STATEMENT

OF

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"A LEGISLATIVE HEARING ON FOUR COMMUNICATIONS BILLS"

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY

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OVERVIEW

Chairman Walden, Ranking Member Eshoo, and distinguished Members of the Subcommittee, thank you for having me testify before you today. My name is Robert McDowell. From 2006 until 2013, I served as a Commissioner of the Federal Communications Commission (FCC). Currently, I am a partner of the internationally recognized law firm of Wiley Rein LLP. I am also a Senior Fellow at the Hudson Institute's Center for Economics of the Internet, a non-profit, non-partisan policy research organization. Nonetheless, I am not testifying today on behalf of any client of Wiley Rein or on behalf of the Hudson Institute. The opinions I express are strictly my own.

I am here today to discuss two proposed bills regarding the regulation of broadband Internet access service providers. The first bill, H.R. 2666, or the No Rate Regulation of Broadband Internet Access Act, would prevent the FCC from regulating the rates charged for broadband Internet access intended by the FCC in its 2015 Open Internet Order.[1] This bill would be a positive and constructive development for the Internet because the FCC's Open Internet Order, while expressly proscribing *ex ante* rate regulation, leaves open the possibility that the Commission could regulate rates in different ways, resulting in collateral and negative effects on broadband infrastructure investment.

The second bill, called the Small Business Broadband Deployment Act, would make permanent the FCC's temporary exemption for small businesses from the enhanced disclosure rules imposed by the Commission's Order. While the FCC's practice has been to grant annual exemptions from these rules for small providers, this bill would provide statutory certainty to

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[1] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("*Open Internet Order*"). The FCC's decision to classify broadband internet access service as a telecommunications service subject to Title II of the Communications Act is currently being reviewed by the U.S. Court of Appeals for the D.C. Circuit. I have long maintained that Title II regulation of broadband providers is both unnecessary and unlawful. If the court vacates the FCC's classification decision, the FCC would once again be legally barred from regulating broadband prices under Title II.

these providers that they will not be subject to these burdensome requirements in the future.

Congress has a terrific opportunity to pass these bills on a bipartisan basis and further the cause of Internet freedom.

EXTENDED ANALYSIS

H.R. 2666 IS NECESSARY BECAUSE THE FCC'S OPEN INTERNET ORDER LEAVES OPEN THE POSSIBILITY THAT THE COMMISSION COULD ENGAGE IN RATE REGULATION, WHICH WOULD STIFLE INVESTMENT IN BROADBAND.

H.R. 2666 addresses a very significant problem raised by Title II regulation of broadband Internet access: Title II is fundamentally about economic regulation and, specifically, price regulation. Although the FCC's Order expressly prohibits the Commission from engaging in *ex ante* rate regulation—in the form of tariffing requirements or otherwise—the Order does nothing to proscribe *ex post* rate regulation. Instead, because the Commission has reclassified broadband as a Title II service, its provision is subject to Section 201(b) of Title II, which *requires* that all charges and prices be "just and reasonable."[2] Under this provision, in the FCC's view, it has the authority–either in response to a complaint or on its own initiative–to review and pass judgment on the retail prices charged by broadband providers.

The FCC attempted to reserve this authority in the Order. While it differentiates between *ex ante* and *ex post* rate regulation, the Order asserts only that the FCC will forbear from applying Title II "in a manner that would enable the adoption of *ex ante* rate regulation."[3] By singling out *ex ante* rate regulation for forbearance, the Order makes clear that *ex post* rate regulation has not been prohibited. Moreover, the Order acknowledges that the FCC will have authority to dictate the rate-related terms and conditions of broadband plans that are offered to consumers. The Order explains that the Commission will be reviewing practices such as usage-based pricing and zero-rating of broadband uses, which have a direct effect on the rates that consumers pay for broadband Internet access service.[4] As a result, absent the passage of H.R. 2666, the Commission has

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2 47 U.S.C. § 201(b).

3 *Open Internet Order* ¶ 441.

4 *See id.* ¶¶ 151-53.

multiple avenues of authority to regulate the rates for broadband without employing *ex ante* rate regulation.

Rate regulation, especially through common carrier regulation, has a history of stifling investment and innovation in services. In fact, when governments have stepped back from rate regulation regimes in the common carrier context, whether those carriers were railroads, trucking companies, airlines, or communications services, investment and innovation have surged, prices to consumers have fallen, and services have improved in quality.[56] The Progressive Policy Institute analyzed the effect of rate regulation specifically on the investment of incumbent telcos, entrants, and cable providers in the early 1990s and early 2000s, concluding based on those examples that regulating the rates for broadband Internet access would have a deleterious effect on investment by ISPs.[7]

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[5] *See* Robert M. McDowell, Commissioner, Federal Communications Commission, "The Siren Call of 'Please Regulate My Rival': A Recipe for Regulatory Failure", Remarks before the Italian Parliament, at 5-1 0 (June 28, 2012), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-314884A1.pdf (also included as Attachment A); *see also* CLIFFORD WINSTON ET AL., THE ECONOMIC EFFECTS OF SURFACE FREIGHT DEREGULATION 4 (1990); Robert E. Gallamore, *Regulation and Innovation: Lessons from the American Railroad Industry in* ESSAYS IN TRANSPORTATION ECONOMICS AND POLICY: A HANDBOOK IN HONOR OF JOHN R. MEYER 493, 493 (José Gómez-Ibáñez, William B. Tye & Clifford Winston, eds., 1999); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1985 (1980); Clifford Winston, *The Success of the Staggers Rail Act of 1980* 8-9 (AEI-Brookings Joint Center, Oct. 2005), *available at* http://www.brookings.edu/research/papers/2005/10/railact-winston; Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSP. 89, 99 (1998).

[6] For instance, local service providers doubled their revenues the year after the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996), was passed. *See* INDUSTRY ANALYSIS DIVISION, COMMON CARRIER BUREAU, FEDERAL COMMUNICATIONS COMMISSION, LOCAL COMPETITION (Dec. 1998), *available at* http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcomp98.pdf . And, between 1996 and 2001, investment by telecommunications firms skyrocketed and capital stock increased at a rate that far exceeded the period before passage of the 1996 Act. *See id.* at 3-4; Lawrence J. Spiwack, *The Truth About Telecommunications Investment After the Telecommunications Act of 1996*, PHOENIX CENTER POLICY BULLETIN NO. 4, at 3-4 (2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=503364. Additionally, the 1996 Act resulted in lowered prices and increased innovation. *See, e.g.*, Reed Hundt, *Ten Years Under the 1996 Telecommunications Act*, 58 FED. COMM. L. J. 399, 402 (2006); The Telecommunications Act of 1996, NTIA (Feb. 4, 1999), http://www.ntia.doc.gov/legacy/otiahome/top/publicationmedia/newsltr/telcom_act.htm#LOCAL (citing ECONOMIC REPORT OF THE PRESIDENT, ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS, U.S. Gov't Printing Office (1999), *available at* http://www.gpo.gov/fdsys/pkg/ERP-1999/pdf/ERP-1999.pdf).

[7] *See* Robert Litan and Hal Singer, *The Best Path Forward on Net Neutrality*, Progressive Policy Institute, at 5-8, 10 (Sept. 2014); *see also* Hal Singer and Robert Litan, *No Guarantees When It Comes to Telecom Fees*,

Furthermore, the FCC's authority to adjudicate rate cases *ex post facto* invites an unlimited number of complaints against broadband companies, heightening regulatory exposure and disrupting providers' innovative products and pricing plans.[8] As a recent study released by the Georgetown University Center for Business and Public Policy observed, "[N]ew regulatory hurdles to offering new services and innovations . . . introduce delay and uncertainty into the innovation cycles for Internet-related products and services."[9] Another study by NERA Economic Consulting explained that a price regulation regime would fail to take into account that "[t]he payoff to consumers is an Internet that provides new services, not just one that provides current services at lower cost. We would be sacrificing enormous potential social gains if we end up losing future applications by making innovation too costly."[10] Furthermore, when considering the risks to investment posed by direct or indirect rate regulation, industry analysts such as Craig Moffett of MoffettNathanson Research downgraded cable stocks, noting that "at its core, Title II is about price regulation."[11]

Additionally, both President Obama and FCC Chairman Tom Wheeler have acknowledged the risk of rate regulation by insisting that the Commission should not and will not engage in the practice. President Obama has stated that he "believe[s] the FCC should reclassify consumer

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PROGRESSIVEPOLICY.ORG (Dec. 16, 2014), http://www.progressivepolicy.org/issues/economy/no-guarantees-when-it-comes-to-telecom-fees/.

8 *See* Robert Kaminski, *Mother, May I?*, Capital Alpha Partners, at 1 (July 2, 2015).

9 *See* Kevin A. Hassett and Robert J. Shapiro, *Regulation and Investment: A Note on Policy Evaluation under Uncertainty, With an Application to FCC Title II Regulation of the Internet*, Georgetown University Center for Business & Public Policy, at 14 (July 14, 2015).

10 *See* Christian Dippon, PhD, and Jonathan Falk, *Economic Repercussions of Applying Title II to Internet Services*, NERA Economic Consulting, at 9 (Sept. 9, 2014).

11 *See* Craig Moffett, *U.S. Cable: Cutting the Cord . . . Downgrading Comcast, Time Warner Cable, and Charter to Neutral*, MoffettNathanson Research, at 4 (Feb. 17, 2015); *see also*, House Subcommittee on Communications and Technology, *Common Carrier Regulation of the Internet: Investment Impacts*, 114th Congress, 1st sess., 2015 (Testimony of Frank Louthan, Managing Director of Equity Research at Raymond James Financial) , *available at* http://docs.house.gov/meetings/IF/IF16/20151027/104110/HHRG-114-IF16-Wstate-LouthanF-20151027-U1.pdf ("Title II is restricting overall investment and returns, … we do not believe it will make the industry as attractive to capital as it had been in the past.").

broadband service under Title II of the Telecommunications Act—while at the same time forbearing from rate regulation."[12] In a similar vein, Chairman Wheeler has stated that "the Open Internet order was constructed so as to put broadband providers in a situation where they could profit from the value of their investments free from any limiting rate regulation."[13] Chairman Wheeler also testified at a Senate appropriations subcommittee hearing that "our goal is not to have rate regulation. And the 201(b) interpretations that some people have said that this gives us some kind of ex-post authority, I would like to be able to make it clear that it is not a rate regulation tool."[14] In response to a follow-up question regarding whether he would object to Congress prohibiting the FCC from regulating broadband rates in the future, the Chairman answered, "If Congress wants to come along and say that's off the table for the next commission, too, I have no difficulty with it."[15]

The language of H.R. 2666 is no broader than what Chairman Wheeler testified that he supports. The bill simply addresses the risk that a future Commission will use the substantial discretion left by the Open Internet Order to regulate rates post hoc through enforcement, notwithstanding the current Commission's promises to avoid rate regulation. In fact, while I fully support the passage of H.R. 2666 as currently constituted, the bill would be improved by clarifying two ambiguities its language that could undermine this purpose.

First, the bill does not expressly state whether it prohibits *all* rate regulation, including *ex post* determinations that rates are unjust or unreasonable, or if it prohibits only the *ex ante* setting

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[12] President Barack Obama, *Statement by the President on Net Neutrality* (Nov. 10, 2014), *available at* https://www.whitehouse.gov/the-press-office/2014/11/10/statement-president-net-neutrality.

[13] Tom Wheeler, Chairman, Federal Communications Commission, Remarks at NCTA-INTX 2015, at 6 (May 6, 2015).

[14] Senate Appropriations Subcommittee on Financial Services and General Government, *Hearing on the FCC's Fiscal Year 2016 Budget Request*, 114th Congress, 1st sess., 2015 (Testimony of Chairman Tom Wheeler).

[15] *See id.*

of rates. This creates the possibility that the next Commission could interpret the law to prohibit only *ex ante* rate regulation, which would vitiate the law's purpose and allow the Commission to engage in other forms of rate regulation.

Second, the bill is ambiguous as to which rates it addresses. To be sure, the bill is likely intended to regulate the rates charged to consumers for broadband Internet access service. But the Order also gives the FCC authority to regulate other kinds of rates, including the rates charged to edge providers[16] and the rates charged to other ISPs and backbone providers.[17]

To avoid any confusion as to what H.R. 2666 is intended to address, it should be revised to state with specificity that it refers to *all* forms of regulation of the rates for Internet access services, including peering and interconnection.

THE SMALL BUSINESS BROADBAND DEPLOYMENT ACT WOULD GIVE SMALL BROADBAND PROVIDERS CERTAINTY THAT THEY WILL NOT BE SUBJECT TO BURDENSOME TRANSPARENCY REQUIREMENTS IN THE OPEN INTERNET ORDER.

Congress also should enact the Small Business Broadband Deployment Act. Since the FCC adopted the Open Internet Order, it has been granting one year exemptions from its enhanced disclosure requirements for small providers of broadband Internet access service, with the current exemption in force until December 15, 2016.[18] These temporary exemptions have created uncertainty as to whether—and to what extent—small providers may become subject to these requirements in the future.

Congress should eliminate this uncertainty by making the exemption for small providers permanent. The requirements—which were designed with the largest broadband providers in mind—impose disproportionate compliance burdens on smaller providers, depleting the

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16 *See, e.g., Open Internet Order* ¶¶ 125-132 (banning paid prioritization).

17 *See id.* ¶¶ 194-206.

18 *Protecting and Promoting the Open Internet*, Report and Order, DA 15-1425, GN Docket No. 14-28, at 4 (rel. Dec. 15, 2015). OMB has not yet issued its approval of the enhanced disclosure rule.

resources needed for broadband Internet access service deployment and operation.[19] Moreover, the benefits derived from the information provided by smaller providers are minimal, and no evidence has been presented to the FCC that their subscribers are not already receiving sufficient information.[20] The nominal benefits derived from requiring smaller providers to comply with these regulations are eclipsed by the onerous nature of the requirements and the uncertainty created by the Commission continually reconsidering the exemption. Accordingly, Congress should enact the Small Business Broadband Deployment Act and make the exemption permanent.

CONCLUSION

Congress has the opportunity, on a bipartisan basis, to foreclose two possibilities that the Open Internet Order will have negative effects on the marketplace for broadband Internet access service. First, Congress should pass H.R. 2666, with some friendly amendments, which would ensure that the Commission cannot engage in the harmful practice of broadband Internet rate regulation. Second, Congress should pass the Small Business Broadband Deployment Act, which would assure small broadband Internet providers that they will never be subject to burdensome disclosure requirements.

Thank you for the opportunity to testify and I look forward to your questions.

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[19] *See, e.g.*, Comments of Alaska Communications Systems, GN Docket No. 14-28, at 4-6 (filed Aug. 5, 2015); Comments of CTIA—The Wireless Association, GN Docket No. 14-28, at 1, 10-13 (filed Aug. 5, 2015); Comments of Gogo Inc., GN Docket No. 14-28, at 4 (filed Aug. 5, 2015).

[20] *See, e.g., id.*

ATTACHMENT A

REMARKS OF
THE HONORABLE ROBERT M. MCDOWELL
COMMISSIONER
FEDERAL COMMUNICATIONS COMMISSION
BEFORE THE
ASSOCIAZIONE EGO AND PUNTOIT
ITALIAN PARLIAMENT
AULA DEI GRUPPI PARLAMENTARI
ROME, ITALY
JUNE 28, 2012

[AS PREPARED FOR DELIVERY]

The Siren Call of "Please Regulate My Rival": A Recipe for Regulatory Failure

Thank you, Gildo, for that kind introduction. It is a great pleasure to be back in Rome, and an honor to be speaking before this impressive gathering of policy and business leaders.

Although planned months ago, both the location and timing of this conference could not have been more opportune. The Internet's fate is, yet once again, at a crossroads. As 193 countries convene in Dubai later this year to renegotiate the International Telecommunications Regulations (ITRs), Europe's view of new Internet regulations proposed by others will be pivotal to the outcome of this important debate. Furthermore, Italy has a crucial role to play in shaping Europe's position on these matters as we head towards the World Conference on International Telecommunications (WCIT) treaty negotiation this coming December.

As always, but especially with the world economy in such a weakened and precarious position, governments should resist the temptation to regulate unnecessarily, get out of the way of the Internet and allow it to continue to spread prosperity and freedom across the globe. Internet connectivity, especially through mobile devices, is improving the human condition like no other innovation in world history.

Take for example the profound effect the mobile Internet has had on the lives of Ali Morrison and Isaac Assan.[1] Ali and Isaac operate a small pineapple farm in Central Ghana. In the past, all too often they had no choice but to sell their pineapples well below market value due to a lack of accurate pricing information. Today, however, through a new mobile application, Ali, Isaac and countless farmers just like them, can instantly find the prevailing value of pineapples in surrounding markets and price their product accordingly. What was previously impossible to accomplish is now easy and quick, not to mention incredibly empowering. Earning more money from this new Web-powered knowledge enables Ali and Isaac to own more property and increase their

[1] *See* 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/.

standard of living – all while raising their expectations in both an economic and political sense. In short, the mobile Internet empowers the sovereignty of the individual while growing economies and fundamentally improving lives around the world.

Globally, upwards of 500,000 people become first-time Internet users *each day* precisely because the Internet has migrated further away from government control since its inception.[2] As governmental barriers around the Internet melted away in the mid 1990s, Internet usage skyrocketed – from only 16 million worldwide users in 1995 to over 2.3 billion today.[3] In short, the absence of top-down government control of the Internet sparked a powerful explosion of entrepreneurial brilliance which has not abated. That could soon change, however.

As we meet here today, some Member States of the International Telecommunication Union (ITU), as well as a few independent groups, are advocating for expanded intergovernmental powers over the Internet.[4] Some proposals are seemingly small or innocuous while others are conspicuously large and radical. We should be especially aware of incremental changes to the ITRs. With the potential to grow larger quite rapidly, proposed ITR amendments that appear tiny today can be the most insidious and lethal to the spread of prosperity and freedom tomorrow.

The proposals I am referring to are quite real, explicit and concrete. They are not imagined. Nor are they the product of caricatures or distortion, as a few pro-regulation proponents and some ITU leaders have alleged. The proposals speak for themselves. Or as they may have said here in Ancient Rome, "Res ipsa loquitur." So in the absence of rhetoric and hyperbole, please allow me to briefly outline a few of them.

First, let us start with then-Russian Prime Minister Vladimir Putin's proposal during a meeting with the Secretary General of the ITU almost exactly one year ago. Last June, he proclaimed that Member States should establish "international control over the Internet using the monitoring and supervisory capabilities of the International

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[2] *See* Internet Growth Statistics, INTERNET WORLD STATS, http://www.internetworldstats.com/emarketing.htm (last visited June 19, 2012). The estimated number of new users per day, as calculated by determining the change in the number of Internet users over a year divided by 365, has varied greatly over the last 5 years. Between March 2011 and March 2012, the estimated number of new online users was 506,849 per day. Over the past 5 years, however, the average daily increase in online users was approximately 630,685. *Id*.

[3] *Id*.

[4] *See, e.g., Proposals for Revision of the International Telecommunication Regulations*, ITU Member States Belonging to the Regional Commonwealth in the Field of Communications (RCC), at 6 (Apr. 17, 2012) ("Member States shall ensure that administrations/operating agencies cooperate within the framework of these Regulations to provide, by mutual agreement, a wide range of international telecommunication services of any type, including . . . services for carrying Internet traffic and data transmission.").

Telecommunication Union."[5] Again, these words speak for themselves and should be taken seriously.

True to Mr. Putin's word, the Russian Federation subsequently put forth formal proposals that would expand the jurisdiction of the ITU into the Internet sphere simply by changing the definition of "telecommunications" to include "processing" and "data."[6] At first glance, this proposed change seems small, but it is tectonic in scope. The submission by the Arab States is almost identical, by the way.[7]

The Russian proposal would also explicitly give the ITU jurisdiction over IP addresses, one of the most important components of the inner workings of the Net.[8] Control of IP addresses is control of the Internet itself.

Although the Russian Federation claims to support "unrestricted use" of the Internet, its submission calls for making a number of revealing *exceptions*, such as "in cases where international telecommunication services are used for the purpose of interfering in the internal affairs or undermining the sovereignty, national security, territorial integrity and public safety of other States, or to divulge information of a sensitive nature."[9] In short, the exceptions created by the Russian Federation's proposal would allow for unlimited intergovernmental control over the Internet's affairs, in keeping with Mr. Putin's vision.

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[5] Vladimir Putin, Prime Minister of the Russian Federation, Working Day, *Prime Minister Vladimir Putin meets with Secretary General of the International Telecommunication Union Hamadoun Touré*, GOV'T OF THE RUSSIAN FED'N (June 15, 2011), http://premier.gov.ru/eng/events/news/15601/.

[6] *Proposed Revisions to Individual Articles of the ITRs*, Russian Federation, CWG-WCIT12 Contribution 95, at 2 (Apr. 13, 2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0095/en ("*Russian Federation Contribution 95*") (defining telecommunication as "[a]ny transmission, emission, processing or reception of signs, signals, writing, images and sounds or data of any nature by wire, radio, optical or other electromagnetic system").

[7] *Proposed Revisions*, Arab States, CWG-WCIT12 Contribution 67, at 3 (Feb. 1, 2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0067/en (defining telecommunication as "[a]ny transmission, emission, reception or processing of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic system"); *Proposal on Third Draft of the Future ITRs*, Arab States, CWG-WCIT12 Contribution 103, at 5 (June 4, 2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0103/en ("*Arab States Contribution 103*"). Further, Iran argues that the current definition already includes the Internet. *Contribution from Iran*, The Islamic Republic of Iran, CWG-WCIT12 Contribution 48, Attachment 2 (Sept. 12, 2011), http://www.itu.int/md/T09-CWG.WCIT12-C-0048/en.

[8] *Further Directions for Revision of the ITRs*, Russian Federation, CWG-WCIT12 Contribution 40, at 3 (2011), http://www.itu.int/md/T09-CWG.WCIT12-C-0040/en ("To oblige ITU to allocate/distribute some part of IPv6 addresses (as same way/principle as for telephone numbering, simultaneously existing of many operators/numbers distributors inside unified numbers space for both fixed and mobile phone services) and determination of necessary requirements."). *See also Arab States Contribution 103* at 9 ("Member States shall, if they so elect, be able to control all naming, numbering, addressing and identification resources used within their territories for international telecommunications/ICTs.").

[9] *Russian Federation Contribution 95* at 3; *Comments on Document CWG-WCIT12/TD-64*, Russian Federation, CWG-WCIT12 Contribution 112, at 54 (June 6, 2011), http://www.itu.int/md/T09-CWG.WCIT12-C-0112/en.

Similarly, Egypt's submission calls for unprecedented economic regulation of Internet traffic through the ITU.[10]

Even though a few proposals have been offered in fora other than the ITU, each gives us a sense of where some ITU Member States would like to go with intergovernmental Internet regulation. For instance, proposals made directly to the U.N. General Assembly by China, Russia, Tajikistan and Uzbekistan call for intergovernmental regulation of Internet content and applications.[11] And, last year, India introduced a resolution at the U.N. calling for a new U.N. body to oversee the Internet.[12]

In short, whether submitted to the U.N. or the ITU, these proposals are about much more than conventional Internet governance. Their scope dwarfs the controversies regarding ICANN and domain names. Without exception, each proposal would radically restructure the Internet ecosystem for the worse. They are before us in black and white. So please look with great skepticism on vehement claims that no proposals to regulate the Internet are before the ITU or the U.N.[13]

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[10] *Africa Region's Proposals to the Review of the ITRs*, Africa Region, CWG-WCIT12 Contribution 116, at 20 (2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0116/en ("Member States shall [take measures to] ensure that fair compensation is received for carried traffic (e.g. interconnection or termination)."). *See also Proposal on International Telecommunications Connectivity (Based on Contribution CWG-WCIT12/C-84)*, Paraguay, CWG-WCIT12 Contribution 113, at 5 (June 6, 2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0113/en (proposing that parties that enter into Internet connection agreements "take into account the possible need for compensation . . . for the value of elements such as traffic flow, number of routes, and cost of international transmission, and the possible application of network externalities, amongst others."); *Arab States Contribution 103* at 9 (proposing an amendment containing language similar to Paraguay's proposal).

[11] 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.

[12] Dushyant Singh, Member of Parliament, Statement on Agenda Item 16 - Information and Communication Technologies for Development, 66th Session of the United Nations General Assembly (Oct. 26, 2011), http://www.un.int/india/2011/ind1945.pdf (proposing "the establishment of a new institutional mechanism in the United Nations for global internet-related policies."). *See also* Commission on Science and Technology for Development, Summary Report of the Chair: Briefing on the Open Consultation on Enhanced Cooperation on Public Policy Issues Related to the Internet (May 18, 2012), http://unctad.org/meetings/en/SessionalDocuments/ecn162012crp2_en.pdf ("Some delegates called for the establishment of an intergovernmental mechanism for enhanced cooperation within the United Nations structure, which would enable governments, on an equal footing, to carry out their roles and responsibilities in international public policy issues pertaining to the Internet.").

[13] *See, e.g.,* Hamadoun I. Touré, Secretary-General, International Telecommunication Union, Opening Remarks to Council Working Group – WCIT-12 (June 20, 2012), http://www.itu.int/en/osg/speeches/Pages/2012-06-20.aspx; Hamadoun I. Touré, Secretary-General, International Telecommunication Union, Remarks to ITU Staff on World Conference on International Telecommunications (WCIT-12) (June 6, 2012), http://www.itu.int/en/osg/speeches/Pages/2012-06-06-2.aspx; Hamadoun I. Touré, Secretary-General, International Telecommunication Union, Opening Welcome Speech at the World Telecommunication Policy Forum (WTPF), Meeting of the Informal Experts Group (IEG) (June 5, 2012), http://www.itu.int/en/osg/speeches/Pages/2012-06-05.aspx; Eric Pfanner, Debunking Rumors of an Internet Takeover, N.Y. TIMES (June 11, 2012),

In addition to the pro-regulation proposals emanating from Member States, a few non-governmental groups have put forth their own ideas for expanded Net regulation as well. This is not entirely surprising. I have learned during my six years on the U.S. Federal Communications Commission that the most common request we receive from industry is, "Please regulate my rival." Essentially, this request translates into, "My rival is running too fast, and I want government to slow him or her down to my level." Industry players that have long operated under legacy regulations are the most susceptible to this affliction.

Perhaps the same could be said of the recent proposal by the European Telecommunications Network Operators' Association (ETNO).[14] ETNO would like IP interconnection agreements to be brought under the ITRs for the first time with a new "sending party network pays" construct.[15] To be effective, the ETNO proposal would have to require an international dispute resolution forum with enforcement powers as well as an intrusive new mechanism for recording Internet traffic flows on the basis of the value of traffic delivery, presumably determined by the ITU. Such expanded "monitoring capabilities" for the ITU fit perfectly into Mr. Putin's vision of the Internet of the future.

In short, the ETNO proposal would upend the economics of the Internet by replacing market forces with international regulations that would create tremendous uncertainty, increase costs for all market players, especially consumers, and ultimately undermine the rapid proliferation of Internet connectivity throughout the globe. Disproportionately harmed by this upheaval would be the developing world. The upward trajectory of living standards for billions of people like Ali and Isaac, the pineapple farmers from Ghana, could be put in jeopardy too.

Furthermore, I can't imagine why network operators would consciously surrender their autonomy to negotiate commercial agreements to an international regulator – unless, of course, they suffer from the "please regulate my rival" malady of an industry that has been regulated too much and for too long. History is replete with such scenarios, and the desire for more regulation for competitors *always* ends badly for the incumbent regulated industry in the form of unintended and harmful consequences.

Take, for example, the American railroads of the early 20th century. Having been heavily regulated since the 1880s,[16] the railroads feared competition from a new and

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http://www.nytimes.com/2012/06/11/technology/debunking-rumors-of-an-internet-takeover.html?pagewanted=all.

[14] *Revisions of the International Telecommunications Regulations – Proposals for High Level Principles to be Introduced in the ITRs*, ETNO, CWG-WCIT12 Contribution 109, at 3 (2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0109/en.

[15] *Id*. at 2.

[16] Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379 (1887). I thank Clifford Winston, a senior fellow at the Brookings Institution's Economic Studies program, for lending his expertise with transportation and industrial organization research and Dominique Lazanski, the Head of Digital Policy at

nimble competitor, the trucking industry. Anxious not to let a less-regulated upstart eat their lunch, instead of convincing the U.S. Congress to deregulate rail to be on an even footing with trucking, the railroads asked lawmakers to *regulate their rivals*. The New Deal Congress, which was enamored with regulation (thus likely prolonging the Great Depression, but that's for another speech) was more than happy to oblige in 1935.[17]

What was the unintended consequence of regulating rivals in the transportation context? With transportation rates cemented at artificially high levels by the regulator, manufacturers and distributors of goods that required shipping found it cheaper to deploy their own trucking fleets.[18] Trucks that operated privately and not as common carriers were exempt from federal economic regulation. Of course, investment and revenue flowed to the least regulated option, private trucking. Congress, the regulators and the railroads didn't foresee this entirely predictable consequence. As a result, the regulated railroads lost market share and income for decades. Rail's share of the surface freight market had fallen from 65 percent at the end of World War II to only 35 percent by the 1970s.[19]

Finally, by the mid 1970s, railroad and trucking executives alike saw the light and pled with Congress to *deregulate* them to give them the freedom to invest and compete in an unfettered market. After enactment of deregulatory laws in 1976 and 1980,[20] the rail and trucking industries respectively began to grow and prosper. Consumers were immediate beneficiaries of deregulation with rates falling by 30 percent[21] and transit time reduced by at least 20 percent by 1988.[22]

But what about profitability? Don't falling prices equate to reduced profits? Isn't jumping from the certainty of price regulation into the unknown chaos of an unregulated competitive market sure to put downward pressure on net revenue? Aren't industries, and even individual companies, really better off in the shelter of command and control regulatory regimes? Doesn't investment in infrastructure increase under the certainty of rate regulation? The answer to all of these questions is: no.

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the TaxPayers' Alliance, for her assistance with research regarding the regulation of the European postal system in the 17th century. I also would like to thank Tyler Cox, Emilie de Lozier, Emanuel Gawrieh and Sarah Leggin for their research contributions.

[17] Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543 (1935).

[18] CLIFFORD WINSTON ET AL., THE ECONOMIC EFFECTS OF SURFACE FREIGHT DEREGULATION 4 (1990).

[19] Robert E. Gallamore, *Regulation and Innovation: Lessons from the American Railroad Industry in* ESSAYS IN TRANSPORTATION ECONOMICS AND POLICY: A HANDBOOK IN HONOR OF JOHN R. MEYER 493, 493 (José Gómez-Ibáñez, William B. Tye & Clifford Winston, eds., 1999).

[20] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

[21] Clifford Winston, *The Success of the Staggers Rail Act of 1980* 8-9 (AEI-Brookings Joint Center, Oct. 2005), *available at* http://www.brookings.edu/research/papers/2005/10/railact-winston.

[22] Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSP. 89, 99 (1998).

History teaches us that profitability and investment tend to *increase* once the weight of regulation is lifted from the collective chest of industry. For example, rail's profitability gained steam after deregulation with its return on investment (ROI) nearly doubling.[23] Better yet, return on equity (ROE), or profit earned on shareholder investment, more than tripled in the early years after deregulation.[24] And investment was stoked by deregulation – railroads invested U.S. $480 billion into network upgrades, or 40 percent of revenue, between 1980 and 2010.[25] All of this was achieved even though the U.S. railroad industry's rates are half of Europe's and are the lowest in the world.[26]

My use of the railroad and trucking example isn't a matter of cherry-picking the most useful scenarios. Deregulation in other networked industries benefited all involved as well. For instance, American airline deregulation that encouraged competition and allowed pricing freedom produced similar results: fares declined, revenues increased, consumers enjoyed more choices and were able to fly more.[27] Similarly, after the partial deregulation of the American telecom sector in 1996, markets witnessed lower prices, increased investment, more powerful innovation, and skyrocketing consumer adoption of new offerings.[28] Success has been especially robust in the American wireless sector because it has been lightly regulated since its inception.[29]

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[23] Railroad's ROI averaged 4.9 percent from 1971 through 1980, compared with a 2.5 percent average between 1970 and 1979. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-90-80, RAILROAD REGULATION: ECONOMIC AND FINANCIAL IMPACTS OF THE STAGGERS RAIL ACT OF 1980 34 (1990).

[24] Railroad's ROE, which averaged only 2.3 percent in the 1970s, climbed to 9 percent between 1971 and 1980. *Id.* at 35.

[25] ASS'N OF AM. RAILROADS, RAIL EARNINGS TODAY PAY FOR CAPACITY AND SERVICE IMPROVEMENTS FOR TOMORROW 1 (2011), *available at* http://www.aar.org/~/media/aar/Background-Papers/Rail-Earnings-Today.ashx.

[26] ASS'N OF AM. RAILROADS, THE COST EFFECTIVENESS OF AMERICA'S FREIGHT RAILROADS 2 (2012), *available at* http://www.aar.org/~/media/aar/Background-Papers/The-Cost-Effectiveness-of-Freight.ashx.

[27] From 1976 to 1982 alone, real fares fell by more than 9 percent. *Compare* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1978 671, table 1134 (99th ed. 1978) *with* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1984 633, table 1099 (104th ed. 1983). These figures are even more impressive considering fuel costs increased by 88 percent over the same period. *Id.* at 636, table 1103. Moreover, passenger traffic and, with it, industry revenues, have expanded. Specifically, total operating revenues grew from 37,629 million in 1975 to 37,629 million in 1985. *See* U,S. DEP'T OF TRANSP., RESEARCH & INNOVATIVE TECH. ADMIN., NATIONAL TRANSPORTATION STATISTICS table 3-22 (2011), *available at* http://www.bts.gov/publications/national_transportation _statistics/pdf/entire.pdf (total operating revenues in 1975 to 37,629 million in 1985. Additionally, the number of air carriers, both passenger and freight, approximately tripled between 1976 and 1983. Thomas Gale Moore, *U.S. Airline Deregulation: Its Effects on Passengers, Capital, and Labor*, 29 J.L. & ECON. 1, 5 (1986) (citing thirty-three certificated carriers in 1976, compared with ninety-eight in 1982). Many new entrants have made their presence known by operating as "low-cost" or "independent," like Southwest Airlines or ValuJet (now known as AirTran). *See* Winston, *supra* note 22, at 93-94.

[28] For instance, local service providers doubled their revenues the year after the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996), was passed. *See* INDUSTRY ANALYSIS DIVISION, COMMON CARRIER BUREAU, FEDERAL COMMUNICATIONS COMMISSION, LOCAL COMPETITION (Dec. 1998), http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcomp98.pdf ("Local Competition Report"). And, between 1996 and 2001, investment by telecommunications firms skyrocketed and capital stock increased at a rate that far exceeded the period

Examples of deregulatory phenomena are by no means limited to American success stories. Europe has also benefited from deregulation. Since the introduction of competition, the European freight rail market has enjoyed healthier growth and investment just as the European postal system did in the 17th century![30]

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before the passage of the 1996 Act. *See id*. at 3-4; Lawrence J. Spiwack, *The Truth About Telecommunications Investment After the Telecommunications Act of 1996,* PHOENIX CENTER POLICY BULLETIN NO. 4, at 3-4 (2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=503364. Additionally, the 1996 Act resulted in lowered prices and increased innovation. *See, e.g.,*Reed Hundt, *Ten Years Under the 1996 Telecommunications Act*, 58 FED. COMM. L.J. 399, 402 (2006); The Telecommunications Act of 1996, NTIA (Feb. 4, 1999), *available at* http://www.ntia.doc.gov/legacy/otiahome/top/publicationmedia/newsltr/telcom_act.htm#LOCAL (citing ECONOMIC REPORT OF THE PRESIDENT, ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS, U.S. Gov't Printing Office (1999), *available at* http://www.gpo.gov/fdsys/pkg/ERP-1999/pdf/ERP-1999.pdf).

[29] Today, the U.S. wireless industry directly or indirectly provides more than 2.4 million jobs and its economic contribution has grown more than five times faster than the overall economy (16 percent versus 3 percent). *See* CTIA-THE WIRELESS ASSOC., SEMI-ANNUAL 2011 TOP-LINE SURVEY RESULTS 10 (2012), http://files.ctia.org/pdf/CTIA_Survey_Year_End_2011_Graphics.pdf ("CTIA SEMI-ANNUAL 2011 SURVEY RESULTS"); *National Framework*, CTIA – THE WIRELESS ASSOC., http://www.ctia.org/advocacy/position_papers/index.cfm/AID/12062 (last visited June 20, 2012) ("CTIA National Framework"). Since the 1996 Act, estimated connections in the wireless industry have increased from 44 million in 1996 to over 331 million in 2011, while average local monthly bills have decreased. Also, in 2011 alone, over $25 billion was invested in United States' wireless infrastructure. *See* CTIA-THE WIRELESS ASSOC., CTIA SEMI-ANNUAL WIRELESS INDUSTRY SURVEY (2012), http://www.ctia.org/advocacy/research/index.cfm/AID/10316 (last visited June 19, 2012); CTIA SEMI-ANNUAL 2011 SURVEY RESULTS at 2, 10. According to the most recent FCC statistics, nine out of ten American consumers have a choice of at least *five* wireless service providers. *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services, WT Docket No. 10-133, *Fifteenth Report*, 26 FCC Rcd 9664, 9669 (2011). As a result, American consumers enjoy low prices – 4 cents per minute – and high mobile usage rates. *See* Roger Entner, *The Wireless Industry: The Essential Engine of U.S. Economic Growth*, RECON ANALYTICS, at 1 (May 2012), http://reconanalytics.com/wp-content/uploads/2012/04/Wireless-The-Ubiquitous-Engine-by-Recon-Analytics-1.pdf).

[30] *Communication from the Commission to the Council and the European Parliament on Monitoring Development of the Rail Market*, at 6, COM (2007) 609 final (Oct. 18, 2007), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0609:FIN:EN:PDF (reporting that, between 2000 and 2005, the Member States with non-incumbent railways witnessed a significant increase in freight rail performance than Member States in which the market was still dominated by a monopoly); *see also* Oliver Stehmann & Hans Zenger, *The Competitive Effects of Rail Freight Mergers in the Context of European Liberalization*, 7 J. COMPETITION L. & ECON. 455, 462 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1833323. Member States that liberalized early recorded the biggest increases in freight rail volume between 1995 and 2004: the U.K. (70 percent),Netherlands (67 percent), Austria (36 percent), and Germany (24 percent). By contrast, output declined in Member States like France that shielded their incumbents from competition. *See Annexes to the Communication on the Implementation of the Railway Infrastructure Package Directives ('First Railway Package')*, at 64, COM (2006) 189 final (May 3, 2006), *available at* http://ec.europa.eu/transport/rail/doc/communication_implementation_1st_rail_pack_annexes.pdf.

Furthermore, during the 30 years war (1618-1648), the decentralization of government undermined the previously monopolistic postal system. Where state monopolies were not enforced, wide diversity existed. For example, in 1695, postal customers in the Free City of Hamburg could choose among local postal entities affiliated with at least eight different regions and various private delivery services.

Hopefully, the point of these analogies is obvious. "Regulating my rival" is a seductive notion for many, but it only lures its victims to rocky shores before revealing itself as a perilous Siren call. Telecom companies should not look to regulate their "rivals," Internet content and applications companies, down to their level – especially not through an intergovernmental body.

Instead, network operators should seek deregulation by their home governments to allow them full flexibility to produce and price freely in competitive markets. In fact, as history shows us, attempting to regulate rivals will only produce unintended consequences that will harm the companies advocating regulation. More importantly, consumers end up losing the most. In short, the opposite of what is desired will occur, something called "regulatory failure." No government, let alone an intergovernmental body, can make economic and engineering decisions in lightning fast Internet time. Nor can any government mandate innovation. But new rules can undermine investment, innovation and job creation all too easily.

Despite these realities, resisting the temptation to regulate is difficult for many. Furthermore, deregulation can seem counterintuitive to some. We always hear talk of "market failure," but we rarely see analyses of "regulatory failure." Perhaps that is why, in the words of Professor Adam Thierer, "regulation *always* spreads."[31] As world economies contract and government debt mounts, repeating the same government actions of regulating more and spending more of the public's money will only produce the same results: shrinking economies and growing debt. It is time to reverse these trends, but doing so will require tremendous political courage.

We can start by avoiding any expansion of regulation to the Internet. Its phenomenal success can be traced directly to its *voluntary* and *self*-governing structure, the result of a multi-stakeholder process free from top-down governmental influences. In fact, policy makers should head in the opposite direction of the proposals outlined earlier. We should learn from the voluntary, bottom-up, self governance approach in the image of the non-hierarchical Internet itself, and look to apply this successful model elsewhere. Revolutionizing public policy through a fundamental modernization of legacy laws to clear away unnecessary regulatory obstructions will uncork the flow of investment

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Competition drove down costs. In 1712, a postal order was issued reiterating the governmental monopoly and reversing private post in Prussia. By 1720, other European states proposed the establishment of cooperative postal arrangements which would bypass Prussia, but serve the Danzig to Petersburg line. The other European states signed a treaty in 1723, which divided the routes amongst the states and included a promise to suppress independent postal carriers, returning postal carriage to a monopolistic state. *See* ELI NOAM, TELECOMMUNICATIONS IN EUROPE 8-13 (Oxford University Press, 1992) (for broader economic themes, see all of chapter 2).

[31] Berin Szoka & Adam Thierer, *Net Neutrality, Slippery Slopes & High-Tech Mutually Assured Destruction*, TECH. LIBERATION FRONT (Oct. 23, 2009), http://techliberation.com/2009/10/23/net-neutrality-slippery-slopes-high-tech-mutually-assured-destruction/ ("The reality is that regulation *always* spreads. The march of regulation can sometimes be glacial, but it is, sadly, almost inevitable: Regulatory regimes grow but almost never contract.").

capital, spark innovation, drive economic growth and propel job creation. Couldn't today's world economy benefit from such positive and constructive change?

On the other hand, dragging rivals down to the lowest common denominator of overly regulated international telecom companies will enshrine mediocrity at best, and, at worst, snuff out incentives to take risks and reap the resulting rewards, therefore killing opportunities to revitalize moribund economies and improve the human condition.

Thank you for having me here today and I look forward to learning from this fabulous conference.