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

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

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[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).

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…").