequate to the task, the same may not be true with respect to antitrust law.

When then FCC Chairman Michael Powell spoke about what he called the four "Internet Freedoms" in 2004, one of his principal concerns was with protecting consumers from having to choose Internet service plans without sufficient information about those plans from broadband providers.[1] Of course, that Freedom is particularly important to us at the FTC. It implicates some of the most important issues regarding consumer rights on the Internet – transparency and disclosure. Will carriers slow down or interfere with applications or services? If so, will consumers be told about this before they sign up? How fast will a consumer's Internet connection actually be? Will they get adequate information about it? To my mind, failure to disclose such material terms could be considered "unfair or deceptive" in violation of the FTC Act. I have no doubt that the FTC will move aggressively to protect consumers using our existing authority.

What is in doubt is whether, without adequate protection for the other three "Internet Freedoms" mentioned by Chairman Powell, consumers will continue to truly experience the promise of the Internet. The other three Internet Freedoms mentioned by Chairman Powell are: (1) consumers' freedom to access content; (2) their freedom to use Internet applications; and (3) their freedom to attach personal devices to the Internet in their homes.[2] These Freedoms are a start toward ensuring consumers' rights on the Internet but, as the Report demonstrates, while antitrust may be a good way of *thinking* about these Freedoms, it is not necessarily well-suited to *protecting* them.

There is a real reason to fear that, without additional protections, some broadband companies may have strong financial incentives to restrict access to content and applications. One way this might happen is by now well understood by almost everyone – a broadband provider with monopoly power in a local market might use that power to block or degrade some applications or content that compete with applications or content

---

[1] Michael Powell, Chairman, FCC, Keynote Address at the Silicon Flatirons Symposium: Preserving Internet Freedom: Guiding Principles for the Industry (Feb. 8, 2004) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

[2] *Id.*

the broadband company itself provides.[3] As the Report notes, many, including many of those who oppose net neutrality regulations, view this sort of "*Madison River*"[4] conduct as inappropriate.[5] I certainly do. And it is possible that responsible broadband providers won't engage in this conduct; after all, the Report identifies strong countervailing incentives not to do so. But as I read the Report there is little chance that antitrust would prevent such a scheme except after a "rule of reason" analysis, which – at least in these types of cases – is likely to be drawn out, uncertain and expensive.[6]

A somewhat more exotic and perhaps even more serious concern is also identified by the Report. If broadband providers begin to sell, to application and content providers, the right to access their customers, then the broadband market will become what some economists call a "two-sided market."[7] The concern arises because the broadband provider's market power when it sells its service to the application and content providers dwarfs its market power on the other "side" of the market (where they sell that service to consumers). Once a consumer chooses a broadband provider, then that provider has monopoly power over access to that consumer for any application or content provider that wants to reach that customer. If a large national broadband provider were to begin charging Internet application and content providers to reach its customers, it would have monopoly power over access to potentially millions of customers nationwide.

This problem, which the Report identifies as a "terminating access monopoly," is not new.[8] In fact, this issue has bedeviled public policy in the telecommunications industry for years.[9] As the Report notes, the dangers from this monopoly power include increased prices being charged by Internet content and applications providers to

---

[3] And, make no mistake, nearly all broadband providers in this country have market power. As of 2006, 95.5% of all broadband in this country is provided by either a cable company or a telephone company. FCC, High-Speed Services for Internet Access as of June 30, 2006 at 7, tbl. 3 (2007). In other words, nearly all local broadband markets are duopolies at best. To be sure, the cable and telephone companies have been competing aggressively against each other in many local markets. However, while the Report repeatedly notes the "considerable debate" regarding the extent of competition from alternative sources, the fact remains that in nearly all local broadband markets, no such third pipe to the home yet exists.

[4] *In re Madison River Commc'ns,* 20 F.C.C.R. 4295 (2005) (consent decree resolving FCC's investigation of a telephone company that provided broadband service and blocked its customers from accessing VoIP services that competed with its own telephone services).

[5] *See Report* at 110, fn. 351.

[6] Of course, it is possible that the FCC would consider this conduct illegal under its residual "public interest" authority.

[7] In a two-sided market, broadband providers sell access for its customers to use applications and content on the Internet and, to the same extent, sell the providers of applications and content access to those consumers. As the Report notes, such arrangements are often good for consumers – they allow the seller to charge a lower price to the "side" of the market that is more price sensitive and make up for it by charging more to the other side. Such arrangements are not uncommon in our economy, for example, in the newspaper and credit card industries.

[8] *See generally Report* at 113-116.

[9] *See generally* Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age* 310-313 (MIT Press 2007).

consumers (to cover those providers' new costs of paying for access to those same consumers) and a reduction in the long run incentives for those application and content providers to develop new products, as the broadband firms would be able to expropriate the value of those new products. While these scenarios may not be certain, as I read the Report it is not clear they could be addressed by antitrust.

The Report notes that in many ways antitrust law is generally well suited as a tool to analyze the impact of potentially problematic conduct on consumers. However, as the Report also notes, there is little agreement over whether antitrust, with its requirements for *ex post* case by case analysis, is capable of fully and in a timely fashion *resolving* many of the concerns that have animated the net neutrality debate.[10] And the Report makes no promises regarding whether enforcement might end up being too little or too late.[11]

The Report also soberly reminds us that regulation often has unintended side-effects. That is surely true. But it seems to me equally clear that this Report shows that doing nothing may have its costs as well.

[10] It is possible that the FTC could approach some of these problems – including interference by a broadband provider with competing Internet content or applications – as "unfair methods of competition" under Section 5 of the FTC act, which prohibits conduct that violates the spirit of the antitrust laws even if it does not violate the letter of the laws. Remedies for such violations are usually limited to cease and desist orders, and there is far less risk of follow-on private litigation than with violations of the Sherman Act.

[11] *See* Report at 235-236 (policy makers should consider whether it will be possible to undo the effects of having no net neutrality regime "if it is later determined that enforcement under current law has been inadequate…").