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MARKUP OF H.R. _____, A BILL TO AFFIRM THE POLICY OF THE UNITED STATES
REGARDING INTERNET GOVERNANCE

THURSDAY, APRIL 11, 2013

House of Representatives,
Subcommittee on Communications
and Technology,
Committee on Energy and Commerce,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:33 p.m., in Room 2123, Longworth House Office Building, Hon. Greg Walden [chairman of the subcommittee] presiding.

Present: Representatives Walden, Latta, Shimkus, Terry, Rogers, Blackburn, Scalese, Guthrie, Kinzinger, Upton (ex officio), Eshoo, and Waxman (ex officio).

Staff Present: Nick Abraham, Legislative Clerk; Gary Andres,

Staff Director; Ray Baum, Senior Policy Advisor/Director of Coalitions; Mike Bloomquist, General Counsel; Matt Bravo, Professional Staff Member; Andy Duberstein, Deputy Press Secretary; Neil Fried, Chief Counsel, C&T; Sydne Harwick, Legislative Clerk; Brittany Havens, Legislative Clerk; Kirby Howard, Legislative Clerk; Peter Kielty, Deputy General Counsel; David Redl, Counsel, Telecom; Charlotte Savercool, Executive Assistant, Legislative Clerk; Phil Barnett, Minority Staff Director; Jen Berenholz, Minority Chief Clerk; Shawn Chang, Minority Senior Counsel; Karen Lightfoot, Minority Communications Director and Senior Policy Advisor; Margaret McCarthy, Minority Professional Staff Member; Roger Sherman, Minority Chief Counsel; and Kara van Stralen, Minority Special Assistant.

Mr. Walden. I will call to order the Subcommittee on Communications and Technology. At the conclusion of opening statements yesterday, the chair called up the committee print and the bill was open for amendment at any point. There still appears to be some misunderstanding about what this legislation does or does not do, and ironically that may be good news since further clarification may be a path towards agreement.

What I heard Ranking Member Waxman and -- Members Waxman and Eshoo and their colleagues say in their opening statement yesterday is that this legislation would require the FCC to strike down its network neutrality regulations. I respectfully disagree.

We know how to draft legislation requiring the FCC to strike the network neutrality regulations. We drafted and passed that through the House last Congress, a resolution of disapproval to do that just. From our point of view, this legislation does not require the FCC to strike its network neutrality regulations. And as a matter of law, statement of policy does not impose statutorily mandated responsibilities on an agency. And this legislation neither requires nor authorizes the FCC to take any action with respect to its network neutrality regulations or any other rules. The FCC knows this well. It is the reason the D.C. Circuit throughout the Commission's attempt to sanction Comcast for its network management of Internet traffic. The FCC had claimed it was authorized to do so by another policy statement already in the Communications Act. The appeals court disagreed. And just as a policy statement cannot authorize the FCC

to adopt network neutrality regulations, a policy statement cannot require the FCC to strike them if the agency otherwise has the authority to impose them in the first place, as the FCC claims in the current appeal of its rules.

For the same reason, I also disagree that this legislation might have the unintended consequences of preventing the U.S. Government entities from enforcing intellectual property law, from taking action against child pornography or from otherwise prohibiting or penalizing any number of other illegal acts.

Let me say it again. A statement of policy does not impose statutorily mandated obligations on an agency, and so cannot require or prohibit an agency action.

Our staffs have met numerous times to discuss these points, in the 2 months since the hearing on this bill, including with the State Department and the FCC.

As I have also explained, there is a big difference between government controlled management and operation of the Internet and punishing use of it to commit illegal acts.

I am also concerned that adding a savings clause is not only unnecessary, but could be harmful. First, if we start adding caveats, then we undermine our ability to argue against authoritarian regimes that will wrap their repressive goals in their own similarly worded caveats. We saw this in Dubai and we will likely see it again.

Second, implying that an agency would otherwise be bound to do or not do something absent the savings clause would undercut the

precedent that a policy statement does not impose statutorily mandated obligations. Moreover, we would need to include in the savings clause every conceivably affected regulation and every conceivably affected agency to avoid implying that we do intend to effect anything we omit from the savings clause. It is far better we simply rely on the precedent that a policy statement does not create statutorily mandated obligations.

I am also concerned that merely passing the same resolution as last year is insufficient. The resolution made sense when we were simply asking the U.S. delegation for specific negotiations to oppose particular treaties. Those proposals have now been adopted by a number of nations and efforts to drag the Internet within the jurisdiction of international regulatory bodies are only going to increase.

Opponents of Internet freedom have ensconced in the treaty their view that government control of the Internet is acceptable. It is therefore more than warranted for us to codify in law our contrary view.

We developed together and unanimously passed the language about promoting a global Internet free from government control. If we meant what we said, I see no reason not to make that very language official U.S. policy.

Americans For Tax Reform, AT&T, CTIA, Google, the Internet Association, NCTA, U.S. Telecom and Verizon have all issued statements of support. I seek unanimous consent to enter those statements into the record. Without objection.

[The statements follow:]

***** COMMITTEE INSERT *****

Mr. Walden. Nonetheless, never let it be said I am unwilling to sit down and further discuss matters in the hopes of reaching amicable resolutions. I am told that Ranking Members Waxman and Eshoo are prepared to vote this bill out today if we will commit to having our staffs sit down again in good faith between now and the full committee markup to see if we can come to agreement. Nothing will be off the table, nothing.

If we reach agreement, terrific. If we do not, we can pick up again at full committee where we leave off today, but we should give this an opportunity to work. This is something I will agree to if Ranking Members Waxman and Eshoo will too.

With that, I will yield back and I will recognize my friend from California, Ms. Eshoo.

Ms. Eshoo. Thank you, Mr. Chairman. I welcome your words and I thank you, because the substantive issues which I raised yesterday and other members did as well on my side of the aisle continue to be of great concern. I believe that it is in the best interests of our subcommittee to find a bipartisan path forward, and I know that you do, too.

The concerns raised by the four Federal agencies as well as several industry groups, including Comptel, the Competitive Carriers Association, and the Computer and Communications Industry Association, I think are real indicators that we have problems with the legislation which we need to correct and get right.

I appreciate your recognition that we do have these differences,

but I am also pleased that you have instructed your staff to work with ours in good faith so that hopefully we can reach a bipartisan agreement before reaching full committee markup.

It is my understanding that, as you said, so I think my understanding is correct, that all options remain on the table, including modifying the policy statement or drafting a new resolution altogether. I am hopeful that we can reach a bipartisan agreement, because it will -- and I think this is the most important point, because I believe that it will strengthen the hands of our diplomats in their negotiations and demonstrate a unified front against oppressive regimes who do not share our values of a free and open Internet.

So if agreement is not reached over the course of our negotiations, Democrats will reserve the right to reiterate our objections at the full committee.

So I want to thank you again, Mr. Chairman, for agreeing to work with us, and I also would like to ask unanimous consent that the letters sent yesterday by Comptel, CCA and CCIA be placed in the record. And with that, I will yield back the balance of my time.

Mr. Waxman. Mr. Chairman.

Mr. Walden. With --

Mr. Waxman. Would you yield to me, Mr. Chairman?

Mr. Walden. Yeah. Without objection, the letters are entered in the record. And I now recognize my friend from California, Mr. Waxman.

[The letters follow:]

***** COMMITTEE INSERT *****

Mr. Waxman. I thank you very much. It is better to work together than to be apart, and we have heard repeatedly that the unanimity of Congress last year carried important weight for our diplomats and the U.S. delegation. And I would like us to see if we can be together.

I am not encouraged by your opening statement, because you seem to reject all the points that we raised, but I hope that in our private discussions we can in good faith look at ways to bridge those differences.

I had never said that the legislation would force the FCC to change its Internet freedom rules, but I worry that it would allow somebody else to use it as a basis to challenge the FCC's rules. When you draft something in law, it has an important impact, and what we think we may be saying may not be what a court would say we said. And so I think it is important that we be very, very clear if we are going to put something into the law. And I know you share that view as well.

Mr. Walden. Would the gentleman yield on that point?

Mr. Waxman. Yes.

Mr. Walden. That is part of why I emphasized what I did in the opening statement, because this is part of the record. Just to make clear, from our perspective, we don't believe that it does that, either.

Mr. Waxman. Thank you. Well, Mr. Chairman, I appreciate your good faith and belief, but I just want us to be sure together that we are doing something that we all agree on, and, of course, we all agreed on the statement that we passed last year as a resolution.

You are committing to negotiate in good faith. I think that leads

me to say that we are willing to abstain from offering amendments and agree to a voice vote to advance the legislation. I will not vote for the legislation today, because it is not in a form that I can approve, but it seems to me we ought to just voice vote the bill out. We will hold back our amendments and then we will continue to talk. And I appreciate your willingness to do that.

Mr. Walden. All right. Anyone else seeking recognition? Either side?

If not, the question now occurs on favorably forwarding to full committee the committee print to affirm the policy of the United States regarding Internet governance.

All those in favor shall signify by saying aye.

All those opposed, no.

The ayes have it, and the committee print is favorably reported.

Without objection, staff is authorized to make technical and conforming changes to the committee print approved by the subcommittee today. So ordered.

Without objection, the subcommittee now stands adjourned.

[Whereupon, at 2:43 p.m., the subcommittee was adjourned.]