STATEMENT
OF
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FEDERAL COMMUNICATIONS COMMISSION

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OVERSIGHT
OF THE
FEDERAL COMMUNICATIONS COMMISSION

Keeping the New Broadband Spectrum Law on Track

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Thank you Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee for inviting us to appear before you today. I share your goals of putting greater amounts of spectrum into the hands of America's mobile consumers and setting aside some of the auction proceeds for constructing a nationwide broadband public safety network. I am pleased to accept your invitation to discuss ideas on how to keep the new broadband spectrum law[1] on track.

As set forth below, I will discuss ideas on what the Commission should do to advance these goals, as well as avenues the Commission should avoid. The overarching goals of the law are to auction all reclaimed spectrum to offer consumers more opportunities to harness wireless broadband, while raising badly needed funds for the U.S. Treasury and attempt to fund a nationwide, interoperable, mobile broadband public safety network.

Specifically, the Commission must: (1) ensure that the rulemaking and auction processes are transparent and the final rules intuitive so that *all* stakeholders – no matter their technology preference or size – have a meaningful opportunity to understand and participate; (2) avoid imposing anything that functions as a spectrum cap; (3) refrain, for now, from reserving new airwaves to create a "nationwide unlicensed spectrum band" within the new 600 MHz Band; (4) pragmatically balance 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 (5) steer clear of encumbrances that scare away bidders and lead directly to unintended harmful consequences.

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[1] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402-6404, 126 Stat. 156, 224-230 (2012) (broadband spectrum law).

Next, I will highlight recent Commission actions on media ownership and special access. Finally, I will briefly discuss ideas regarding an overhaul of America's outdated communications laws and the peril of increasing attempts by a growing number of countries to establish international regulations over the Internet.

Implementing the Broadband Spectrum Law

Transparency and simplicity. As required by statute, the Commission launched a comprehensive notice of proposed rulemaking regarding incentive auctions in September.[2] Comments on the Incentive Auction Notice are due on January 25, 2013. At the outset, I acknowledge and thank Chairman Genachowski for his willingness to accommodate edits and suggestions to improve the document. We agree that working together is especially important given the unique characteristics and complexities of the project. We will have to cull through a plethora of proposals and new questions. At this early stage, some ideas appear to be better than others. Nonetheless, I'm pleased that we included questions designed to capture comments regarding *all* concepts and practicable ideas.

As we are discussing an open proceeding, I must reserve final judgment until at least the time that the comment period closes in the spring and more likely until final rules issue. That said, learning from my experience with the AWS-1 and 700 MHz auctions, the general thoughts that I have offered for some time now merit repeating today: Quite simply, the incentive auctions will be the most complex in world history and the entire process may take the greater part of a decade. I urge the Commission to work in a deliberate and transparent manner, with an eye toward simplicity, humility and

[2] *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, WT Docket No. 12-268, Notice of Proposed Rulemaking, 27 FCC Rcd 12357 (2012) (Incentive Auction Notice).

restraint. The agency's historic light touch regulatory policy for mobile technologies has enabled the U.S. wireless sector to flourish and *consistently* lead the world. I am hopeful that the Commission will not put America's positive momentum in the wireless area at risk as we explore the myriad options related to the incentive auctions.

History teaches us that past regulatory efforts to micromanage the wireless market, despite presumed good intentions, have resulted in harmful unintended consequences. Problems resulting from bad decisions *always* return to the Commission and ultimately harm consumers. Similarly, Members of Congress must spend valuable time dealing with such regulatory failures. As a result, uncertainty lingers over markets and inhibits investment while spectrum lies fallow. For these reasons and more, we must avoid the temptation to design rules that may be fashionable-at-the-moment, but fail to attract new entrants. When it comes to spectrum policy, simplicity works best.

Avoid imposing the functional equivalent of a spectrum cap. Auction rules should present realistic opportunities for small, medium and large entities – no matter their preferred technology – to bid for and secure licenses without excluding *any* interested participant. While the broadband spectrum law explicitly prevents the Commission from excluding entities that meet the prospective auction rules, as well as the long-standing technical, financial, character and citizenship requirements,[3] the law also clarifies that the Commission may adopt and enforce new rules concerning spectrum aggregation.[4] Consequently, some may be tempted to adopt the functional equivalent of a spectrum cap, which, assuredly, would be given a different name.

[3] *See* broadband spectrum law § 6404.

[4] *See id*.

Indeed, a proposal to cap spectrum holdings is discussed at length not only in the Incentive Auction Notice, but in a companion Spectrum Aggregation Notice[5] adopted on the same September day. I am concerned that reviving the concept of a spectrum cap under any moniker could create harmful uncertainty and may reduce the pool of auction participants. Until now, spectrum caps were a dead and buried 20th century industrial policy relic. Let's not exhume them.

By way of brief background, in 2001, the Commission adopted the current case-by-case analytical process after determining that spectrum aggregation limits were no longer necessary due to meaningful competition among providers of telecommunications services. Since that time, the Commission has analyzed commercial wireless spectrum holdings on the basis of the transaction as a whole, oftentimes in close consultation with the Department of Justice. The current approach was created to result in narrowly-tailored, transaction-specific spectrum remedies that safeguard against anticompetitive behavior, encourage increased investment, and spur the creation of innovative consumer offerings.

I voted to concur on the substance of the Spectrum Cap Notice because I cannot agree with the view that the Commission's current flexible approach, which examines spectrum holdings on a case-by-case basis and within the unique context of each auction or proposed transaction, is broken at its foundation. Further, I question whether the proposals discussed in the Spectrum Cap Notice are compatible with the goal of the broadband spectrum law: to make spectrum more abundant in the mobile marketplace by

[5] *See Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Notice of Proposed Rulemaking, 27 FCC Rcd 11710 (2012) (Spectrum Cap Notice).

allowing it to flow to its highest and best use as quickly as possible. As the new law makes clear, spectrum, which ultimately ends up in the hands of our nation's wireless broadband consumers, is *the* path to some of the best innovations that boost broadband adoption and economic growth. Adopting a one-size-fits-all cap, or some functional equivalent, will reduce auction proceeds, therefore undermining efforts to build the nationwide broadband public safety network mandated by Congress.

Refrain, for now, from reserving a new spectrum band for unlicensed use. I have long been an ardent supporter of unlicensed uses of the television white spaces.[6] That said, I respectfully disagree with calls to create within the new 600 MHz Band the world's first nationwide unlicensed spectrum band suitable for robust wireless broadband on contiguous low-band frequencies.[7] As a preliminary matter, any action in this regard would be premature. I wholeheartedly agree that unlicensed spectrum, no matter where it exists, plays a critical role in the context of mobile broadband services. Nonetheless, at this early stage in the incentive auction process, it is not apparent that we should stop the progress well underway in the TV white spaces arena to create a solution for a problem – an alleged shortage of unlicensed spectrum in lower spectrum bands – that may never exist. The timeline for identifying, auctioning and ultimately clearing additional licensed spectrum within this new band is unclear, let alone the timeline for setting aside and reserving a given amount of channels for unlicensed use. In any event, over-the-air

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[6] *See e.g., Unlicensed Operation in the TV Broadcast Bands, ET Docket No. 04-186, Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket No. 02-380, Second Memorandum Opinion and Order, 25 FCC Rcd 18661 (2010); *Unlicensed Operation in the TV Broadcast Bands, ET Docket No. 04-186, Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket No. 02-380, Second Report and Order and Memorandum Opinion and Order, 23 FCC Rcd 16807 (2008).

[7] *FCC Launches First-in-the-World Incentive Auction to Repurpose Broadcast Television Spectrum for Mobile Broadband; Auction Set to Unleash Wave of Economic & Innovation Opportunities for U.S.*, FCC News Release (rel. Sept. 28, 2012).

television broadcasting, and its associated white spaces, will still be with us in a post-incentive auction world giving consumers approximately the same amount of white spaces that were available prior to the passage of the incentive auction legislation.

More importantly, reserving a large unlicensed slice of spectrum would go directly against the Commission's goal in the TV white spaces effort – to maximize efficiency and gain consumer benefits from an undefined and under-used resource. Put another way, a contiguous swath of spectrum *would* be clearly defined, exclusive and easily transferable – everything the white spaces are not. Given today's unprecedented budget deficits and the consumer benefits of exclusive-use licenses, I question whether the U.S. can afford *not* to auction any and all spectrum recovered in this band. Would reserving a large swath of unlicensed spectrum frustrate Congress's express directive that the Commission attempt to raise at least $7 billion for a nationwide, interoperable public safety network?

Carefully balance flexible-use with interference protections. Similarly, I question whether the proposed five megahertz channel blocks discussed in the Incentive Auction Notice would result in a band plan that reserves too much spectrum for unlicensed use, contrary to Congress's explicit intent. Or, would auctioning spectrum in six megahertz channels, that is, on a broadcast channel-by-channel basis, be more intuitive and thus lead to a more efficient and fruitful auction? I am eager to learn from all interested stakeholders during the public comment process.

I also wonder whether the proposed six megahertz guard bands are in fact "no larger than technically reasonable to prevent harmful interference between licensed

services outside the guard bands."[8] Are six megahertz guard bands truly necessary to prevent harmful interference given the technological improvements that may come over the horizon after we adopt rules? As technology advances, smaller guard bands could end up being more practical not to mention more spectrally efficient. We certainly would not want to prevent such a beneficial byproduct from coming forth tomorrow as an unintended consequence of our actions today.

Likewise, I will work to ensure that, consistent with the statute's explicit call for "flexible-use" spectrum allotments,[9] the new licensing rules are intuitive, appropriately minimal and "future proof," which will draw bidder interest and, ultimately, more easily lead innovators to develop and design devices and services that we cannot imagine today. We must keep in mind that technology and user preferences evolve quickly. For example, no one had heard of the iPhone, e-readers, wireless tablets, or SmartTV just six short years ago when I first joined the Commission. Yet these devices are part of everyday life today.

While we may collectively acknowledge the scientific tension between flexible-use licensing and the appropriate size of guard bands, all policymakers have an obligation to provide entrepreneurs the freedom to run with their imaginations and bring new experiments to the marketplace. I am hopeful that we will proceed with humility and invest the necessary time and energy to think carefully and thoughtfully before we act. As none of us can predict the next disruptive technology, or where its spectrum home will be, I caution against inadvertently preventing further innovation and stifling future uses of spectrum based on trends, including: labeling certain spectrum as "prime" (*i.e.*, that

[8] broadband spectrum law § 6407(b).

[9] *See e.g.*, *id*. §§ 6401(b)(1)(B), 6402.

located below 1 GHz); classifying other bands as "junk;" or prejudging the "value" of spectrum bands that have yet to be auctioned. History shows us that today's "junk" is often tomorrow's "prime."[10]

No encumbrances. Many of us recall the 700 MHz auction that concluded in early 2008, which raised a record amount of revenue, over $19 billion. The auction also succeeded in reallocating this valuable slice of the airwaves to licensees who have since been rolling out new and exciting "fourth generation" wireless broadband services, such as "Long Term Evolution" (LTE). Nonetheless, two important objectives of the auction were not met. First, the Commission failed to entice a winning bidder to build a state-of-the-art nationwide, interoperable network for America's public safety personnel. Second, even after satisfying the demands of potential new entrants by imposing an "open access" condition on a 22 megahertz swath known as the "C" Block, the Commission failed in its quest to attract a new national broadband provider. Now four years later, today's discussion gives us an opportunity to recall and reanalyze the lessons learned.

With respect to the public safety partnership, the FCC's order included a plan to spark a public/private partnership by allocating 10 megahertz of spectrum for public safety use, known as the "D Block." The Commission created this framework after working closely with the public safety community, and I supported it. Hopes were high that this additional spectrum would provide an incentive for a private entity to construct a

[10] Relinquished by the federal government and commonly known as a "junk band," the FCC allocated the 2.4 GHz band for unlicensed use in 1995. Among other ubiquitous devices such as digital cordless telephones, utility metering devices, fire and security alarm systems, wireless bar code readers, wireless local area networks and baby monitors, entrepreneurs deployed "wireless fidelity" or "Wi-Fi" in the 2.4 GHz band. In 2011, more than 37% of all U.S. Internet traffic flows over unlicensed Wi-Fi at some point. *See* CISCO, VNI FORECAST HIGHLIGHTS, http://www.cisco.com/web/solutions/sp/vni/vni_forecast_highlights/index.html#~Country (last visited Dec. 11, 2012) (filter using United States and Network Connections).

nationwide, interoperable, broadband public safety network all of us have been discussing since at least the attacks of September 11, 2001. We did this to try to create an incentive for the private side of the public/private partnership to invest risk capital to build a nationwide public safety network suitable for 21st century challenges. In the aftermath of the auction, we learned that potential bidders were deterred by onerous build-out and service rules that would have required the eventual licensee to incur massive costs in an atmosphere of extreme uncertainty regarding how many, if any, public safety entities might actually sign up as paying customers.

Of course, Congress has given new life to the D Block and we are grateful for your leadership. Based on this experience, the lesson learned is that encumbrances on spectrum and prescriptive rules tend to scare off bidders.

With respect to the "open access" requirements for the "C" Block, I cast the only dissent because the evidence in the record told me that the market was already headed toward open access through natural evolution. I also did not think that the plan would achieve the advertised goal of attracting new broadband competition. Additionally, as I pointed out in my dissent, I was concerned that larger carriers would avoid the encumbered C Block and outbid smaller players in the smaller, less-regulated spectrum blocks. Sadly, all of my fears proved to be correct.

Here again, I am hopeful that the Commission will keep these lessons in mind as we develop new auction and licensing rules for spectrum located in the 600 MHz Band. The "open access" encumbrance was unnecessary and, ultimately, harmful. Wireless "openness" is prevalent today – consumers have a choice of no fewer than three operating

systems, plus unlicensed Wi-Fi. Yet, we must wonder whether that condition led to a lack of interoperability within the 700 MHz band.

We should all remember that we are at the beginning of what will surely be a lengthy and complicated process. All of the hard decisions lie ahead. I am eager to contribute to the Commission's ongoing effort and will greatly appreciate the thoughts and insights of the members of this subcommittee and all involved.

Liberating Federal Spectrum for Auction

Finally, the Executive Branch must do more to relinquish 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 process can be opaque and the incentives encourage inefficiencies.

History teaches us that exclusive use licenses are the best vehicle to promote the most efficient development of spectrum. Although policies regarding spectrum *sharing*, the cornerstone of the Administration's federal spectrum policy, could offer a few benefits, they are anemic when compared with the strengths of exclusive use licenses allocated through auction. Accordingly, Congress, the Executive Branch and the FCC should all work together to implement policies that would give federal users of spectrum an incentive to relinquish it for auction. This scenario could be a win-win-win for the government, the economy and consumers alike. With progress in spectrum policy all too often measured in decades, however, we should implement constructive new ideas will

all deliberate speed. America's mobile broadband marketplace, and especially its consumers, cannot afford to wait.

Special Access

During both my career in the private sector and my six and a half years at the Commission, I have spent countless hours working on public policy concerning "special access" services and facilities. I have digested competing, and often conflicting arguments, hypotheses and scenarios. During this time, I have maintained that the only way to conduct a proper assessment of the current rules is to first conduct a comprehensive and granular data collection followed by a *bona fide* market analysis. Ideally, we should have before us a current and detailed building-by-building, cell-site-by-cell-site map of the variety of facilities and services available and their price. Furthermore, we should know what new facilities and services may have arrived in the market that may be substitutable for what was dubbed "special access" in the late 20th century. Although such a large data collection may seem daunting, the Department of Justice was able to gather such valuable information during its review of the SBC/AT&T and Verizon/MCI mergers in the last decade. If this information was necessary for transaction reviews then, it is surely needed for potential important rule changes now.

Unfortunately, none of the FCC's previous voluntary data collections yielded enough data to build an adequate evidentiary record.[11] The FCC admitted as much in a

[11] *See Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 24 FCC Rcd 13638 (2009); *Data Requested in Special Access NPRM,* WC Docket No. 05-25, RM-10593, Public Notice, 25 FCC Rcd 15146 (2010); *see also Clarification of Data Requested in Special Access NPRM,* WC Docket No. 05-25, RM-10593, Public Notice, 25 FCC Rcd 17693 (2010); *Competition Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 26 FCC Rcd 14000 (2011).

court filing last year.[12] Despite this incomplete record, in August, the Commission "temporarily" suspended – in other words, *changed* – its special access rules.[13] Precisely because the Commission changed a substantive rule before building a sufficient evidentiary record to support such a pivot, I dissented from that order and continued my call for a comprehensive data collection.

The Commission is now in the process of finalizing and releasing a comprehensive data collection. Since the order has not yet been released to the public, I am prevented from providing details. Nevertheless, I am pleased that the order is mandatory and will be conducted largely on a nationwide basis.

This important exercise will require the cooperation of all the players in what I hypothesize to be a complex special access market. Accordingly, it is my hope that the Commission will work with all affected parties to ensure that the burdens of this data collection are as minimal as possible. I am also supportive of the Commission's efforts to protect confidential and sensitive data. Our work should help ensure that any additional rule changes are legally sustainable.

In the meantime, I thank Chairman Genachowski, and all of my colleagues, for their willingness to incorporate many of my numerous edits along the way.

Modernizing the Commission's Media Ownership Rules

I am hopeful that the Commission will conclude the quadrennial media ownership proceeding as soon as possible. As is required by Section 202(h) of the Communications

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[12] Opposition of the Fed. Commc'ns Comm'n to Petition for Writ of Mandamus at 1, *In re COMPTEL, et al*., No. 11-1262 (D.C. Cir. filed Oct. 6, 2011).

[13] *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order, 27 FCC Rcd 10557 (2012).

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.[14] Because of today's competitive media landscape, the Commission should resist proposals that would result in new and unnecessary regulation, such restricting broadcasters from entering into some forms of contracts that could provide efficiencies ultimately benefiting consumers.

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,[15] as online sources gain in

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[14] 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).

[15] 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://stateofthemedia.org/2012/overview-4/key-findings/ (last visited Mat 14, 2012) ("THE STATE OF THE NEWS MEDIA 2012"); THE STATE OF THE NEWS MEDIA 2012, LOCAL TV, http://stateofthemedia.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.

popularity.[16] This trend has led many prominent daily newspapers to declare bankruptcy, while others have faced more dire circumstances. In fact, over the past five years, an average of 15 daily papers, or about one percent of the industry, have shuttered their doors *each year*.[17]

Regardless of any rule changes we may implement, traditional media owners are now choosing to invest in new, *unregulated* digital outlets rather than acquire more heavily-regulated traditional media assets. Many dailies are experimenting with new business models, such as reducing the number days that the newspaper is printed,[18] moving to online-only formats[19] or partnering with online distributors.[20] These rules are truly remnants of a bygone era. Once again, the marketplace has moved quickly past obsolete communications laws.

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[16] 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 that 20 percent in the same time period. *See, e.g.,* ECONOMIC 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; 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.

[17] THE STATE OF THE NEWS MEDIA 2012, MAJOR TRENDS, http://stateofthemedia.org/2012/overview-4/major-trends/.

[18] For instance, the 175-year-old daily New Orleans *Times-Picayune* is now printed only three times per week. *See, e.g.,* Maya Rodriguez, *Former and Current Times-Picayune Staffers Bid Farewell to Daily Paper,* WWLTV.COM, http://www.wwltv.com/news/local/Former-and-Current-Times-Picayune-staffers-bid-farewell-to-daily-newspaper-171955991.html (Sept. 30, 2012).

[19] Currently, 172 newspapers have launched online subscription plans or placed content behind a paywall. This represents a 15 percent increase since January alone and more papers are expected to follow suit in the coming months. Papers with Digital Subscriber Plans/Paywalls, NEWS & TECH (May 10, 2012), http://www.newsandtech.com/stats/article_22ac1efa-2466-11e1-9c29-0019bb2963f4.html (last visited May 14, 2012); THE STATE OF THE NEWS MEDIA 2012, NEWSPAPERS, http://stateofthemedia.org/2012/newspapers-building-digital-revenues-proves-painfully-slow/ (stating that roughly 150 newspapers have instituted a "metered model").

[20] THE STATE OF THE NEWS MEDIA 2012, OVERVIEW, http://stateofthemedia.org/2012/overview-4/ (stating that Reuters is producing original news shows for YouTube; Facebook has entered into partnerships with *The Washington Post, The Wall Street Journal* and *The Guardian*; and Yahoo! paired with ABC News to be its sole provider of news video).

Further, evidence before the Commission demonstrates that in-market combinations do not negatively affect viewpoint diversity[21] and may actually increase the quantity and quality of local news and information provided by commonly-owned outlets to benefit the American consumer.[22] More than likely, the FCC ban on broadcast-newspaper cross-ownership has hastened a decline in newsgathering across the country. We must ensure that the heavy hand of government regulation does not continue to distort the marketplace or limit the options of broadcasters and the newspaper community to attract investment, increase efficiencies, and share the costs of news production.

Second, the Commission must resist calls for limiting the use of joint sales, shared service, and local news service agreements. These agreements provide efficiencies lowering the operation and production costs for broadcasters enabling them to deploy economized resources to the benefit of consumers. By creating new overly-regulatory attribution rules targeting these agreements, the FCC may cause the unintended consequences of raising expenses and reducing the amount of local programming provided by a broadcaster. Further, the Commission should not regulate without a full understanding of how these agreements are used in the marketplace and whether there are

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[21] *See, e.g.,* Newspaper Association of America, Comments, MB Docket No. 09-182, at 18-20 (Mar. 5, 2012) ("NAA Comments"); Adam D. Renhoff and Kenneth C. Wilbur, Local Media Ownership and Viewpoint Diversity in Local Television News, at 3, 15 (June 12, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308596A1.pdf ("[T]hese findings show that under the proposed definition of viewpoint diversity, variation in television station co-ownership and cross-ownership is generally found to [have] negligible effects on viewpoint diversity. However, it is important to note that the data are limited to the degree of media co-ownership and cross-ownership currently allowed under FCC rules.").

[22] *See, e.g., 2010 Quadrennial Regulatory 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, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, 17519 ¶ 85, n.185 (2011); NAA Comments at 15-18; Diversity and Competition Supporters, Initial Comments, MB Docket No. 09-182, at 40-43 (Mar. 5, 2012); Adam D. Renhoff and Kenneth C. Wilbur, Local Media Ownership and Media Quality, at 3, 15 (June 12, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308504A1.pdf; Jack Erb, Local Information Programming and the Structure of Television Markets, at 4, 27-28, 40-41 (May 20, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308508A1.pdf.

systemic abuses that have limited competition and viewpoint diversity in broadcast markets. In the face of an intensely competitive new media marketplace, placing new rules on these agreements could violate the spirit and letter of Section 202(h).

Finally, the Commission needs to move forward soon on reviewing our policies and rules regarding diversity in broadcasting built upon the firm foundation of new diversity studies. As part of the FCC's media ownership review, the Commission requested comment on a myriad of proposals to enhance media diversity. For those proposals aimed at expanding opportunities for minorities and women, however, we have to be mindful that any action the Commission would undertake regarding race- and/or gender-based regulations must satisfy the rigorous demands of the Constitution's Equal Protection Clause, including the strict scrutiny standard under the Supreme Court's *Adarand*[23] line of cases. Although the Commission has made improvements in its collection of minority ownership data and taken the initial steps to acquire information regarding the information needs of communities, it should conclude badly needed studies to assist us in supporting any new race- and/or gender-based regulations to determine the best approaches to increase media diversity, in accordance with the Constitution. As a matter of good government, the Commission should act quickly. We are long overdue for such action.

Broadcast Indecency

In June, the Supreme Court held that the Commission failed to provide fair notice regarding the application of its broadcast indecency standards to cases involving fleeting

[23] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

expletives and momentary nudity.[24] When the Court ruled, the Commission had approximately 1.5 million indecency complaints pending involving about 9,700 broadcasts. I am pleased that the dedicated staff of the Enforcement Bureau has begun to tackle this monumental undertaking and has already reduced the backlog to approximately a half million complaints involving about 5500 broadcasts. We owe it to American families and the broadcast licensees involved to carry out our statutory duties by resolving the remaining complaints with all deliberate speed. Going forward, the Commission must ensure that its indecency standards are clear, that broadcasters have the requisite notice and that Americans, especially parents such as myself, are secure in their knowledge of what content is allowed to be broadcast.

Modernizing FCC Procedures and Regulations

Reform of our communications laws and FCC procedure have been an important topic of debate for many years. Many have suggested that the Commission streamline its procedures and ensure that unnecessary, outdated or harmful FCC rules are repealed. Chairman Genachowski has taken notable steps in reforming various procedures at the agency, but more can be done.

I commend your Committee for its work on FCC reform legislation which includes many constructive ideas. For example, requiring the Commission to include in its rulemaking process cost benefit analyses to support any future rules would result in a

[24] FCC v. Fox Television Stations, Inc., No. 10-1293, slip op. (U.S. June 21, 2012). The Court also denied certiorari in *FCC v. CBS Corporation*, No. 11-1240, slip op. (U.S. June 29, 2012), bringing an end to the litigation over the momentary exposure of Janet Jackson's breast. In vacating the Commission's order, the Third Circuit held that the Commission's decision was arbitrary and capricious, because the agency departed from its policy of excusing the broadcast of fleeting moments of indecency. CBS Corp. v. FCC, 663 F.3d 122 (3rd Cir. 2011).

smarter rulemaking process. Additionally, updating the Government in Sunshine Act[25] in a way that improves the FCC's efficiency and ability to negotiate while preserving its transparency is something that has also gained wide support. Also, requiring that future regulatory proceedings start with a thorough market analysis that examines the state of competition would be a positive change. In the absence of market failure, adopting unnecessary regulations 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 look forward to working with all of you in pursuit of these worthy goals.

Regarding updating and repealing outdated regulations, the Commission should 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, 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.[26] 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 market evolutions.

Complex questions abound and they will need to be answered prior to the completion of this transition. How do we encourage continued investment in the networks supporting an IP transition? What can the Commission do to speed the

[25] 5 U.S.C. § 552b.

[26] *See* Comments of AT&T, *In the Matter of Connect America Fund*, WC Docket No. 10-90 (February 24, 2012).

transition along? What happens with legacy infrastructure? How can we ensure that the Commission remains faithful to the Act and Commission precedent, both of which treat broadband Internet access as an information service? These questions, and many more, require careful and focused consideration by the Commission and all stakeholders.

Protecting Internet Freedom

The Commission could start with a much-needed modernization by closing the Title II docket with no action taken.[27] Closing this proceeding would send a strong signal to investors and regulators around the world that the United States rejects the notion of subjecting nimble Internet innovations to late 19th century industrial policy that is the foundation of the Communications Act of 1934. We can do better. We can adopt new policies that provide entrepreneurs the freedom to invest and innovate without fear of suffocation from obsolete laws written for a monopoly analog voice world. If approached intelligently, consumers would be the ultimate beneficiaries of a powerful explosion of entrepreneurial brilliance.

Furthermore, should the FCC's 2010 regulation of Internet network management be overturned by the court, in lieu of resorting to the destructive option of classifying, for the first time, broadband Internet access services as common carriage under Title II, the FCC should revive a concept I first proposed nearly five years ago – that is to use the tried and true multi-stakeholder model for resolution of allegations of anti-competitive conduct by Internet service providers. A multi-stakeholder forum, where governments can have a seat at the table, supported by the backstop of existing antitrust and consumer

[27] *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, 25 FCC Rcd 7866 (2010).

protection laws, could spotlight market failures and cure them more quickly – and more effectively – than antiquated telephone laws.

If we are going to preach the virtues of the multi-stakeholder model at the pending World Conference on International Telecommunications (WCIT) in Dubai, we should practice what we preach. Not only would the U.S. then harmonize its foreign policy with its domestic policy, but such a course correction would yield better results for consumers as well.

And while I am on the important topic of the WCIT, Chairman Genachowski and I were in Dubai last week and we can report that our delegation is working hard to prevent an expansion of the ITU's jurisdiction into any aspect of the Internet. The WCIT has not yet concluded, but I welcome any questions on this topic. I have attached a recent op-ed on the WCIT for your reference. See attachment A.

If Internet freedom survives the Dubai talks, however, we should not let our guard down. The next conference is in May and it will lay the foundation for a more fundamental and far-reaching negotiation on these and other matters in 2014 in Korea. Accordingly, I strongly urge all of us to maintain our vigilance because freedom's foes are patient and persistent incrementalists.

Conclusion

Thank you for having us before you today, and I look forward to your questions.

ATTACHMENT A

POLITICO

Staring down Internet freedom's foes

By: Robert M. McDowell
November 30, 2012

On Monday, representatives from 193 countries are convening in Dubai in the United Arab Emirates, to renegotiate a treaty that could give an arm of the United Nations new powers over the Internet. Despite increased scrutiny of these talks, many countries seem more determined than ever to turn the supremely bad idea of establishing international regulation of the Net into reality. American diplomats will have to navigate a torrent of formal proposals that would curtail Internet freedom, limit consumers' choices and increase costs for all Net users. How the negotiations end will shape the future of the Net, as well as the prospects for global freedom and prosperity.

The purpose of the Dubai talks, known as the World Conference on International Telecommunications, is to re-examine a 1988 treaty that loosened rules covering telephone and computer communications. The regulatory framework adopted in 1988 took a "hands off" approach to emerging technologies, such as what later became the Internet. As a result, the Internet is now the greatest deregulatory success story of all time. For instance, in 1995, shortly after it was privatized, only 16 million people used the Net. That number has spiked to more than 2.5 billion today with upward of a half million people becoming first-time Internet users each day. If, however, some key regimes have their way, such soaring positive trend lines will flatten.

For a decade, countries such as Russia and China, plus dozens of others from Arab and African regions, have pushed with increasing intensity for the International Telecommunication Union, a treaty-based organization operating under the U.N., to expand its authority over the Internet. In fact, Russian Prime Minister Vladimir Putin candidly revealed last year in a meeting with the ITU secretary general that he has a goal to establish "international control over the Internet" through new ITU rules. Net users everywhere should take Putin and his allies quite seriously.

Months ago, chatter intensified that some countries were going to propose expanding the ITU's rules to cover many corners of the complex Internet ecosystem. Yet many of these same countries, and ITU leaders, continue to issue vehement denials of an ITU Internet power grab. In recent days, however, the truth has been revealed in irrefutable, black and white diplomatic proposals to regulate key aspects of the Net. Stranger than fiction, here are just a few of the most recent submissions:

• Changing the treaty's definitions of terms so the ITU and its member states can regulate the Internet economy like an ancient telephone monopoly;

• Eliminating anonymity for Internet consumers through new international "registration records" (in the name of "privacy") allowing government monitoring of consumers' Net activity;

• Replacing existing nonprofit private-sector groups that keep the Net working with global government agencies that would regulate vital Web naming, numbering, addressing and identification functions that allow every Web-connected device (such as mobile phones, tablets and personal computers) to work; and

• Creating global rules so foreign phone companies or governments could charge fees to consumers' favorite websites (costs ultimately passed on to consumers), perhaps on a "per click" basis.

Increasingly, pro-regulation forces are shrouding their proposals in seemingly innocuous sales pitches, such as the need for better cybersecurity, more stable markets or ubiquitous Internet access. ITU leadership and some member states have even brazenly argued that the 1988 rules already give the ITU jurisdiction over the Net and give legitimacy to censorship. If these aggressive regulatory expansionists are conspiring today to trash long-standing international consensus to insulate the Net from regulation by conjuring limitless ITU authority where plainly none exists in current treaty text, think of how they would contort a new pact that gave them even the tiniest hook into the Internet's affairs.

If new regulatory ideas gain steam, the ensuing uncertainty is likely to inhibit Net entrepreneurs' constructive risk taking, investment and innovation because engineering and business decisions would become politicized within intergovernmental bodies. Consequently, consumer costs would rise and fewer Net-powered products and services would emerge. Furthermore, the Net could become divided between countries opting for the ITU regulatory structure versus those that choose to stick with the current hands-off approach. In addition to creating an engineering nightmare for the Net, a borderless and global network of networks, the result would be a lower-quality and more expensive Internet for everybody. Each Internet consumer in the world would suffer the effects of the ensuing confusion.

Ironically, some of the most energetic proponents of expanded ITU powers hail from the developing world, which would be hurt the most by increased costs resulting from more Net regulation. Several independent studies, including a World Bank report, show that an open and freedom-enhancing Web grows developing world economies faster than those of industrialized nations, all while giving individuals an information gateway to escape poverty and oppression. Preserving an unfettered Net is the best way to continue this positive trend. Yet whether hoping new rules would steer cash from popular websites into their treasuries or whether a new paradigm could provide insidious ways to track and crack down on political rivals, authoritarian regimes resent an unregulated Net.

Some rays of hope have crested the horizon, however. Our diplomats' efforts are fueled by a rare unwavering consensus emanating from Washington. Recently, both houses of a divided Congress unanimously passed bipartisan resolutions championing Internet freedom and directing our diplomats to oppose even the smallest expansion of ITU authority. Our negotiators should avoid at all costs agreeing to seemingly minor, technical or harmless treaty "tweaks" that most likely would be used later to undermine Net

freedom.

Slightly encouraging are a few recent statements from ITU leadership asserting that changes to the rules will emerge only if they are “agreed upon by all participants through consensus,” and “[the WCIT] cannot empower governments to exercise greater regulation of the Internet.” Curiously, however, ITU leaders take a giant step backward when they also claim, “there have not been any proposals calling for a change from the bottom-up multi-stakeholder model of Internet governance to an ITU-controlled model.” The explicit language of several proposals on file at the ITU, as well as in official ITU documents, contradict this misleading assertion — leaving observers wringing their hands over leadership’s ultimate designs.

A successful WCIT would produce a treaty that not only eschews expanded regulation of any aspect of the Internet but also commits to free markets, freedom of speech, competition and deregulation. The people of every nation, but especially tomorrow’s first-time Net users in the developing world, deserve no less.

After the December WCIT, new talks commence in May. Defenders of Internet freedom should never let their guard down, for freedom’s foes are patient and persistent incrementalists. To be continued …

Robert M. McDowell is a commissioner of the Federal Communications Commission and a member of the U.S. delegation to the WCIT.