

**STATEMENT**

**OF**

**COMMISSIONER ROBERT M. McDOWELL  
FEDERAL COMMUNICATIONS COMMISSION**

**BEFORE THE  
UNITED STATES SENATE  
COMMITTEE ON  
COMMERCE, SCIENCE, AND TRANSPORTATION**

**OVERSIGHT  
OF THE  
FEDERAL COMMUNICATIONS COMMISSION**

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## INTRODUCTION

Thank you, Chairman Rockefeller, Ranking Member Thune and Members of the Committee for inviting me to join you today. It has been an honor working with you over the years, and I am pleased to be back before you. As always, I look forward to answering any questions you may have.

Although the bulk of my testimony focuses on my serious concerns regarding increased international regulation of the Internet, I am hopeful that the Federal Communications Commission adopts some sensible policies in other areas this year.

## TODAY'S POLICY PRIORITIES

### **I. The FCC Should Adopt Pragmatic Policies for the Upcoming Incentive Auction.**

The most important priority for the Commission this year is to implement the congressionally-mandated incentive auction. We should do so by:

- Ensuring that the rulemaking and incentive auction processes are transparent and the final rules are intuitive so that all stakeholders – no matter their technology preference or size – have a meaningful opportunity to understand and participate;
- Avoiding imposing anything that functions as a spectrum cap;
- Refraining, for now, from reserving airwaves to create a “nationwide unlicensed spectrum band” within the new 600 MHz Band;
- Pragmatically balancing the tension between flexible-use spectrum policies and adequate interference protections to account for the technological improvements that will undoubtedly develop while the proceeding is underway and after the rules are implemented; and
- Steering clear of encumbrances that scare away bidders and lead directly to unintended harmful consequences.

### **II. The Executive Branch Must Liberate More Spectrum for Exclusive Use Licenses Awarded Through Auctions.**

In addition to creating a constructive environment for an incentive auction, the Executive Branch must do more to liberate spectrum occupied by the federal government and send it to auction for exclusive use licenses. The federal government occupies a majority of the most useful spectrum. Without a doubt, much of it is used for important purposes such as national defense, air traffic control and law enforcement. But does anyone believe that all federal spectrum is being used efficiently? We don't have clear answers to these questions because the current structure is opaque and discourages the government from relinquishing spectrum. Ill-defined policies to promote spectrum “sharing” in lieu of auctions for exclusive use licenses are

insufficient to meet America's spectrum needs. This scenario must be rectified or the U.S. wireless industry risks losing the global lead in wireless it has *always* enjoyed.

### **III. The FCC Should Modernize America's Obsolete Media Ownership Rules.**

As is required by Section 202(h) of the Communications Act, the FCC must modernize its media ownership rules to reflect the current economic realities of the marketplace and eliminate any and all unnecessary mandates.<sup>1</sup> Not only should the Commission look to deregulate the traditional media sector in the face of competition from new media, it should avoid adding new and unnecessary rules. For example, due to today's competitive media landscape, the Commission should resist proposals that would restrict broadcasters from entering into some forms of contracts, such as joint sales, shared service and local news service agreements, that could provide efficiencies ultimately benefiting consumers. Unfortunately, new draft rules in this regard are pending before the Commission. If adopted, they would reduce the amount of news and information available to smaller communities.

Additionally, evidence continues to mount that the 1975 newspaper-broadcast cross-ownership ban should be largely eliminated. Although the Commission proposed a relaxation of the ban on newspaper-television ownership for the largest markets and considered eliminating restrictions on newspaper-radio combinations, these proposals are anemic and do not reflect marketplace realities. Over the past decade, broadcast stations and daily newspapers have grappled with falling audience and circulation numbers, diminishing advertising revenues and resulting staff reductions,<sup>2</sup> as online sources gain in popularity.<sup>3</sup> This trend has led many

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<sup>1</sup> Section 202(h) of the Telecommunications Act of 1996 states that:

The Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially . . . and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 111-12 § 202(h) (1996); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (amending Section 202(h) of the 1996 Act). I concurred in the December 2011 notice of proposed rulemaking, because the Commission appears to be prepared to accept a regulatory *status quo* while I think major changes are necessary and required by Section 202(h).

<sup>2</sup> Although some sectors of the news industry have experienced a slight resurgence, newspapers continue to face decline with both advertising and circulation revenues continuing on a downward path. In 2011, network and local news viewership increased for the first time in years; however, local TV station advertising revenues still experienced a decline. See PEW RESEARCH CTR'S PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2012, KEY FINDINGS, <http://stateofthemediamedia.org/2012/overview-4/key-findings/> (last visited March 8, 2013) ("THE STATE OF THE NEWS MEDIA 2012"); THE STATE OF THE NEWS MEDIA 2012, LOCAL TV, <http://stateofthemediamedia.org/2012/overview-4/key-findings/> (explaining that some of this loss is due to a reduction of political and automotive advertising from 2010 and that these revenues will rebound during a busy election cycle).

<sup>3</sup> In fact, the White House's Council of Economic Advisors has found that newspapers are one of America's fastest-shrinking industries losing approximately 28.4 percent of its workforce between 2007 and 2011. Online publishing job growth, on the other hand, increased by more than 20 percent in the same time period. See, e.g., ECONOMIC

prominent daily newspapers to declare bankruptcy or go out of business altogether. Over the past five years, an average of 15 daily papers, or about one percent of the industry, have shuttered their doors each year.<sup>4</sup> The newspaper-broadcast cross-ownership ban could be exacerbating this situation, according to evidence compiled in the FCC's record over the years.<sup>5</sup> Not only is such a rule unnecessary, it appears to be harming the public interest. Keeping the ban on the FCC's rulebooks is contrary to Congress's mandate under section 202(h).

The Commission recently indicated that it would accept new evidence for the record to help determine whether cross-ownership has a harmful effect on diversity.<sup>6</sup> Once that review is complete, along with proper public comment, we should waste no time in completing this proceeding, which is nearly three years overdue.

#### **IV. The FCC Should Repeal Outdated Analog Regulations in The New IP World.**

The Commission should prioritize its reform efforts to focus on the market's transition from telecom networks that were built for analog voice services to state-of-the-art data networks that convey an infinite slurry of ones and zeros (the "IP transition"). Comments filed at the FCC indicate that within at least the 22 states where AT&T operates, for instance, 70 percent of the residential customers with access to plain old telephone service over aging copper networks are projected to have chosen a competitive alternative by the end of 2012.<sup>7</sup> As in so many cases, while our statute and rules stay firmly rooted in the 20th century, the market is whizzing past us. We are overdue for a fresh look at how our laws may be hindering – rather than helping – such

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REPORT OF THE PRESIDENT TOGETHER WITH THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS 188 (February 2012) (citing a LinkedIn study), *available at* [http://www.whitehouse.gov/sites/default/files/docs/erp\\_2012\\_complete.pdf](http://www.whitehouse.gov/sites/default/files/docs/erp_2012_complete.pdf); Matt Rosoff, *Newspapers Are The Fastest Shrinking Industry In The U.S.*, BUSINESS INSIDER (Mar. 8, 2012), [http://articles.businessinsider.com/2012-03-08/tech/31135175\\_1\\_linkedin-job-growth-newspapers#ixzz1us0z9Urf](http://articles.businessinsider.com/2012-03-08/tech/31135175_1_linkedin-job-growth-newspapers#ixzz1us0z9Urf).

<sup>4</sup> THE STATE OF THE NEWS MEDIA 2012, MAJOR TRENDS, <http://stateofthemedias.org/2012/overview-4/major-trends/>.

<sup>5</sup> *See, e.g.*, Comments of the Newspaper Association of America, *2010 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182 (Mar. 5, 2012); Comments of A.H. Belo Corporation, *2010 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182 (Mar. 5, 2012); Joint Comments of Bonneville International Corporation and the Scranton Times, L.P., *2010 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182 (Mar. 5, 2012); Comments of Cox Media Group, *2010 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182 (Mar. 5, 2012); Comments of Tribune Company, Debtor-in-Possession, *2010 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182 (Mar. 5, 2012).

<sup>6</sup> *Statement from FCC Chairman Julius Genachowski on the Status of the Media Ownership Proceeding*, News Release (Feb. 26, 2013), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2013/db0226/DOC-319131A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0226/DOC-319131A1.pdf).

<sup>7</sup> *See* Comments of AT&T, *In the Matter of Connect America Fund*, WC Docket No. 10-90 (Feb. 24, 2012).

market evolutions. At a minimum, we could learn a great deal from sensibly structured test bed programs.

### **PROTECTING INTERNET FREEDOM**

Ladies and gentlemen, we are losing the fight for Internet freedom. Any doubts about this proposition should now be dispelled. The Internet is no longer at a crossroads – with freedom and prosperity down one avenue, and command and control government domination down the other. The course of the Internet’s fate was dramatically altered for the worse during a treaty negotiation in Dubai last December. As a result, this freedom-enhancing and borderless network of networks – the greatest deregulatory success story of all time – is quickly being absorbed into an intergovernmental structure that uses centralized, top-down choke points. Unless defenders of Internet freedom and prosperity act quickly, boldly and imaginatively, this tragic trajectory will become irreversible.

My testimony on this important matter can be summed up in four main points:

- 1) Last year’s World Conference on International Telecommunications (“WCIT”) dramatically ended the era of international consensus to keep intergovernmental hands off of the Internet;
- 2) Defenders of Internet freedom must act *quickly* to turn the threat of increased intergovernmental control of the Internet into an opportunity to reverse course through liberalization of markets that will spark competition, investment and innovation;
- 3) We must offer other nations, especially those in the developing world that feel disenfranchised from Internet governance processes, an alternative to international regulation by improving and enhancing multi-stakeholder entities, such as the Internet Governance Forum (“IGF”); and
- 4) Congress can and should continue to play a constructive role by amplifying the call for more Internet freedom.

#### **I. Last year’s WCIT dramatically ended the era of international consensus to keep intergovernmental hands off of the Internet.**

Since becoming commercialized in the mid 1990s, the Internet migrated further away from governmental control. As a result of deregulation, the number of people using the Net world-wide grew from a mere 16 million in 1995 to over 2.4 billion today.<sup>8</sup> Net access, especially through increasingly powerful and affordable mobile devices, is improving the human condition more quickly and fundamentally than any other technology in history. Nowhere is this phenomenon more apparent than in the developing world where unfettered Internet technologies

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<sup>8</sup> Internet Growth Statistics, INTERNET WORLD STATS, <http://www.internetworldstats.com/emarketing.htm> (last visited March 7, 2013).

are expanding economies and raising living standards. These innovations also empower individuals with information that they have never had before, thus threatening authoritarian regimes that rule closed societies. As a result, these regimes, and their client states, have been pushing for more international Internet regulation in lieu of the non-governmental “multi-stakeholder” model for Internet governance. At a minimum, a new international regulatory overlay provides authoritarian governments political “cover” and international legal “legitimacy” for restricting Internet communications in their own countries.

For many years, the global consensus regarding Internet policy centered on market opening liberalization and competition. Internet governance was left to non-governmental private sector groups that not only have a perfect track record of keeping the Internet open and working, but helping it thrive as well. This hands-off approach is what has produced tremendous investment and innovation that has made the Internet ecosystem flourish.

Starting a few years ago, however, countries such as Russia, China, Saudi Arabia and others diligently and patiently worked to change that structure incrementally. Among their many proposals were draft rules that would have the force and effect of international law calling for:

- Changing basic definitions contained in treaty text so the International Telecommunication Union (“ITU”) would have unrestricted jurisdiction over the Internet;<sup>9</sup>
- Allowing foreign phone companies to charge global content and application providers internationally mandated fees (ultimately to be paid by all Internet consumers) with the goal of generating revenue for foreign government treasuries;<sup>10</sup>

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<sup>9</sup> See, e.g., *Arab States Common Proposals for the Work of the Conference*, Algeria (People’s Democratic Republic of), Bahrain (Kingdom of), Comoros (Union of the), Djibouti (Republic of), Egypt (Arab Republic of), Iraq (Republic of), Jordan (Hashemite Kingdom of), Kuwait (State of), Lebanon, Libya, Mauritania (Islamic Republic of), Morocco (Kingdom of), Oman (Sultanate of), Qatar (State of), Saudi Arabia (Kingdom of), Somali (Democratic Republic of), Sudan (Republic of the), Tunisia, United Arab Emirates and Yemen (Republic of), Contribution 7, at Art. 2 (Oct. 24, 2012), <http://www.itu.int/md/S12-WCIT12-C-0007/en> (“*Arab States Contribution 7*”); *African Common Proposals for the Work of the Conference*, African Telecommunication Union Administrations, Contribution 19, at Art. 2 (Nov. 2, 2012), <http://www.itu.int/md/S12-WCIT12-C-0019/en> (“*Africa Contribution 19*”); *Proposals for the Work of the Conference*, India (Republic of), Contribution 21, at Art. 2 (Nov. 3, 2012), <http://www.itu.int/md/S12-WCIT12-C-0021/en> (“*India Contribution 21*”); *Proposals for the Work of the Conference*, Russian Federation, Contribution 27, at Art. 2 (Nov. 17, 2012), <http://www.itu.int/md/S12-WCIT12-C-0027/en> (“*Russia Contribution 27*”); *Proposals for the Work of the Conference*, Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan, Contribution 47, at Art. 2 (Dec. 11, 2012), <http://www.itu.int/md/S12-WCIT12-C-0047/en> (“*Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan Contribution 47*”).

<sup>10</sup> See, e.g., *Arab States Contribution 7* at Arts. 6.0.5, 6.0.6; *Africa Contribution 19* at Arts. 6.0.1-6.0.6; *Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan Contribution 47* at Arts. 6.0.3, 6.0.4; *Revisions of the International Telecommunications Regulations – Proposals for High Level Principles to be Introduced in the ITRs*, ETNO, CWG-WCIT12 Contribution 109, at 2 (June 7, 2012), <http://www.itu.int/md/T09-CWG.WCIT12-C-0109/en>.

- Subjecting cyber security and data privacy to international control, including the creation of an international “registry” of Internet addresses that could track every Internet-connected device in the world;<sup>11</sup>
- Imposing unprecedented economic regulations of rates, terms and conditions for currently unregulated Internet traffic swapping agreements known as “peering;”<sup>12</sup>
- Establishing ITU dominion over important non-profit, private sector, multi-stakeholder functions, such as administering domain names like the .org and .com Web addresses of the world;<sup>13</sup>
- Subsuming into the ITU the functions of multi-stakeholder Internet engineering groups that set technical standards to allow the Net to work;<sup>14</sup>
- Centralizing under international regulation Internet content under the guise of controlling “congestion,” or other false pretexts; and many more.<sup>15</sup>

In fact, then-Russian Prime Minister Vladimir Putin plainly stated in 2011 that it was his goal, and that of his allies, to establish “international control over the Internet” through the ITU.<sup>16</sup> Last December in Dubai, they succeeded in establishing an insidious foothold in their

<sup>11</sup> See, e.g., Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan, and Uzbekistan to the United Nations addressed to the Secretary-General, Item 93 of the provisional agenda - Developments in the field of information and telecommunications in the context of international security, 66th Session of the United Nations General Assembly, Annex (Sep. 14, 2011), [http://www.cs.brown.edu/courses/csci1800/sources/2012\\_UN\\_Russia\\_and\\_China\\_Code\\_o\\_Conduct.pdf](http://www.cs.brown.edu/courses/csci1800/sources/2012_UN_Russia_and_China_Code_o_Conduct.pdf) (last visited March 8, 2013); *Arab States Contribution 7* at Art. 5A; *Proposals for the Work of the Conference*, Cameroon (Republic of), Contribution 15, at Art. 5A (Oct. 2, 2012), <http://www.itu.int/md/S12-WCIT12-C-0015/en> (“*Cameroon Contribution 15*”); *Africa Contribution 19* at Art. 5A; *India Contribution 21* at Art. 5A; *Common Proposals for the Work of the Conference*, ITU Member States, Members of the Regional Commonwealth in the Field of Communications (RCC), Contribution 14, at Art. 5A (Oct. 1, 2012), <http://www.itu.int/md/S12-WCIT12-C-0014/en> (“*RCC Contribution 14*”); *Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan Contribution 47* at Art. 3C.

<sup>12</sup> See, e.g., *Arab States Contribution 7* at Art. 6.0.4; *India Contribution 21* at Art. 6.0.4; Internet Society Background Paper, *International Telecommunications Regulations*, available at <http://www.internetsociety.org/sites/default/files/Internet%20Society%20Background%20Paper-%20International%20Telecommunication%20Regulations%281%29.pdf> (last visited March 8, 2013).

<sup>13</sup> See, e.g., *Arab States Contribution 7* at Art. 3.5; *Russia Contribution 27* at Art. 3A.2; *Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan Contribution 47* at Art. 3B.

<sup>14</sup> See, e.g., *Africa Contribution 19* at Art. 3.4A; *Russia Contribution 27* at Art. 3A; *Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan Contribution 47* at Arts. 1.6, 3.1, 4.2, 4.3.

<sup>15</sup> See, e.g., *Arab States Contribution 7* at Art. 5A; *Africa Contribution 19* at Art. 5B. Some member states also called for requiring network operators to disclose to the government identification information about every communication carried over their networks or to give the governments control of the routing of those communications. *Arab States Contribution 7* at Arts. 3.3, 3.6; *Africa Contribution 19* at Arts. 3.3, 3.4B; *RCC Contribution 14* at Art. 3.3; *Algeria, Saudi Arabia, Bahrain, China, United Arab Emirates, Russian Federation, Iraq, Sudan Contribution 47* at Arts. 3.3, 3B.3; *Cameroon Contribution 15* at Art. 3.6.

<sup>16</sup> *Prime Minister Vladimir Putin meets with Secretary General of the International Telecommunication Union Hamadou Touré*, GOV’T OF THE RUSSIAN FED’N, <http://government.ru/eng/docs/15601/print/> (last visited March 8, 2013) (“The International Telecommunication Union is one of the oldest international organisations; it’s twice as old as the United Nations. Russia was one of its co-founders and intends to be an active member. We are thankful to you for the ideas that you have proposed for discussion. One of them is establishing international control over the

patient and incremental quest to "control" the operations, content and economics of the Net. In short, Mr. Putin largely achieved the first stage of his goal. We allowed this to happen even though we were explicitly forewarned.

Hindsight allows us to see with great clarity that not only were defenders of Internet freedom too slow to take these efforts seriously, but they all too easily fell victim to a disciplined campaign of deception. For instance, before the WCIT, ITU leadership made three key promises:

- 1) No votes would be taken at the WCIT;
- 2) A new treaty would be adopted only through "unanimous consensus;" and
- 3) Any new treaty would not touch the Internet.<sup>17</sup>

All three promises were promptly broken<sup>18</sup> in Dubai in the name of making the Internet more "democratic" through near-perfect Orwellian cynicism. ITU leadership and pro-regulation member states succeeded in co-opting arguments for preserving a freedom-enhancing, flat and

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Internet using the monitoring and supervisory capabilities of the International Telecommunication Union (ITU). If we are going to talk about the democratisation of international relations, I think a critical sphere is information exchange and global control over such exchange. This is certainly a priority on the international agenda.").

<sup>17</sup> *WCIT-12: Clarification Needed During Open Letter Session*, ITUBLOG (Nov. 15, 2012), <http://itu4u.wordpress.com/2012/11/15/wcit-12-clarification-needed-during-open-letter-session/> (last visited March 8, 2013) ("Internet Control is simply not in the ITU mandate and ITU will continue to fully support the multistakeholder approach which it initiated some ten years ago for the World Summit of the Information Society."); Hamadoun I. Touré, *U.N. We Seek to Bring Internet to All*, WIRED.COM (Nov. 7, 2012), <http://www.wired.com/opinion/2012/11/head-of-itu-un-should-internet-regulation-effort/> (last visited March 8, 2013) (stating "[n]o proposal will be accepted if it is not agreed upon by all participants through consensus."); Hamadoun I. Touré, *Global Media Briefing on WCIT*, ITU (June 22, 2012), <http://www.itu.int/en/osg/speeches/Pages/2012-06-22.aspx> (last visited March 8, 2013) ("We all know that, in the true tradition of the ITU, we will not vote on any issues— just like in January, at the World Radiocommunication Conference, where in four weeks we did not vote once, but came to consensus on every issue."); Speech by ITU Secretary-General Touré, *The Challenges of Extending the Benefits of Mobile*, ITU (May 1, 2012), <http://www.itu.int/en/osg/speeches/Pages/2012-05-01.aspx> (last visited March 8, 2013) ("You will, I am sure, have seen and read various media articles talking about the UN or the ITU trying to take over the Internet. Let me say quite plainly and clearly: This is simply ridiculous."); David McAuley, *WCIT 'Internet Governance' Hype Distracts Attention From Serious Issues, ITU Head Says*, BLOOMBERG, Sept. 11, 2012, <http://www.bna.com/itus-toure-wcit-b17179869586/> (last visited March 8, 2013) (quoting ITU Secretary-General Touré that WCIT "has nothing to do with [Internet] Governance.").

<sup>18</sup> Remarks by Assistant Secretary Strickling at the PLI/FCBA Telecommunications Policy & Regulation Institute (Dec. 14, 2012), [http://www.ntia.doc.gov/Remarks\\_by\\_Assistant\\_Secretary\\_Strickling\\_at\\_PLI/FCBA](http://www.ntia.doc.gov/Remarks_by_Assistant_Secretary_Strickling_at_PLI/FCBA) (last visited March 8, 2013) ("The International Telecommunication Union had made two important promises in advance of the conference. First, that it would operate by consensus and second, that Internet issues would not be appropriate for inclusion in the ITRs. As it turned out, the ITU could not deliver on either of these promises. When around 40 percent of the participating countries do not sign the final documents of the conference, it is obvious that the ITU did not achieve the consensus it had promised.").

multi-stakeholder driven Internet governance structure while turning the logic of these arguments on its head to justify their egregious power grab.<sup>19</sup>

At the end of the negotiation, 89 countries had signed on to the new treaty language, 55 did not sign and 49 did not attend the WCIT. The “vote count” did not end last December, however. Member states have until 2015 to sign the treaty and many more are expected to do so. Among those at risk of signing are otherwise close allies, such as many European nations. If we do not act quickly, the number of signatories to the treaty will increase rapidly.

In short, the U.S. experienced a rude awakening regarding the stark reality of the situation: when push comes to shove, even countries that purport to cherish Internet freedom are willing to succumb to the clever and deceptive tactics of regulatory incrementalists. Our experience in Dubai is a chilling foreshadow of how international Internet regulation could grow insidiously and at an accelerating pace.

Specifically, the explicit terms of the new treaty language give the ITU policing powers over “SPAM,” and attempt to legitimize under international law foreign government inspections of the content of Internet communications to assess whether they should be censored by governments under flagrantly transparent pretexts such as “network congestion.”<sup>20</sup> The bottom line, however, is that the ITU has now claimed jurisdiction over the Internet’s operations and content.

More fundamentally, pro-regulation forces succeeded in upending decades of consensus that maintained that Internet service providers, as well as Internet content and application providers, should be insulated from intergovernmental control. They accomplished this feat with simple changes in the definitions of crucial treaty terms.<sup>21</sup> Their audacity doesn’t stop there,

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<sup>19</sup> Notably, at the end of the WCIT, a “resolution to foster the greater growth of the Internet” was adopted “resolving to instruct the Secretary-General to continue to take necessary steps for ITU to play an active and constructive role” in Internet governance. This will serve to broaden the scope of the ITU’s rules to include the Internet, undermining the highly successful, multi-stakeholder model of Internet governance, therefore stunting its growth, not fostering it.

<sup>20</sup> INTERNATIONAL TELECOMMUNICATION UNION, FINAL ACTS: WORLD CONFERENCE ON INTERNATIONAL TELECOMMUNICATIONS, at Art.5B (Dubai 2012) (“FINAL ACTS”). The new ITRs provide signing nations with a greater ability to regulate the blocking of “SPAM,” opening the door to the regulation of content on the Internet, including possible blockage of political dissent or other forms of protected speech under the First Amendment of the U.S. Constitution. *See id.*

<sup>21</sup> FINAL ACTS at Art.1 abis). For example, an early disagreement at the WCIT over the reach of the international treaty’s application resulted in a vague, undefined new term that could have far-reaching consequences. Prior to the WCIT, the ITRs applied only to “Recognized Operating Agencies” (ROAs), or telecommunications operators in each country. During the WCIT, some countries sought to change the term to “Operating Agencies,” expanding the ITRs applicability. This debate was resolved by the adoption of “Authorized Operating Agencies” (AOA), undefined in the ITU Constitution. At present there is no definitive interpretation of which entities this provision applies to, likely precipitating disputes between member states regarding which entities specifically qualify as AOAs. Most assuredly, however, given current trends, key member states will push aggressively for definitions that are as expansive as possible.

however. Many countries, in addition to the ITU itself,<sup>22</sup> brazenly argued that the *old* treaty text from 1988 gave the ITU broad jurisdiction over the Internet.<sup>23</sup>

If these aggressive regulatory expansionists are willing to conjure ITU authority where clearly none existed before, their imaginations will see no limits to the ITU's authority over the Internet's affairs under the new treaty language. Their appetite for multilateral regulatory expansionism is insatiable as they envision the omniscience of intergovernmental regulators able to replace the billions of daily decisions that allow the Internet to blossom and transform the human condition.

At the same time, worldwide consumer demand is driving technological convergence. As a result, companies such as Verizon, Google, AT&T, Amazon, Microsoft, Netflix, and many more lesser-known enterprises in the U.S. and in other countries, are building across borders thousands of miles of fiber optics to connect sophisticated servers and routers that bring voice, video and data services more quickly to consumers tucked into every corner of the globe. From an engineering perspective, the technical architecture and service offerings of these companies look the same. Despite this wonderful convergence, an international movement is growing to foist 19th Century regulations designed for railroads, telegraphs and analog voice phone monopolies onto new market players that are fundamentally different from the monoliths of yore.

To be blunt, these dynamic new wonders of the early 21st Century are perilously close to being smothered by innovation-crushing old rules designed for far different technologies which operated in a much less competitive market long ago. The practical effect of expanded rules would be to politicize engineering and business decisions inside sclerotic intergovernmental bureaucracies. As a technical matter, a centralized, top-down "management" model for the Internet defies its flat and democratic architecture and would cause a global engineering

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<sup>22</sup> The ITU can serve as a useful and constructive forum for the resolution of many important international communications policy matters, such as harmonization of spectrum and the allocation of satellite orbital slots. In contexts such as these, reaching international consensus through the ITU can produce positive outcomes. The danger, however, lies with unwarranted ITU "mission creep" into new spheres, such as the complex ecosystems of the Internet. Replicating the ITU's antiquated telecommunications regulations for modern digital communications technologies and services that do not operate like, or in any way resemble, traditional telecom services would be highly counterproductive. Although maintaining strong U.S. involvement in the pre-WCIT-12 ITU mission is vital, on a going forward basis, we should reassess America's support for new ITU actions we find harmful to freedom, prosperity, our national interest, and the well-being of all nations, but especially the developing world.

<sup>23</sup> Speech by ITU Secretary-General Touré, *WCIT-12 – Myths and Reality* (Sept. 24, 2012), <http://www.itu.int/en/osg/speeches/Pages/2012-09-24.aspx> (stating that "ITU's day-to-day activities [] are already fundamental to promoting Internet growth."); *WCIT-12 Myth Busting Presentation*, ITU, Slides 24, 25, <http://www.itu.int/en/wcit-12/Pages/WCIT-backgroundbriefs.aspx> (last visited March 8, 2013) (stating that "[m]any consider that [the ITU definition of telecommunications] includes communications via the Internet, which runs on telecom infrastructure" and that it is an incorrect "myth" that the "ITU's scope does not include the Internet" and that "WCIT is about the ITU or the UN extending their mandate so as to control the Internet.").

nightmare. For example, how would a partitioned Internet work? How would entrepreneurs be able to build and operate new cross-border technologies such as cloud computing?

More importantly, the effect of a stunted Internet ecosystem impaired by a new international regulatory overlay could be devastating to efforts to improve the human condition across the globe. If these trends continue, Internet growth would be most severely impaired in the developing world where Web-connected mobile devices and their applications enable worried parents to locate medicine for their sick children, villagers to find drinkable water and farmers to learn prevailing market prices for their crops.<sup>24</sup> Even in the U.S., brilliant and daring technologists who are working to transform the world could be forced to seek bureaucratic permission to innovate and invest. At a minimum, this scenario would create tremendous uncertainty while driving up costs ultimately borne by all Net consumers.<sup>25</sup>

In sum, the dramatic encroachments on Internet freedom secured in Dubai will serve as a stepping stone to more intergovernmental regulation of the Internet in the very near future. The end result will be devastating to global prosperity and freedom.

## **II. Defenders of Internet freedom must act *quickly* to turn the threat of increased intergovernmental control of the Internet into an opportunity to reverse course through liberalization of markets that will spark competition, investment and innovation.**

We must act quickly. While we debate what to do next, Internet freedom's foes around the globe are working hard to exploit a treaty negotiation that is far larger in significance than the WCIT. In 2014, the ITU will convene in Busan, Korea and conduct what is literally a

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<sup>24</sup> See, e.g., Ken Banks, *In African Agriculture, Information is Power*, Nat'l Geographic (Sept. 5, 2011), <http://newswatch.nationalgeographic.com/2011/09/05/in-african-agriculture-information-is-power/>.

<sup>25</sup> A recent news article summed up the chaotic effects of a partitioned Internet. Note the Russian official's call for the U.S. to agree to international regulation of the Net to avoid fragmentation – a clever and cynical maneuver to turn arguments against Net regulation on their head.

The U.N. has no power to force the United States to adopt any Internet regulation, and the U.S. refused to sign the December treaty, along with 55 other countries. But if a large number of countries agree on regulations, the Internet could become fragmented, with very different rules applying in different regions of the world. "That becomes an engineering nightmare," McDowell said. Russia has pushed hardest for international Internet regulation. "In the future we could come to a fragmented Internet," warned Andrey Mukhanov, one of Russia's representatives to the U.N. conference, as the U.S. and many European countries declined to sign the treaty in December. "[Fragmenting] would be negative for all, and I hope our American and European colleagues come to a constructive position." But by a "constructive position," Mukhanov means one with international web regulation.... Technology groups and companies like Google say that the regulations, while they often seem nice on the surface, give government the power to censor content.

Maxim Lott, *Internet Still Under Attack by UN, FCC Commissioner Says*, FOXNEWS.COM (Feb. 13, 2013).

constitutional convention, called a “plenipotentiary” meeting, which will define the ITU’s mission for years to come. Member states will rewrite the ITU constitution and elect a new Secretary General. This scenario poses both a threat and an opportunity for Internet freedom. The threat is obvious: more international Internet regulation. We have an opportunity, however, to change the debate by finding arguments that are more compelling to the developing world. We can start by reminding member states of the incredible benefits brought forth by policies that promote open markets through liberalization and competition. These are the paths that have proven to lead to investment, innovation, universal connectivity and global prosperity.

We can start by working to find new allies at the upcoming World Telecommunications Policy/ICT Forum (“WTPF”), which convenes in Geneva this May. This conference will focus squarely on Internet governance and will shape the 2014 Plenipotentiary. Accordingly, the highest levels of the U.S. Government must make this cause a top priority and recruit allies in civil society, the private sector and diplomatic circles around the world.<sup>26</sup>

Internet freedom’s allies simply cannot dither again. If we do, we will fail, and global freedom and prosperity will suffer.

**III. We must offer other nations, especially those in the developing world that feel disenfranchised from Internet governance processes, an alternative to international regulation by improving and enhancing multi-stakeholder entities, such as the Internet Governance Forum.**

Merely saying “no” to any changes to the multi-stakeholder model has proven to be a losing proposition, as the outcome of the WCIT clearly illustrates. The Plenipotentiary meeting in 2014, and the WTPF this coming May in Geneva, provide us with opportunities to amend and enhance the current multi-stakeholder structure to include more meaningful participation by developing world nations. Due to limited time and resources, many smaller countries simply cannot attend the myriad Internet governance meetings that are held around the globe each year. As a result, a disproportionate amount of aspiring nations feel left out of the decision making. Such perceived disenfranchisement has fueled the drive to expand the legal authority of the ITU. We should work to change this disparity as soon as possible.

The best avenue to amplify the voice of the developing world would be through strengthening participation in the IGF. The IGF was chartered in 2005 in Tunis at the U.N.’s World Summit on the Information Society. It first met in Athens in 2006. The IGF includes among its participants civil society, the private sector, non-profits, governments and the ITU itself. Its structure is classically multi-stakeholder in nature: it operates by consensus and no

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<sup>26</sup> The effort should start with the President immediately making appointments to fill crucial vacancies in our diplomatic ranks. The recent departures of my distinguished friend, Ambassador Phil Verveer, his legendary deputy Dick Beaird, as well as WCIT Ambassador Terry Kramer, have left a hole in the United States’ ability to advocate for a constructive – rather than destructive – Plenipot.

government or other entity controls it. The IGF is a forum for decision making, but is not the decision maker. In other words, it is a “wiki” environment that operates in a flat, democratic and bottom-up manner where the smallest of players can become empowered, much like the Internet itself.

The international community, including the private sector, civil society, non-profits and governments alike, should strive to find ways to increase meaningful participation in the IGF by all interested stakeholders. As with many organizations, achieving this goal may be a matter of raising adequate funds. We should not allow this challenge to act as an obstacle, however. If we do not give developing nations a meaningful good faith role in shaping the evolution of the Internet through a non-governmental multi-stakeholder entity, they will continue to vote in great numbers to radically expand the ITU’s reach. Ironically, it is the developing world that stands to gain the most from an unfettered Internet, and they will lose the most under centralized, top-down control of the Internet’s operations, content and economics.

#### **IV. Congress can and should continue to play a constructive role by amplifying the call for more Internet freedom.**

As we make communications policy here in the United States, we tend to forget that nearly every government and communications provider on the globe studies what we do. Without a doubt, this hearing is streaming live in some countries and is being blocked by government censors in others. Every detail of our actions is scrutinized while influencing nations everywhere.

Furthermore, when Congress speaks, especially when it speaks with *one* loud and clear voice as it did last year with the unanimous, bipartisan and bicameral resolutions concerning Internet freedom, policymakers across the globe pause to think. Repeatedly, I have been told by international officials that, despite the negative outcome of the WCIT, last year’s resolutions had a positive effect.<sup>27</sup>

This year, Congress can help by speaking loudly and clearly to support policies that promote Internet freedom and global prosperity as we head toward the ITU’s plenipotentiary meeting in 2014.

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<sup>27</sup> Many other proposals that would threaten the Internet were defeated at the WCIT, such as “sender party pays,” which would have required Web content providers to pay Internet service providers (ISPs) in other countries for the traffic sent over those networks. See also David Gross, *Walking the Talk: The Role of U.S. Leadership in the Wake of WCIT*, BLOOMBERG, Jan. 17, 2013, <http://www.wileyrein.com/resources/documents/Gross--BNA--1.17.13.pdf> (last visited March 8, 2013) (explaining that Congress’s clear message was heard at WCIT, “This action was important not only because of the substance of Congress’s statements, but also because the world understood just how extraordinary it is for our Congress to act with unanimity, especially in an era when Congress has immense difficulty reaching consensus on almost anything. At the end of WCIT, I heard from many foreign officials that they knew that the United States would not sign the revised treaty with its Internet-related provisions because Congress had sent a clear and unequivocal message that such an agreement was unacceptable to the American people.”).

## CONCLUSION

I ask each of you today to take bold and decisive action *now*. As we dine on our Thanksgiving dinners in 2014, let us not look back at today and lament how we did not do enough. We have but one chance. Let us be resolute and tell the world that all nations will benefit if we stand strong together for Internet freedom.

Thank you for having me before you today. I look forward to your questions.