STATEMENT
OF
COMMISSIONER ROBERT M. MCDOWELL
FEDERAL COMMUNICATIONS COMMISSION

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Thank you, Chairwoman Emerson, Ranking Member Serrano, and Members of the Subcommittee for inviting me to join you today. This is the first opportunity I have had to testify before your Subcommittee, and I am honored to be here. I have served as an FCC commissioner for nearly six years, and every day has been a privilege.

The Federal Communications Commission (FCC) was created by Congress in 1934, and today its influence reaches far beyond the radios, telephones and telegraphs of the 1930's. By some estimates, the FCC holds sway over one-sixth of the American economy – or a slice of the economic pie that is the same size as the health care sector. Our actions touch the daily lives of all Americans. During my time at the FCC, I have advocated for market-based solutions to public policy challenges, or toward the lightest regulatory touch possible and only when absolutely necessary.

It is also important to note that while all of the Commissioners ultimately vote on a budget proposed by the Chairman for delivery to Office of Management and Budget, I have never been involved in the development of the agency's budget request. With that context in mind, I am happy to provide insight in response to any questions you may have.

The FCC is always a busy place and this year is no different. Among the many important issues we are examining are: review of our media ownership rules, implementing a new statute governing low-power FM radio and FM translators, review of program access exclusivity agreements in the pay TV market, and review of the sports blackout rule, among many others.

Today, however, I would like to focus on three additional policy initiatives currently before the Commission: implementing the new spectrum incentive auction law, adopting universal service contribution reform, and examining the complexities, legalities and burdens of proposed rules governing the maintenance of online political advertising files by television broadcasters. Lastly, I'd like to address the spectre of possible regulation of Internet governance by the International Telecommunication Union (ITU). Each of these matters involves expending Commission resources and, therefore, taxpayer dollars.

SPECTRUM POLICY

As Americans have become accustomed to using sophisticated mobile devices in their everyday lives, increased wireless activity has put new demands on our overall spectrum availability. Recognizing the need for spectrum to flow toward its highest and best use, a month ago, Congress passed legislation[1] that some estimate could place up to an additional 80 megahertz of prime television broadcast spectrum into American consumers' hands. Congratulations on that bipartisan achievement. As a result of this law, the FCC will conduct the most complicated spectrum auction, or auctions, in history.

[1] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402-6404, 126 Stat. 156 (2012). The Senate and House of Representatives voted on the conference report accompanying H.R 3630 on February 17, 2012. H.R. REP. NO. 112-399, at 69-76 (2012) (Conf. Rep.).

Meanwhile, a debate continues over whether or how the FCC should shape the outcome of this process. History has proven that regulators' attempts to over-engineer spectrum auctions often result in harmful, unintended consequences. Thus, I hope all of us can apply the lessons learned from the Commission's past missteps as we implement this new legislation.

I am committed to working with my colleagues to ensure that our auction rules are minimal and "future proof," allowing for flexible uses in the years to come as technology and markets change. Furthermore, I am optimistic that we can create band plans that offer opportunities for small, medium and large companies to bid for and secure licenses without having to exclude *any* player from the auctions.

I am confident that the FCC can get it right this time. And "getting it right" means avoiding regulatory hubris by keeping the government's hands off of the marketplace's steering wheel as much as possible.

UNIVERSAL SERVICE REFORM

Last fall, the Commission accomplished the complicated task of modernizing the high cost portion of the Universal Service Fund (USF). Historically, the high cost fund only supported traditional telecommunications services and did not directly support the deployment of broadband. Also, the program has grown tremendously over the years without promoting efficiency. For example, the high cost fund subsidized multiple providers in the same area while other parts of our nation still remained unserved. Furthermore, the old structure allowed providers to receive subsidies to serve areas that were already served by unsubsidized competitors. In part, due to these and other inefficiencies, the high cost fund grew from $1.69 billion in 1998 to over $4 billion by the end of last year.[2]

The FCC's reform efforts last fall addressed these issues, among many others, and transformed the high cost fund into one that will support next-generation communications technologies, while also keeping a lid on spending. Chairman Genachowski and Commissioners Copps (since retired) and Clyburn should be commended for this accomplishment.

Although reform of the high cost fund was a monumental achievement, I noted at the time that making changes to that program was merely a *first step* because the Commission only addressed the distribution, or spending, side of the USF equation. Equally important is the need to fix the contribution methodology, or the "taxing" side of the ledger. In other words, how we are going to pay for all of this?

[2] Similarly, the aggregate amount spent on all USF programs grew from $3.66 billion in 1998 to over $8 billion through 2011. Sources: Federal Communications Commission and Universal Service Administrative Company.

To put this issue in perspective, the universal service contribution factor, a type of tax paid by telephone consumers, has risen each year from approximately 5.5 percent in 1998 to almost 18 percent in the first quarter of this year.[3] This trend is unacceptable because it is unsustainable. We need to abate this automatic tax increase, and find a way to decrease and control the contribution factor.

In a perfect world, the Commission would have conducted *comprehensive* reform by addressing both the spending and taxing sides at the same time. While the FCC did not include contribution reform in its landmark order last fall, I have urged the Chairman to initiate, and conclude, contribution reform as early this year as possible.

REQUIREMENTS ON TELEVISION BROADCASTERS – POLITICAL FILES

Within the next few months, the Commission may vote on a proposal to place the political advertisement portion of television broadcasters' public inspection files on a government-hosted website. Transparency is a laudable public policy goal, especially in the context of political spending. Furthermore, providing broadcasters with more cost-effective means to comply with FCC rules is also a noble endeavor. Congress should be aware, however, that this particular issue brings with it many factual, legal and pragmatic complexities that are not obvious at first glance.

By way of background, Commission rules require the public inspection file to contain a series of documents, including information regarding broadcasters' programming of local interest, hiring practices, correspondence from the public and the political file. Since 1965, broadcasters have kept these paper files at the relevant station under the mandate that they be available for inspection by any member of the public upon reasonable request. The contents of the public file generally speak to whether a broadcaster is serving its community of license properly. The Commission voted to require online posting of most portions of broadcasters' general public inspection files in 2007, but exempted political files from the requirements because the burdens outweighed the benefits.[4]

The political file contains information for candidates seeking to purchase political ads and sheds light on the spending patterns of campaigns, political committees, third-party groups and such. Unlike other parts of the public inspection file, the contents of the political file do not speak to whether a broadcaster is serving its local community of license. The political file is a tool for examining transparency in campaign spending rather than broadcaster behavior. Although Section 315 of the Act has mandated that

[3] *See* Proposed First Quarter 2012 Universal Service Contribution Factor, CC Docket No. 96-45, *Public Notice*, 26 FCC Rcd 16814 (OMD 2011).

[4] Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, MM Docket Nos. 00-168, 00-44, *Report and Order*, 23 FCC Rcd 1274, 1322 (2008). The 2007 order never went into effect because of challenges before the Commission, the courts and the Office of Management and Budget where the information collection was questioned under the Paperwork Reduction Act.

broadcasters keep a political file since 2002, Congress should be aware that this requirement seems to be experiencing "mission creep" at the FCC.

In October 2011, the Commission proposed to reverse its 2007 position regarding political file mandates with little to no evidence that candidates, their representatives, or members of the local communities served by broadcasters have been unable to access the required information, let alone that the benefits would outweigh the costs.[5] In fact, the evidentiary record before the Commission illustrates that the proposed new rules could cost the TV broadcast industry $15 million in upfront expenses to scan existing paper files and upload them to a new government website while also forcing each station to incur upwards of $140,000 per year in recurring costs to maintain the information in real-time, or "immediately," as the FCC has proposed. The record also shows that these new federally-mandated costs on businesses would likely be offset by cuts to local programming and newsgathering. Not only would such a rule be especially onerous for smaller and independent broadcasters in these challenging economic times, but it could also undermine long-standing federal policy to promote local programming.

Furthermore, the proposed rules would require broadcasters to reveal proprietary and competitively sensitive advertising and rate information online. While the original goal of such disclosure may have been to create more transparency in the political spending process, the unintended consequence could be to encourage price signaling and other anti-competitive conduct by broadcasters that could produce harmful market distortions.

Before venturing further down this regulatory road, policy makers should be thoughtful and deliberative when examining the implications and nuances that could arise as a result of their potential actions. I still see many unanswered questions:

- If the public policy goal of new rules is to produce more transparency in campaign spending, is the FCC the best agency to achieve such ends?
- As a threshold matter, does the FCC possess the legal authority to require these political advertising disclosures be posted online?[6]
- Didn't Congress intend through the Bipartisan Campaign Reform Act of 2002 for the expert agency on campaign finance disclosure matters, the Federal Election Commission (FEC), to be in charge of implementing campaign finance disclosure requirements?
- If so, would FCC requirements that are duplicative to FEC rules violate the Paperwork Reduction Act?

[5] Even if such evidence exists, the Commission has enforcement mechanisms to handle matters of non-compliance.

[6] Broadcasters also have additional political disclosure requirements beyond what is in the Commission's political file rule. 47 C.F.R. § 73.1943. In 2002, the Bipartisan Campaign Reform Act of 2002 (BCRA) amended section 315 of the Communications Act to require disclosure of purchases of broadcast time on behalf of a candidate or that communicates a political message of national importance. Bipartisan Campaign Reform Act of 2002 § 504, 47 U.S.C. § 315(e) (2002). The text of BCRA was not incorporated into the Commission's rules through a rulemaking proceeding.

- In the wake of the Supreme Court's decision in the *Citizens United*[7] case, is it not the role of the legislative branch to debate and craft new laws in the campaign finance arena that would focus on the entities spending the money rather than having an agency, which has no expertise in campaign finance, regulate in this area?
- Where are the equities in singling out only television broadcasters for such disclosure requirements when political campaigns spend money on a plethora of outlets to contact and influence voters including, but certainly not limited to, advertising expenditures on: radio, newspapers, the Internet, direct mail, outdoor ads, cable television, satellite radio and TV, paid activists to knock on doors, and many, many more avenues for voter outreach?

Furthermore, the Supreme Court reiterated in its *Citizens United* decision that political speech is core protected speech under the First Amendment; therefore, as a threshold matter, the government's ability to regulate in this area is severely curtailed. As a consequence, administrative agencies and Congress alike should think carefully before imposing new laws and regulations that could be construed by the Court as *de facto*, or "backdoor," inhibitions on political speech.

I am hopeful that we as policy makers can comply with all relevant laws while finding the right balance between protecting core political speech and encouraging transparency without disproportionately burdening one of many outlets.

INTERNATIONAL REGULATION OF THE INTERNET

Finally, all of us should be concerned with a well-organized international effort to secure intergovernmental control of Internet governance. The Internet has historically flourished within a deregulatory regime not only within our country but internationally as well. In fact, the long-standing international consensus has been to keep governments from regulating core functions of the Internet's ecosystem.

Unfortunately, some nations, such as China, Russia, India, Iran and Saudi Arabia, have been pushing to reverse this consensus by giving the International Telecommunication Union (ITU) regulatory jurisdiction over Internet governance. The ITU is a treaty-based organization under the auspices of the United Nations.[8] As Russian Prime Minister Vladimir Putin said last June, the goal of this effort is to establish "international control over the Internet using the monitoring and supervisory capabilities of the [ITU]."[9]

[7] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (prohibiting the government from limiting communications spending for political purposes by corporations and unions).

[8] History, ITU, http://www.itu.int/en/about/Pages/history.aspx (last visited Dec. 7, 2011).

[9] Vladimir Putin, Prime Minister of the Russian Federation, Working Day, GOV'T OF THE RUSSIAN FED'N, http://premier.gov.ru/eng/events/news/15601/ (June 15, 2011) (last visited Dec. 7, 2011).

In 1988, delegates from 114 countries gathered in Australia to agree to a treaty that set the stage for dramatic liberalization of international telecommunications.[10] As a result, the Internet was insulated from government control and quickly became the greatest deregulatory success story of all time.

Today, however, several countries within the 193 member states of the ITU[11] want to renegotiate the 1988 treaty to expand its reach into previously unregulated areas. A few specifics are as follows:

- Subject cyber security and data privacy to international control;
- Allow foreign phone companies to charge fees for "international" Internet traffic, perhaps even on a "per-click" basis for certain Web destinations, with the goal of generating revenue for state-owned phone companies and government treasuries;
- Impose unprecedented economic regulations such as mandates for rates, terms and conditions for currently unregulated traffic-swapping agreements known as "peering;"
- Establish for the first time ITU dominion over important functions of multi-stakeholder Internet governance entities such as the Internet Corporation for Assigned Names and Numbers, the nonprofit entity that coordinates the .com and .org Web addresses of the world;
- Subsume under intergovernmental control many functions of the Internet Engineering Task Force, the Internet Society and other multi-stakeholder groups that establish the engineering and technical standards that allow the Internet to work; and
- Regulate international mobile roaming rates and practices.

These efforts could ultimately partition the Internet between countries that live under an intergovernmental regulatory regime and those member states that decide to opt out. Such a legal structure would be devastating to global free trade and rising living standards. It would also create an engineering morass.

These latest attempts to regulate Internet governance have rallied opposition on a bipartisan basis. Chairman Genachowski has also been working to raise awareness on this important issue.

For your convenience, I have attached a copy of a recent *Wall Street Journal* op-ed that I penned which provides more detail on the issue. (*See* Exhibit A).

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[10] *See* International Telecommunication Union, Final Acts of the World Administrative Telegraphy and Telephone Conference, Melbourne, 1988: International Telecommunication Regulations (Geneva 1989), *available at* http://www.itu.int/osg/csd/wtpf/wtpf2009/documents/ITU_ITRs_88.pdf (last visited Feb. 21, 2012).

[11] Overview, ITU, http://www.itu.int/en/about/Pages/overview.aspx (last visited Dec. 7, 2011).

CONCLUSION

In sum, while serving as a commissioner, my focus has been to support policies that promote consumer choice offered through abundance and competition rather than regulation and its unintended consequences, whenever possible. In the absence of market failure, unnecessary regulation in the name of serving the public interest can have the perverse effect of harming consumers by inhibiting the constructive risk-taking that produces investment, innovation, competition, lower prices and jobs. I will continue to examine the FCC's public policy challenges through this lens.

Thank you again for the opportunity to appear before you today. I look forward to your questions.

Exhibit A

Robert M. McDowell, *The UN Threat to Internet Freedom*, WALL ST. J., Feb. 21, 2012, at A19, *available at* http://online.wsj.com/article/SB10001424052970204792404577229074023195322.html.

The U.N. Threat to Internet Freedom
Wall Street Journal
February 21, 2012
By Robert M. McDowell

Top-down, international regulation is antithetical to the Net, which has flourished under its current governance model.

On Feb. 27, a diplomatic process will begin in Geneva that could result in a new treaty giving the United Nations unprecedented powers over the Internet. Dozens of countries, including Russia and China, are pushing hard to reach this goal by year's end. As Russian Prime Minister Vladimir Putin said last June, his goal and that of his allies is to establish "international control over the Internet" through the International Telecommunication Union (ITU), a treaty-based organization under U.N. auspices.

If successful, these new regulatory proposals would upend the Internet's flourishing regime, which has been in place since 1988. That year, delegates from 114 countries gathered in Australia to agree to a treaty that set the stage for dramatic liberalization of international telecommunications. This insulated the Internet from economic and technical regulation and quickly became the greatest deregulatory success story of all time.

Since the Net's inception, engineers, academics, user groups and others have convened in bottom-up nongovernmental organizations to keep it operating and thriving through what is known as a "multi-stakeholder" governance model. This consensus-driven private-sector approach has been the key to the Net's phenomenal success.

In 1995, shortly after it was privatized, only 16 million people used the Internet world-wide. By 2011, more than two billion were online—and that number is growing by as much as half a million every day. This explosive growth is the direct result of governments generally keeping their hands off the Internet sphere.

Net access, especially through mobile devices, is improving the human condition more quickly—and more fundamentally—than any other technology in history. Nowhere is this more true than in the developing world, where unfettered Internet technologies are expanding economies and raising living standards.

Farmers who live far from markets are now able to find buyers for their crops through their Internet-connected mobile devices without assuming the risks and expenses of traveling with their goods. Worried parents are able to go online to locate medicine for their sick children. And proponents of political freedom are better able to share information and organize support to break down the walls of tyranny.
The Internet has also been a net job creator. A recent McKinsey study found that for every job disrupted by Internet connectivity, 2.6 new jobs are created. It is no

coincidence that these wonderful developments blossomed as the Internet migrated further away from government control.

Today, however, Russia, China and their allies within the 193 member states of the ITU want to renegotiate the 1988 treaty to expand its reach into previously unregulated areas. Reading even a partial list of proposals that could be codified into international law next December at a conference in Dubai is chilling:

• Subject cyber security and data privacy to international control;

• Allow foreign phone companies to charge fees for "international" Internet traffic, perhaps even on a "per-click" basis for certain Web destinations, with the goal of generating revenue for state-owned phone companies and government treasuries;

• Impose unprecedented economic regulations such as mandates for rates, terms and conditions for currently unregulated traffic-swapping agreements known as "peering."

• Establish for the first time ITU dominion over important functions of multi-stakeholder Internet governance entities such as the Internet Corporation for Assigned Names and Numbers, the nonprofit entity that coordinates the .com and .org Web addresses of the world;

• Subsume under intergovernmental control many functions of the Internet Engineering Task Force, the Internet Society and other multi-stakeholder groups that establish the engineering and technical standards that allow the Internet to work;

• Regulate international mobile roaming rates and practices.

Many countries in the developing world, including India and Brazil, are particularly intrigued by these ideas. Even though Internet-based technologies are improving billions of lives everywhere, some governments feel excluded and want more control.

And let's face it, strong-arm regimes are threatened by popular outcries for political freedom that are empowered by unfettered Internet connectivity. They have formed impressive coalitions, and their efforts have progressed significantly.

Merely saying "no" to any changes to the current structure of Internet governance is likely to be a losing proposition. A more successful strategy would be for proponents of Internet freedom and prosperity within every nation to encourage a dialogue among all interested parties, including governments and the ITU, to broaden the multi-stakeholder umbrella with the goal of reaching consensus to address reasonable concerns. As part of this conversation, we should underscore the tremendous benefits that the Internet has yielded for the developing world through the multi-stakeholder model.

Upending this model with a new regulatory treaty is likely to partition the Internet as some countries would inevitably choose to opt out. A balkanized Internet would be

devastating to global free trade and national sovereignty. It would impair Internet growth most severely in the developing world but also globally as technologists are forced to seek bureaucratic permission to innovate and invest. This would also undermine the proliferation of new cross-border technologies, such as cloud computing.

A top-down, centralized, international regulatory overlay is antithetical to the architecture of the Net, which is a global network of networks without borders. No government, let alone an intergovernmental body, can make engineering and economic decisions in lightning-fast Internet time. Productivity, rising living standards and the spread of freedom everywhere, but especially in the developing world, would grind to a halt as engineering and business decisions become politically paralyzed within a global regulatory body.

Any attempts to expand intergovernmental powers over the Internet—no matter how incremental or seemingly innocuous—should be turned back. Modernization and reform can be constructive, but not if the end result is a new global bureaucracy that departs from the multi-stakeholder model. Enlightened nations should draw a line in the sand against new regulations while welcoming reform that could include a nonregulatory role for the ITU.

Pro-regulation forces are, thus far, much more energized and organized than those who favor the multi-stakeholder approach. Regulation proponents only need to secure a simple majority of the 193 member states to codify their radical and counterproductive agenda. Unlike the U.N. Security Council, no country can wield a veto in ITU proceedings. With this in mind, some estimate that approximately 90 countries could be supporting intergovernmental Net regulation—a mere seven short of a majority.

While precious time ticks away, the U.S. has not named a leader for the treaty negotiation. We must awake from our slumber and engage before it is too late. Not only do these developments have the potential to affect the daily lives of all Americans, they also threaten freedom and prosperity across the globe.

Mr. McDowell is a commissioner of the Federal Communications Commission.