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# ELEVATING THE CONSUMER IN COMMUNICATIONS POLICY-MAKING

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As a representative of Silicon Valley in the U.S. House of Representatives for the past twenty years and now as the Ranking Member of the House Subcommittee on Communications and Technology, I have witnessed first-hand the unprecedented growth in the communications and technology sectors. Silicon Valley companies like Google, Yahoo!, and Facebook have redefined our world with products that change the way we live, conduct business, and interact with one another. At the same time, start-ups like TuneIn, Eye-Fi, Waze, and Roku are working hard to achieve the same level of name recognition by changing their respective industries and offering innovative products that fit our ever-evolving technology demands. At a time when our country continues to recover economically, Silicon Valley has proven to be a powerful example of ingenuity and business leadership. My primary goal as Ranking Member of the House Subcommittee on Communications and Technology is to replicate this success across the country by advocating for a regulatory framework that enhances competition, consumer choice, and innovation.

At its core, the Communications Act of 1934 recognizes the importance of protecting the public interest.<sup>1</sup> This principle has been tested time after time and has ensured that the public airwaves remain available to those seeking the benefits of telecommunications, even as the communications landscape has evolved. Nearly eighty years after the Act was signed into law, consumers are

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<sup>1</sup> Communications Act of 1934, 47 U.S.C. § 151 (2006).

becoming increasingly reliant on a host of new technologies. Since Congress passed the Telecommunications Act of 1996,<sup>2</sup> broad innovation in the video, audio, and wireless spheres has led to a convergence in the telecommunications marketplace and an ever-increasing number of companies seek to provide services through a variety of means, including through cable, satellite, and the Internet. Consequently, lawmakers have been left with the challenge of balancing this new era with existing laws and regulations.

This changing landscape presents many new questions for consumers to grapple with:

- How will the “spectrum crunch” affect the performance of a mobile subscriber’s smartphone?
- What network speed does the consumer get when they choose to upgrade from 3G to 4G?
- Can the inventor of a mobile application be assured unrestricted distribution of their app across wired and wireless networks?
- What is the cause of the recent blackouts affecting a favorite broadcast or cable programming?
- What more can be done to elevate the consumer when developing communications policy and ensure an environment that enhances consumer choice and protection?

The 111th Congress provided a perfect example of how to address prevailing consumer concern when it passed the Commercial Advertisement Loudness Mitigation Act (“CALM Act”),<sup>3</sup> a bill I first introduced in 2008. Through the passage of the CALM Act, Congress addressed a top consumer complaint to the Federal Communications Commission over the last half century—the annoyance of blaringly loud television commercials. The CALM Act was signed into law in December 2010 and broadcasters and pay-TV providers were required to be in compliance with the Act as of December 2012. While this simple bill does not purport to solve the many challenges facing the telecommunications sector, it is a commonsense look at how policymaking can be responsive to consumer experience.

As Ranking Member of the Subcommittee on Communications and Technology, I am committed to ensuring the U.S. leads the world in telecommunications. Using the CALM Act as a template, here are several other areas where I believe the 113th Congress can have an impact on policy affecting consumer experience in the communications and technology marketplace.

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<sup>2</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

<sup>3</sup> Commercial Advertisement Loudness Mitigation Act, 47 U.S.C. § 621 (2006).

## I. AVOID THE UPCOMING SPECTRUM “CRUNCH”

During the 112th Congress, much of the Subcommittee’s attention focused on freeing up additional spectrum to support the nation’s growing demand for wireless broadband. Consumers have wholeheartedly adopted the transition to smartphones and tablets, and are receiving and transmitting mobile data at an increasingly astonishing rate. In the last few years, we have reached a tipping point in communications policy in which there appears to be broad awareness that the country faces a severe shortage in its spectral resources—popularly known as the “spectrum crunch.” In fact, statistics show that the volume of data traffic on mobile service provider networks will increase thirty-five times from 2011 to 2016,<sup>4</sup> and that there are now more than 100 million smartphone users generating more than one gigabyte of mobile data per month.<sup>5</sup> The Federal Communications Commission has announced that the spectrum deficit could impact network performance as soon as next year and lead to an overall spectrum deficit of 300 MHz over the next five years.<sup>6</sup> In its report, *Mobile Broadband: The Benefits of Additional Spectrum*, the FCC hypothesized that this spectrum shortage may affect mobile broadband service quality and lead to higher prices for consumers.<sup>7</sup> Customers are already experiencing some of these effects as wireless carriers have reduced data speeds and announced an end to unlimited data plans and a shift to “share plans.”<sup>8</sup>

Continued innovation and economic growth in this sector depends on our ability to leverage spectrum for communications service providers and entrepreneurs creating new applications and products for the wireless market. We must develop a comprehensive and forward-thinking spectrum policy that will allow us to avoid this potential slowdown, and harness all available resources to tackle this problem now.

The Obama Administration has outlined an aggressive agenda to maintain our country’s place as a leader in communications technology. President Obama’s Wireless Innovation and Infrastructure Initiative is a direct response

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<sup>4</sup> *TIA’s 2012 ICT Market Review and Forecast*, TELECOMM. INDUS. ASS’N (Mar. 19, 2012), <http://commcns.org/YdBlE>.

<sup>5</sup> CISCO SYS. INC., CISCO VISUAL NETWORKING INDEX: GLOBAL MOBILE DATA TRAFFIC FORECAST UPDATE, 2011-2016, at 3 (Feb. 14, 2012), *available at* <http://commcns.org/13N4pas>.

<sup>6</sup> FCC, FCC STAFF TECHNICAL PAPER, MOBILE BROADBAND: THE BENEFITS OF ADDITIONAL SPECTRUM 9 (2010).

<sup>7</sup> *Id.* at 20. *See also* Amy Gahran, *FCC Warns of Looming Mobile Spectrum Crunch*, CNN (Nov. 5, 2010), <http://commcns.org/YdBQ6D>.

<sup>8</sup> *See* News Release, AT&T, An Update for Our Smartphone Customers With Unlimited Data Plans (July 29, 2011), *available at* <http://commcns.org/106olBn>; *see also* Press Release, Verizon Wireless, Verizon Wireless Unveils New Share Everything Plans For Basic Phones, Smartphones, Tablets and More (Jun. 12, 2012), *available at* <http://commcns.org/Vx39FH>.

to the growing concern over a spectrum crunch caused by the proliferation of wireless communications services.<sup>9</sup> In the initiative, President Obama called for stakeholders in the commercial and government sectors to clear 500 MHz of spectrum for mobile broadband use, indicating a preference to see spectrum cleared by implementing voluntary incentive auctions, and working amongst federal agencies to make more efficient use of exclusive bands of spectrum held by the federal government.

In February 2012, Congress took the first steps towards creating a twenty-first century spectrum policy when it passed H.R. 3630, the Middle Class Tax Relief and Job Creation Act.<sup>10</sup> The bill, which had widespread bipartisan support, gives the FCC the authority to hold voluntary incentive auctions for spectrum currently occupied by broadcasters. While we will have to wait to see just how many broadcasters choose to participate, it is believed that the FCC will generate over \$25 billion in revenue from the auction and clear as much as 120 MHz of spectrum, making more of this resource available for consumers' mobile broadband use.<sup>11</sup>

The spectrum legislation also includes two critical public safety provisions that will have long-term benefits for communities around the country. A key recommendation included in the 9/11 Commission Report was the development of a compatible radio network for first responders. The recently enacted spectrum bill includes funding for the development of a nationwide, interoperable mobile network for emergency first responders.<sup>12</sup> The law ensures that all branches of our public safety community will have a national communications network that supports both mission-critical voice and data services.

Additionally, I led efforts to include provisions in the new law that will upgrade our nation's 9-1-1 call centers to provide enhanced information to first responders through text, photos, and videos sent by the originating caller. For more than a decade, I have fought to upgrade our 9-1-1 call centers, first to determine the location of calls originating from wireless phones, and today to upgrade to an IP-based Next Generation 9-1-1 system.

While the newly enacted spectrum law represents a positive step towards achieving the President's ultimate goal of freeing up spectrum, it is also incumbent upon the federal government, holders of about sixty percent of the best spectrum, to work to alleviate the upcoming spectrum crunch.<sup>13</sup> The Presi-

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<sup>9</sup> See Press Release, The White House, President Obama's Plan to Win the Future Through the Wireless Innovation and Infrastructure Initiative (Feb. 10, 2011), available at <http://commons.org/uiLaiQ>; see also FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010) [hereinafter NATIONAL BROADBAND PLAN].

<sup>10</sup> Pub. L. No. 112-96, 126 Stat. 156.

<sup>11</sup> NATIONAL BROADBAND PLAN, *supra* note 9, at 76.

<sup>12</sup> Middle Class Tax Relief and Job Creation Act §§ 6101-6303.

<sup>13</sup> PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, EXEC. OF-

dent's Council of Advisors on Science and Technology ("PCAST") has charted an exciting path forward in this regard by releasing a recent report in which it proposed a new hierarchy on how spectrum should be used.<sup>14</sup> PCAST recommends the first ever "shared-use spectrum superhighway" between the private and public sector, representing enormous potential for the immediate expansion of the availability of wireless broadband.<sup>15</sup> This new architecture, which moves the U.S. away from long-term spectrum licensing, will open up more capacity for innovation and create new companies focused on developing technology that will allow users to navigate between frequencies on the proposed superhighway.

Finally, the federal government and private industry must continue to encourage investment in spectrum efficiency technology. Solutions like automatic Wi-Fi switches, small cell technologies, and cognitive radio are examples of ideas that will preserve the level of service that we currently enjoy and open up the spectrum continuum to increased capacity. This is wise policy and Congress should embrace this calling to promote investment in new technologies to make spectrum efficiency a reality.

## II. DRIVING INNOVATION THROUGH UNLICENSED SPECTRUM

As I visit with technology start-ups across my congressional district, the message is very clear: unlicensed spectrum drives opportunities to develop and deploy technologies that support key sectors of the U.S. economy, including healthcare, education, energy, and telecommunications. In total, these unlicensed applications and devices generate an estimated \$50 billion annually for the U.S. economy.<sup>16</sup> The United States has been a world leader in unlicensed spectrum, dating back to the FCC's decision over twenty-five years ago to open up spectrum within the "junk bands" for unlicensed use.<sup>17</sup> Since that time,

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OFFICE OF THE PRESIDENT, REPORT TO THE PRESIDENT: REALIZING THE FULL POTENTIAL OF GOVERNMENT-HELD SPECTRUM TO SPUR ECONOMIC GROWTH 8 (July 2012), available at <http://commcns.org/Vx3s38>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at vii. The PCAST Report also calls for the Secretary of Commerce to "immediately identify 1,000 MHz of Federal spectrum in which to implement the new architecture." Access to the underutilized spectrum will be governed with assistance from industry partners by a newly proposed Federal Spectrum Access System (SAS).

<sup>16</sup> MARK COOPER, CONSUMER FED'N OF AMERICA, THE CONSUMER BENEFITS OF EXPANDING SHARED USE OF UNLICENSED RADIO SPECTRUM: LIBERATING LONG-TERM SPECTRUM POLICY FROM SHORT-TERM THINKING (Nov. 18, 2011), available at <http://commcns.org/XJFDok> (calculating that the \$50 billion per year in value stems from consumers ability to "extend broadband service through the use of wi-fi hot spots" as well as providers ability to "offload" data traffic thereby reducing the number of cell sites that must be built and maintained).

<sup>17</sup> Julius Genachowski, Chairman, FCC, Address at the GSMA Mobile World Con-

billions of devices have been sold and everyday technologies like Wi-Fi and Bluetooth are enjoyed by millions of consumers. Today, Silicon Valley is at the forefront of leveraging the power and potential of the unlicensed economy, from applications that better manage the supply-and-demand of electricity to improving patient care by connecting doctors and nurses to wireless medical devices in a more cost-efficient manner.

Based on these technological and economic benefits, preserving access to license-free spectrum has become an important part of our national telecommunications policy. In fact, the National Broadband Plan, the nation's proposal for developing a universal broadband infrastructure, lists "increas[ing] opportunities for unlicensed devices and innovative spectrum access models" among the key ways of promoting innovation and a "world-leading mobile broadband infrastructure."<sup>18</sup> The Plan also outlines a series of proposals by which the United States can leverage unlicensed spectrum to meet our broadband goals, including two which the Congress and FCC have made considerable progress. These proposals recommend that the FCC identify a contiguous, nationwide band for unlicensed spectrum and "accelerate the introduction of innovative products and services that access the 'white spaces' spectrum between TV channels."<sup>19</sup>

In negotiations leading up to the February 2012 passage of the Middle Class Tax Relief and Job Creation Act, I fought to preserve, protect, and enhance unlicensed spectrum. Despite the future of unlicensed spectrum being called into question during the drafting of this bill, a compromise was reached that allows the FCC to preserve and optimize existing TV white spaces, enables the creation of nationwide guard bands that can be used for unlicensed use, using some of the spectrum relinquished by TV broadcasters in the incentive auction, and requires the FCC to allow unlicensed indoor devices to operate in the 5350-5470 MHz band.<sup>20</sup>

While we may not know what the future holds for wireless, small businesses and inventors should be given every opportunity to use unlicensed spectrum to drive new innovation. The value of this resource is immeasurable and Congress should continue to champion policies that enable new unlicensed applications and services.

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gress 5 (Feb. 27, 2012) available at <http://commcns.org/13N59fK>.

<sup>18</sup> NATIONAL BROADBAND PLAN, *supra* note 9, at 1.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> Middle Class Tax Relief and Job Creation Act §§ 6406-6407, Pub. L. No. 112-96, 126 Stat. 156, 231-32.

### III. EXAMINING THE IMPACT OF DATA CAPS

This past summer, the House Subcommittee on Communications and Technology began a series of hearings on the future of the audio and video markets.<sup>21</sup> In addition to exploring the current regulatory structure for legacy technologies, the Subcommittee also focused on an emerging consumer choice found in over-the-top video providers like Netflix and Hulu. A potential limitation is in the growth of these services and the use of data caps—an Internet data usage policy that limits the amount of data a subscriber can send and receive over a broadband network.

As previously noted, consumer demand for innovative, data-intensive video and audio applications continues to grow as Internet Service Providers (“ISPs”) and wireless carriers are abandoning unlimited data plans. Arguing that imposing a cap preserves user experience on their network by clearing congestion, some providers have imposed data caps or usage-based billing and speed throttling techniques for any consumer who exceeds his or her data allocation.<sup>22</sup> There is no denying that over-the-top video streaming and mobile applications are bandwidth-intensive. For example, at 4G speeds, a consumer with a five gigabyte data plan would only be able to stream 1.2 hours of audio content per day through their mobile device.<sup>23</sup> These techniques represent a transition from flat rate pricing, however, ISPs and wireless providers should be encouraged to be as transparent as possible in their billing procedures, while increasing consumer education to ensure these changes are well understood.

Since it appears that data caps are here to stay,<sup>24</sup> Congress should turn its attention to how these caps are affecting user behavior and examine the impact of this policy on future innovation, such as the provision of web-based video services. Specifically, Congress should call on the FCC to closely evaluate these caps so that consumers can be made aware of how they are being implemented and what they are intended to do.

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<sup>21</sup> See *The Future of Audio: Hearing Before the Subcomm. on Commc’n and Tech. of the H. Comm. On Energy & Commerce*, 112th Cong. (Jun. 6, 2012). See also *The Future of Video: Hearing Before the Subcomm. on Communications and Technology*, 112th Cong. (2012).

<sup>22</sup> See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, 27 F.C.C.R. 8610, ¶ 273 (July 18, 2012) (reporting that “even where the physical capacity exists to provide broadband service, some of the leading [ISPs] have begun to impose data caps or shift to usage-based billing. . . . [I]n 2008 Comcast imposed a data cap of 250 gigabytes per month, . . . [i]n May 2011, AT&T imposed a cap of . . . 250 GB for its U-verse service”).

<sup>23</sup> See Eliot Van Buskirk, *What AT&T’s New Data Limits Mean for Music Fans*, EVOLVER.FM (Mar. 2, 2012, 10:33 AM), <http://commcns.org/WnN57n>.

<sup>24</sup> Cecilia Kang, *FCC Chairman Supports Broadband Data Caps Amid Netflix Protest*, WASH. POST (May 22, 2012, 11:16 AM), <http://commcns.org/WMQsDn>.

#### IV. PROVIDE CLARITY IN WIRELESS CHOICES

The nation's growing demand for mobile broadband is being propelled by our wireless providers' ability to deliver devices that operate with increasing speed and efficiency. While consumers appear excited by the next generation of wireless broadband, commonly marketed today as "4G," without a standard definition of the technology, consumers often experience vastly different speeds depending on the wireless provider and location, leading to significant consumer confusion.<sup>25</sup>

Given that 4G networks are generally two to three times faster than mobile devices in the 3G generation, there is no doubt that 4G will change the wireless industry and the way consumers experience mobile communications.<sup>26</sup> The wireless industry has invested billions of dollars to improve service coverage, reliability and data speeds, and consumers' demand for 4G is expected to skyrocket. However, until providers are ready to roll out a seamless network and consumers have an understanding of the technology, it is critical that wireless companies provide consumers with the information they need to make an informed decision when purchasing 4G devices and services.

The best way to meet consumer expectations and protect them in their decision-making is to ensure that consumers have reliable and easy to understand information when it comes to data speeds, network reliability, coverage area, pricing, and the network conditions that can impact the speed of applications and service used on the network. Last year, I introduced the *Next Generation Wireless Disclosure Act*,<sup>27</sup> legislation that would establish guidelines for defining 4G speeds, and require wireless companies to make the aforementioned information available at the point of sale and in all billing materials. The legislation also would require the FCC to evaluate the speed and price of 4G wireless data service provided by the top ten U.S. wireless carriers in order to provide consumers with access to a side-by-side comparison in their service area.<sup>28</sup> I am pleased by the FCC's recent announcement that the next edition of its *Measuring Broadband America* report will attempt to include detailed informa-

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<sup>25</sup> See Robert Cheng, *T-Mobile, Sprint Sow Confusion Over '4G'*, WALL ST. J. (Nov. 3, 2010), <http://commcns.org/Vx3Z5f>; see also Mark W. Smith, *Smartphone Users Face Confusion*, USATODAY (Jan. 9, 2011, 7:00 AM), <http://commcns.org/WMQuet>.

<sup>26</sup> Compare Mark Sullivan, *AT&T Roars Back in PCWorld's Second 3G Wireless Performance Test*, PC WORLD (Feb. 22, 2010, 8:12 PM), <http://commcns.org/10mB2Ne> (finding that download speeds for 3G service on the four major carriers varied from 0.79 to 1.41 mbps) with Mark Sullivan, *4G Wireless Speed Tests: Which Is Really the Fastest?*, PC WORLD (Mar., 13, 2011, 6:00 PM) <http://commcns.org/WMQzio> (citing 4G download speeds on the major carriers from 1.01 to 2.28 mbps).

<sup>27</sup> H.R. 2281, 112th Cong. (2011).

<sup>28</sup> *Id.*



tion on actual mobile broadband performance.<sup>29</sup>

As consumers continue to wander in an uncertain 4G landscape, both Congress and the FCC need to be vigilant in protecting consumers and ensure they know exactly what they are getting when they sign up for a wireless data plan and device. If consumers demand faster, more reliable wireless data service, there should be no reason why providers cannot also enhance transparency in sales and billing and ensure that consumers are fully informed before they commit to a long-term service contract.

## V. PRESERVE AN OPEN AND FREE INTERNET

Openness of the Internet—the ability of any person, anywhere in the world to reach out and access legal content that someone else has made available on the Web—has been a hallmark of the Internet since it was created.<sup>30</sup> The openness of the Internet has changed our economy and revolutionized business, resulting in three million jobs over the last fifteen years and drawing more than \$250 billion in investment from the capital venture community.<sup>31</sup> This investment has driven streaming video, mobile apps, and an online shopping marketplace, which by 2015 is expected to produce nearly \$300 billion in U.S. sales.<sup>32</sup> This success and growth has come in large part due to the Internet's place as an open forum where companies compete online, and consumers have a choice in the content they consume.

As the Internet reaches new levels of popularity both in the United States and around the globe, preserving a consumer's ability to control what they access online must be a top priority. The most pressing challenge comes from nations like Russia and China who have expressed a strong interest in shifting the multi-stakeholder model of Internet governance to intergovernmental con-

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<sup>29</sup> FCC To Launch Mobile Broadband Services Testing and Measurement Program, *Public Notice*, 27 F.C.C.R. 10,875, 10,875 (Sept. 4, 2012); see also FCC, 2012 Measuring Broadband America: A Report on Consumer Wireline Broadband Performance in the U.S. (2012), available at <http://comcomns.org/VOV3ZY>.

<sup>30</sup> Vinton Cerf, Op-Ed., *Keep the Internet Open*, N.Y. TIMES (May 24, 2012), <http://comcomns.org/Vx4uMt>. In the piece, Mr. Cerf, who is Google's chief Internet evangelist and is universally recognized as one of the "fathers of the Internet," writes: "The Net prospered precisely because governments—for the most part—allowed the Internet to grow organically, with civil society, academia, private sector and voluntary standards bodies collaborating on development, operation and governance." *Id.*

<sup>31</sup> HAMILTON CONSULTANTS, INC., DR. JOHN DEIGHTON & DR. JOHN QUELCH, ECONOMIC VALUE OF THE ADVERTISING-SUPPORTED INTERNET ECOSYSTEM 4 (Jun. 10, 2009) available at <http://comcomns.org/SWnMwL> (estimating in 2009 that 3.05 million jobs are sustained by the advertising-supported Internet).

<sup>32</sup> SUCHARITA MULPURI ET AL., FORRESTER RESEARCH, U.S. ONLINE RETAIL FORECAST, 2010 TO 2015: ECOMMERCE GROWTH ACCELERATES FOLLOWING "THE GREAT RECESSION" (Feb. 21, 2011).

trol. Today, the Internet's architecture and technical operations are driven by a multi-stakeholder approach, led by institutions like the Internet Corporation for Assigned Names and Numbers ("ICANN"), the Internet Governance Forum, World Wide Web Consortium and Internet Engineering Task Force ("IETF"). These independent bodies, with the ability to adapt to rapidly evolving technologies, have managed and maintained the Internet since it was first introduced to the public.

Later this year, the United Nations' designated agency for information and communications technology, the International Telecommunications Union ("ITU"), will consider such proposals.<sup>33</sup> These proposals represent a troubling expansion of the ITU's authority and extreme indifference to a long-standing approach to Internet governance that allows all interested stakeholders to participate as equals in the processes of knowledge-sharing and decision-making.

At the time this publication went to print, the U.S. was continuing to fend off proposals expected to be considered before the World Conference on International Telecommunications ("WCIT"). These proposals include high-level revisions of long-standing, international regulations such as bringing cyber security under international control; imposing economic regulations on "peering" arrangements; establishing intergovernmental control over ICANN, IETF, and other multi-stakeholder groups that establish Internet engineering and technical standards, as well as regulating international mobile roaming rates.<sup>34</sup> Consumers could be directly impacted by data privacy provisions that would facilitate a nation's ability to access personal information online, and regulations that may balkanize the global Internet by allowing censorship through the use of filtering technologies.<sup>35</sup> These last two provisions would have an undeniable chilling effect on Internet usage at a time when the developing world most needs the democratizing effects of a free and open Internet. Consumers across the globe stand to benefit from an unfettered Internet and these revisions could have a devastating impact on innovation, economic growth, and freedom of expression.

While there is no question that nations must work in concert to address challenges to the Internet's growth and stability, these issues can best be addressed using the existing multi-stakeholder model. The United States, which announced its delegation to WCIT in October 2012, must be resolute in opposing these changes to the Internet's architecture both now and in the future. Congress and the Administration are unified in the belief that the Internet's success

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<sup>33</sup> Robert M. McDowell, Op-Ed, *The U.N. Threat To Internet Freedom*, WALL ST. J. (Feb. 21, 2012), <http://commsns.org/SeO0ZV>.

<sup>34</sup> See *World Conference on International Telecommunications*, INTERNET SOCIETY, <http://commsns.org/W4TK81> (last visited Jan. 17, 2013).

<sup>35</sup> *Id.*

is a result of the principles of open markets and free expression. I am proud to be an original co-sponsor of H.R. Con. Res. 127, a bipartisan resolution that unequivocally states the support of Congress for the multi-stakeholder model of Internet governance. The resolution unanimously passed the House by a vote of 414-0 and it is my sincere hope that with this strong stance, we can avoid a scenario where the Internet becomes subject to intergovernmental control.<sup>36</sup>

Just as the country must respond to international efforts to assert control over the Internet, we must also ensure consumer choice and the openness of the Internet are protected from anyone willing to propagate harms through the network. Since 2005, the FCC has championed the original, open nature of the Internet by first developing policy statements and then implementing official rules protecting consumer access to lawful Internet content, services and applications.<sup>37</sup> The 2010 Report and Order preserves a free and open Internet for consumers by promulgating basic rules that promote transparency, prohibit blocking of lawful content and applications, and ensure there is no unreasonable discrimination of lawful network traffic by wireline broadband providers.<sup>38</sup> This Order solidifies pre-existing principles of fairness and openness that has encouraged billions of users to embrace this platform and led thousands of Internet-based companies and start-ups to online prosperity.<sup>39</sup> Together these basic rules of the road provide both consumers and content providers with the assurances they need to continue to access and invest in applications, services, and devices.

Net neutrality is an important consumer rights issue and I support the strongest possible action to preserve the open environment of the Internet. In the years to come, I believe we must continue to ensure that consumers can innovate through the Internet as its creators envisioned. To that end, I believe that basic rules of the road should be applied across all means of connecting to the Internet, whether wireline or wireless. Consumers will also benefit from

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<sup>36</sup> H.R. Con. Res. 127, 112th Cong. (2012) (as passed by House, Aug. 2, 2012).

<sup>37</sup> *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provisions of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Policy Statement*, 20 F.C.C.R. 14,986 (Aug. 5, 2005).

<sup>38</sup> *In re* Preserving the Open Internet; Broadband Industry Practices, *Report and Order*, 25 F.C.C.R. 17,905, ¶ 1 (Dec. 21, 2010) [hereinafter Open Internet Order].

<sup>39</sup> *Id.* (finding that the three basic rules adopted in the Order—transparency, no blocking, and no unreasonable discrimination are “grounded in broadly accepted Internet norms”).

efforts that prevent the division of Internet traffic into “fast lanes” and “slow lanes” either through paid prioritization or exemptions for carriers of partial Internet traffic. Finally, it is my hope that the FCC will enforce these rules aggressively and respond not only to violations of the Order, but also attempts to evade its spirit.

Congress granted the FCC with authority to promote online openness.<sup>40</sup> I defended the Open Internet Order as Ranking Member of the House Subcommittee on Communications and Technology as a proper exercise of agency authority to protect end users and promote competition in the voice, video, and audio marketplace. I appreciate the Commission’s careful reconsideration of their net neutrality principles following the United States Court of Appeals for the District of Columbia Circuit’s decision in *Comcast v. FCC* and I believe the FCC has wisely built in exceptions to the current Order that give broadband providers the latitude to reasonably manage their networks.<sup>41</sup> Although this new Order already faces a court challenge with constitutional implications to the First Amendment and the Takings Clause of the Fifth Amendment,<sup>42</sup> there can be no doubt that this Order is overwhelmingly supported by consumers, with the FCC receiving more than 100,000 comments during the rule-making process with a majority in favor of open Internet protections.<sup>43</sup>

## VI. REFORMING SPECIAL ACCESS SERVICES

Even as the Internet has opened up new markets and opportunities for users, consumers of high-speed broadband find themselves reliant on the network infrastructure and connections of a few large incumbent companies. Nearly all wireline and wireless broadband providers depend on high-capacity circuits known as “special access” to connect their customers to the Internet. These middle-mile connections serve as the backbone for dedicated high-speed broadband and support Internet access for small businesses, Fortune 500 corporations, universities, hospitals, public safety organizations, and government agencies.

In the spirit of competition, the regulatory framework Congress established in the Telecommunications Act of 1996 was intended to ensure that access to these inputs be made available by incumbent companies to telecommunications providers at cost-based wholesale rates rather than through a flexible pricing

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<sup>40</sup> 47 U.S.C. § 706 (2006).

<sup>41</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (holding that the FCC could not exercise ancillary jurisdiction under Title I of the Communications Act to regulate the network management practices of petitioner ISP)

<sup>42</sup> Joint Brief for Verizon and Metro PCS at 42-49, *Verizon v. FCC*, No. 11-1355 (D.C. Cir. Sep. 30, 2011).

<sup>43</sup> Open Internet Order, *supra* note 38, ¶ 2.

model.<sup>44</sup> This structure was also supposed to allow new entrants sufficient time to build out their own middle-mile networks. Encouraged that the market had demonstrated a “strong and irreversible trend toward a multiplicity of carriers,”<sup>45</sup> the FCC deregulated the special access market in 1999 and established a price flexibility regime for service providers.<sup>46</sup> Despite this early optimism, the widespread competition envisioned in the 1996 Act has not materialized in the special access market and ownership of special access lines has become concentrated primarily in a small number of companies that control nearly ninety percent of the overall market.<sup>47</sup>

In June 2012, the FCC granted the petitions for regulatory relief of two incumbent telephone companies, enabling these providers to increase the rates they charge to businesses for special access services in the San Francisco and San Antonio markets.<sup>48</sup> Given the complexity of the arguments on both sides of this issue and the implications to competition in the telecommunications market, the FCC has recently determined that a mandatory data request from incumbent and competitive providers is needed. Through the collection of this information, the FCC intends to conduct a comprehensive study detailing the impact of current special access regulation on the market. After several attempts at revising its special access rules, I would like to see the FCC act expeditiously to conduct the appropriate data collection of cost structures and pricing for incumbent and competitive data carriers. I am also supportive of the FCC’s most recent decision that puts on hold any petitions for pricing flexibility until the agency determines whether its rules have achieved the market competition goals of the Telecommunications Act. This will ensure that additional price increases will not take place until the agency can develop policy that is good for consumers, small businesses, and the competitive telecommu-

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<sup>44</sup> See 47 U.S.C. §§ 251(c)(2), 252(d)(1) (2006).

<sup>45</sup> *In re Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 F.C.C.R. 14,221, 14,390 (Aug. 5, 1999) (statement of Comm’r Ness).

<sup>46</sup> *Id.* ¶¶ 1-3; see also News Release, FCC, Commission Adopts Pricing Flexibility and Other Access Charge Reforms (Aug. 5, 1999), available at <http://commcns.org/WMQJWZ>.

<sup>47</sup> See *Ex Parte* Notice from Erin Boone, Senior Corporate Counsel, Federal Regulatory Affairs, Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25; RM-10593 (Mar. 1, 2012), available at <http://commcns.org/VbLICH> (calling attention to Level 3’s belief that three price-cap local exchange carriers “have dominant shares of the special access market, at or approaching 90%”).

<sup>48</sup> Petitions of Pacific Bell, Southwestern Bell, and Windstream for Pricing Flexibility in Specified Metropolitan Statistical Areas Deemed Granted By Operation of Law, *Public Notice*, 27 F.C.C.R. 7174 (Jun. 26, 2012).

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## VII. CONCLUSION

Looking ahead, it is clear that the 113th Congress has a unique opportunity to preserve the rich experience of the American consumer across our robust technological landscape. A laser-like focus on increasing competition, innovation, and consumer choice should drive our decision and policy-making, and Congress has to work with industry leaders and all stakeholders for the benefit of the consumer.

I am very grateful to have been given the opportunity to introduce the twenty-first volume of the *CommLaw Conspectus*. This volume is yet another example of the *Conspectus's* place as a leader in scholarly research and debate on issues of communications law and policy. In keeping with the focus of the Preface on giving consumers more choice in the marketplace, T. Randolph Beard, George Ford, Lawrence Spiwak, and Michael Stern provide a legal and economic analysis of the creation of a retail market for set-top boxes as well as the FCC's "AllVid" proposal. Cynthia Conti addresses the FCC's interpretation of the localism policy in U.S. broadcasting and develops a discussion on the social need for such a policy. Derigan Silver and Ruth Walden highlight the movement by lower federal and state courts to remove constitutional protections for private defamatory speech. The volume also features comments exploring ICANN's decision to expand the number of top-level domain names available on the Internet, digital estate planning, and how the United States and Europe can reconcile E.U. privacy regulations with the Patriot Act. With this volume, the editors and staff of the *CommLaw Conspectus* have once again raised the level of discourse on the law, economics, and policy, and I congratulate them on a job well done.