



Testimony of Harold Feld
Senior Vice President
Public Knowledge

Before the
U.S. House of Representatives
Committee on the Energy and Commerce
Subcommittee on Communications and Technology

Jointly with the
Committee on Foreign Affairs
Subcommittee on Terrorism, Nonproliferation, and Trade
And the
Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations

Hearing On:
Fighting for Internet Freedom: Dubai and Beyond

Washington, DC
February 5, 2013

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Good morning Chairmen Walden, Poe, and Smith, Ranking Members Eshoo, Sherman, and Bass and members of the subcommittees. I am Harold Feld, Senior Vice President at Public Knowledge, a public interest nonprofit dedicated to the openness of the Internet and the open access for consumers to lawful content and innovative technology. As part of Ambassador Kramer’s highly successful outreach to civil society, I and my colleague Rashmi Rangnath served as advisory members of the U.S. delegation to the ITU World Conference on International Telecommunications (WCIT) in Dubai this past December. I am pleased to have the opportunity to testify before you today on the ongoing effort to ensure that Internet freedom is preserved through the policies and interactions of nations and individuals at the International Telecommunications Union (ITU).

Introduction

Let me begin with a personal observation. I have been involved in what people loosely refer to as “Internet governance” for over 15 years. I was involved in the debate around the formation of the

Internet Corporation for Assigning Names and Numbers (ICANN) and served on the ICANN Names Council (as it was then called) in 2002-03. I have testified previously before the House Subcommittee on Technology and Telecommunications on the subject of ICANN and the future of Internet governance. For as long as I can remember, I have heard variations of “the ITU wants to take over the Internet.” Accordingly, when the State Department and other non-governmental organizations (NGOs) collectively referred to as “civil society” reached out to Public Knowledge with concerns about what might happen at the WCIT, I initially reacted with considerable skepticism. How, I asked, could the ITU “take over the Internet?”

My experience as an advisory member to the U.S. delegation to the WCIT has convinced me that this time is different. The danger to free expression online, and the possibility of a fragmented global Internet with tariffs and checkpoints at every national border, is unfortunately very real. It is important to stress, however, that this is **not** because the ITU is an evil organization that hates freedom or a bloated bureaucracy that wants world domination, as some have argued. Nor is it simply a struggle between nations that have an agenda of censorship and repression seeking to hijack the ITU’s processes to extend their reach beyond their borders – although this is certainly part of the problem we face.

Rather, as demonstrated in Dubai, the ITU presents a complicated set of issues and challenges that require a great deal of diplomatic effort and engagement to address. This engagement must include the broad coalition of private sector actors and civil society representatives that the State Department and Ambassador Kramer successfully brought together and engaged prior to the WCIT. It requires us to recognize the difference between the institutional interests of the ITU

and the agendas of the various member states. We must work actively to oppose the agendas of those countries which, for their own reasons, seek to extend their reach beyond their own borders and supersede national protections on privacy, free expression and due process either by direct efforts to internationally regulate content or through control of routing information or other technical aspects of “Internet governance.”

At the same time, however, we must recognize the diversity of interests from nations that share our concerns for free expression, but seek an appropriate forum to address issues ranging from cybersecurity to the global digital divide. Many of these countries, even if they are uneasy about the possibility of enabling global censorship, believe the ITU provides them with such a forum. Our challenge going forward lies in providing a more compelling vision of how the existing International multi-stakeholder processes can better address these very real concerns. This must include a commitment on our part to improve the existing multi-stakeholder processes to meet the concerns of developing nations that participation in these forums requires far greater resources than they have available, or that these forums are essentially captured by the United States and other developed nations.

In making our case, continued engagement with global civil society will remain critical. As I discuss below, the United States outreach to global civil society – both through inclusion of domestic NGOs and engagement with NGOs based in other countries – was critical to enhancing our credibility and making our case in Dubai. As a result, we did not stand isolated at the WCIT. We must build on this foundation through a policy that demonstrates both our continued

engagement in good faith, at the ITU and elsewhere, while simultaneously demonstrating the continued firmness of our resolve.

The Lead Up To The WCIT and What Actually Happened In Dubai.

Two diametrically opposed narratives have emerged from Dubai. In unfortunate echoes of the Cold War, proponents of expanded ITU jurisdiction and defenders of the ITU as an institution accuse the United States of having “ITU-phobia,” or of refusing to negotiate in good faith because of our supposed dominance of the Internet. Alternatively, some commentators have cast this as a straightforward contest between those who want U.N. control of the Internet and those who love freedom, with countries that signed the ITRs siding automatically with the former.

With regard to the accusation that we did not enter into these negotiations in good faith, I can say from my own personal experience that this is categorically not true. The United States went into the World Conference for International Telecommunications with a good faith resolve to negotiate changes to the ITRs to reflect today’s telecommunications networks. At the same time, however, the US government, businesses and civil society agreed that the WCIT must not deal with Internet governance issues. These issues are appropriately discussed in multi-stakeholder forums that provide a voice to governments, businesses, civil society and the Internet technical community and the ITU is not such a forum. Nor were we alone in this resolve. Many other countries equally made clear that they did not believe that the WCIT was an appropriate place to discuss Internet governance or issues surrounding Internet content.

Nevertheless, many of the issues that countries wanted to discuss going into the WCIT were extremely controversial and lacked international consensus. For instance, some countries wanted the ITRs to recognize their right to monitor Internet traffic, control content flowing over the Internet and give them a role in allocation of naming and numbering resources. Others were opposed to these measures and had different proposals of their own. Attempting to forge a consensus among these widely divergent positions in the short duration of the conference was ill advised and proved unsuccessful. Many of these issues would have to be openly discussed and deliberated upon carefully and with consideration for all points of view before they could be incorporated in an international treaty.

Before the WCIT, Dr. Hamadoun Toure, Secretary General of the ITU, assured the world that the WCIT would not be about Internet governance. Yet, as the conference progressed it became clear that for many member states, the WCIT would be all about Internet governance. Russia, China, S. Arabia, UAE, and a few other states made proposals that would have fundamentally changed the open nature of the Internet. For instance, these states made proposals calling for recognition of rights of member states to suspend Internet services, to monitor Internet traffic routes, and to encourage Internet access providers to impose additional charges on application and service providers for privileged access to the Internet. These proposals would have harmed the free flow of information on the Internet by providing legitimacy at the international level to indiscriminate surveillance and also by preferring commercial arrangements inconsistent with the open nature of the Internet.

Thanks to the efforts of the US and our allies, many of these provisions did not make it to the final acts of the WCIT. I was proudly part of this delegation and witnessed first hand its good faith efforts to bridge differences of opinions among countries. As part of our negotiations, we made concession on every single proposal not related to Internet governance, such as proposals governing international roaming and handicap accessibility.

Most significantly, after engagement with global civil society and numerous other countries, the United States reversed its previous position with regard to an express recognition of the fundamental right of free expression in the ITRs. Until Dubai, the United States took the position that the ITRs, as a technical document, should not contain any reference to human rights, even if the reference is one with which we fundamentally agree and support. In the spirit of compromise and consensus, the United States was prepared to support inclusion of a reference to the Fundamental Right of Free Expression set forth in Article 19 of the U.N. Convention on Fundamental Human Rights in the Preamble of the ITRs, as urged by global civil society and numerous member states.

Yet, the final acts of the WCIT did not stay true to the promise that the WCIT would not be about Internet governance. They contain certain provisions and resolutions that touch on Internet governance. In addition, a number of countries sought to subvert the language on free expression and create new rights for member states using the language of human rights. While the implications of these provisions will emerge once countries start implementing them, it is clear that they do not move towards an Internet governance system that respects and fosters the free

flow of information. For these principled reasons, the U.S. government and 53 other countries did not sign the ITRs. Public Knowledge fully supports this decision.

At the same time, we must recognize that the 89 countries that signed the ITRs are not all of one mind or purpose with regard to the future of the ITU and its jurisdiction over Internet issues. The ITRs addressed many issues other than the Internet governance and human rights references that made it impossible for the United States and 53 other countries to sign. It would be an unfortunate mistake to regard the signatory countries as uniformly supporting a broader role for the ITU in the area of Internet governance – despite the efforts of the ITU and certain member states to create just such an impression. By the same token, however, it would be a mistake to assume that countries that declined to sign the ITRs in Dubai could not be persuaded to sign in the future, if we do not continue to remain engaged in good faith and offer a viable alternative.

The Role Of Civil Society

Any account of the developments during the WCIT would be incomplete without telling the story of civil society's role in the conference.

Civil society participation in the WCIT faced many challenges. First, the ITU was not initially open to civil society membership. Thus, while many industry representatives could participate in ITU processes as sector members, for various reasons, civil society could not. In the lead up to the WCIT civil society made several attempts to overcome this barrier and provide meaningful comments to the ITU. After all, the conference was discussing issues such as governments' ability to control Internet content and the nature of traffic flows on the Internet. These issues

have deep impacts on the freedom of expression and other human rights and civil society was uniquely qualified to speak to these issues.

The ITU, for its part, responded with numerous efforts to engage with global civil society, including providing an opportunity for public comment and holding a meeting between Secretary Torre and representatives of global civil society organizations present in Dubai. The ITU also persuaded members to agree to webcasting the plenary sessions and the meetings of Committee 5, the substantive Committee. While welcome, these efforts nevertheless had significant limits. As ITU staff repeatedly advised us, the ITU is ultimately a creature of its member states, and participation relies heavily on either participating through a member state or sector member delegation. While some member states and some sector members (such as the Internet Society) provided credentials to civil society, many others did not. This stands in marked contrast to multi-stakeholder forums such as ICANN, where NGOs can participate fully in their own right. In particular, the inability of unaffiliated NGOs to access ITU documents, or to have a formal say in ITU efforts, severely constrained participation by internationally diverse civil society organizations.

Despite these constraints, civil society managed to gain access to some WCIT documents via leaks and based on this raised public awareness about the conference.

The one silver lining to this situation was the willingness of some governments, most prominently the US government, to include members of civil society on their delegation. I would like to extend my gratitude to the US government for including us and other civil society

members on its delegation. It is important to note however, that this was not an option available to civil society representatives in many other countries.

Public Knowledge participated as part of the U.S. delegation, as well as in international forums with other NGOs. For example, Public Knowledge joined 30 other international civil society organizations in a joint declaration at the Best Bits conference in Baku a month prior to the WCIT highlighting key concerns both with the ITU process and for free expression online. In Dubai, representatives from civil society NGOs participating in affiliation with sector members or as part of national delegations (and the small number of NGOs that sought to participate without formal affiliation) met regularly. Through this engagement, global civil society helped to highlight at WCIT, and within their respective delegations, concerns with regard to various proposals and their potential impact on free expression online.

For the United States, the presence of a diverse and global representation of civil society NGOs allowed the United States to reach out directly to this community, which shared many of the same concern with regard to Internet freedom and the future of Internet governance. Ambassador Kramer met with global civil society representatives at the Best Bits conference in Baku, and again in Dubai. This outreach, combined with inclusion of domestic civil society representatives such as Public Knowledge, enhanced U.S. credibility as a champion of Internet freedom and transparency.

The inability of civil society to participate effectively in the WCIT was inconsistent with a multi-stakeholder model of Internet governance, a model that we all believe in. Any forum that

discusses Internet governance issues must provide civil society the opportunity to participate in its own right and without having to be part of a government delegation. This applies to the upcoming WTPF and the ITU plenipotentiary conference in 2014. The US government has been very supportive of this principle in the past. I sincerely appreciate this support and request that it continue and become more vocal.

Moving Forward: Remaining Engaged In The Global Debate.

The good news is that the Dubai conference was just the beginning of the discussion around global Internet governance, not the end. Although the United States Government refused to sign the ITRs, the Internet as a global medium is too important to democratic and economic progress for the United States to disengage from this discussion moving forward. The next step for the United State government must be to fully engage in diplomacy and outreach, not merely with those countries that agreed with us in Dubai, but with those countries that disagreed with us about the role of the ITU and the value of the multi-stakeholder process. Many of these countries are small and developing nations that must be persuaded that the multi-stakeholder process of governance benefits them as much as it benefits the United States and other developed countries.

The freedom of expression online connects democratic activists domestically and internationally, amplifying their voices in the digital public square. Leaving judgment of each regime aside, no one can deny the role that free expression on the Internet had on building support across borders for the uprisings in Tunisia, Egypt, Libya, and other Arab Spring countries. Many of these activists utilize the same websites and online communications tools as the members of Congress

here in this room. Egyptian or Libyan or Syrian citizens sharing their struggles with democracy with their American cousins over a free and open Internet can hopefully support their efforts to make the most of their new free society.

On the economic side, the Internet and information technology industries continue to be the thriving sector in a slumping global economy. According to OECD (Organization for Economic Cooperation and Development) calculations, in 2009 some 12% of the value added of the non-financial business sector in the United States could be attributed to Internet-related activities. At present, the Internet contributes more of a percentage to America's GDP than traditional industry sectors like information and technical services, construction, education, agriculture, and arts, entertainment, and recreation. And it comprises about 5.5 percent or \$252 billion of all retail. U.S. economic growth and international trade are dependent upon bringing the world around to our vision of democracy, rule of law, and trade to other nations. Any U.S. trade representative can argue the benefits of free trade to their counterpart in another country, but open access to American products, exports, and consumers online can spread the opportunity of international trade to even the smallest town or village with a broadband connection. American businesses will lose these opportunities for trade and economic expansion if we do not share our vision and success with open Internet communication with the developing world.

Through my many conversations as a part of the delegation, it was clear that many developing countries hold the accurate view of the United States as the one of the main drivers of the Internet. The facts of global Internet traffic support these impressions. North America now accounts for a majority of global Internet traffic, with US company Netflix generating more than

33% according to a recent Sandvine report. Eight out of the ten largest cloud storage centers in the world are in the U.S., positioning the U.S. to maintain its Internet leadership as remote big data continues to support business growth.

Unfortunately, this dominance by American traffic, content, and storage, combined with the economic strength of the United States results in sense of disenfranchisement among smaller and developing countries in a multi-stakeholder process. The focus of the American outreach and diplomacy must be to empower smaller and developing countries through their participation and in a shared vision of the opportunity of the Internet for economic opportunity and political empowerment. Even those nations that seek to emulate our success often take the attitude that ‘well, multi-stakeholderism is OK for you; you’re a big country with lots of resources, well established Internet industries, and fully deployed networks. We need a different approach.’ These countries have a long history of close relationships with the ITU. They view the ITU as an important source of technical assistance and standards development through the ITU-T, and a source of aid for network development through the ITU-D. The fact that the ITU is structured around member states, under rules that these countries understand, encourages them to view the ITU as a counterweight to the United States and other developed nations.

Repeatedly, countries seeking to advance an agenda of expanding the role of the ITU in Internet governance have sought to exploit these concerns. We must be wary of tactics intended to show our resolve that play into the narrative of opponents who seek to cast us as international bullies. For this reasons, recent calls to defund the ITU or curtail our participation should be rejected. We have appropriately demonstrated the firmness of our resolve by refusing to sign the new ITRs.

We must equally show our willingness to engage even when our view does not carry the majority.

While we must not allow ourselves to be portrayed as bullies, we must also guard against the impression that we are wavering in our commitment to our principles. Too often, the willingness to engage is taken as a sign of weakness. We proved in Dubai this was not the case, and Congress may, from time to time, find it necessary to demonstrate that it remains equally true going forward. As long as Secretary General Toure and others continue to insist that the United States and other nations will eventually be compelled to sign the new ITRs, we will continue to need to demonstrate that we cannot be bullied, and that our continued willingness to engage does not signal a weakening of our resolve. Public Knowledge and I therefore support the effort in this Congress to demonstrate its unity around Internet freedom through a bill similar to the 112th Congress' unanimous bipartisan resolution, S. Con. Res. 50. The draft language that has been shared with us is similar to S. Con. Res. 50 and continues to provide for a position that civil society and all stakeholders should be able to support.

Small and developing countries, especially those from the southern hemisphere, are the swing bloc as the ITU works to implement the acts of the WCIT. Failure to engage these countries on the benefits of an open network will only confirm their view of the United States and others who refused to sign the ITRs as countries that are working to preserve their dominance of the network. There are several international forums over the next couple years which will provide the opportunity for the United States to demonstrate the power and ability that the multi-

stakeholder process of governance offers these countries and the importance of a global open Internet to their growth.

The story of the Internet in the United States has been one of new innovative companies and organizations using the networks decentralized structure to compete. If this was not true, we would still be using Webcrawler to search for content and ICQ to chat instead of the market dominant Google and Facebook. With continued engagement, we could share the benefits of these experiences with other countries.

Finally, I must give a word of caution to those who think we can best achieve our goals by cutting funding to the ITU or otherwise refusing to engage with those who do not agree with us. The Internet is a global medium. Its strength as an engine of freedom and as an engine of economic growth depends heavily on it remaining a global medium. If we isolate ourselves, we cede the ground to our opponents, giving them the opportunity to gradually pick off our allies one by one. Indeed, supporters of the ITRs have boasted that this is exactly their plan.

Our vision of a free global Internet is a compelling one. We should continue to have faith in our ability to share that vision rather than risk an isolation we cannot sustain.

The Continuing Role of Civil Society

Simply engaging in diplomacy with small and developing countries is only half of the effort. Civil society can play a large role in empowering smaller and developing countries in a multi-stakeholder process. Independent voices from civil society help to balance out the dominant

diplomatic position of the United States government and other large governments while adding critical non-state support for Internet freedom and openness to the multi-stakeholder process. It is not enough for the United States to include civil society groups among its delegation periodically, but the United States government must stand up for the full inclusion of civil society as a stakeholders and participants in future conferences. Civil society groups are trusted globally as defenders of Internet freedom.

Beyond WCIT and the ITU

Commitment to engagement with global civil society, and constructive good faith engagement with the rest of the world on Internet governance issues, cannot stop with WCIT and the ITU. It must extend to all our international negotiations and participation in multi-stakeholder forums. The absence of support for our full inclusion by the United States government in international trade negotiations, for example, sends the wrong message to smaller and developing countries that the voice of the outsiders are not welcomed, whether these voices come from governments or their public. In Europe, for example, activists repeatedly referred to the WCIT as “ACTA by the back door.” While we gratefully accepted the support of European NGOs and member states in resisting encroachment of the ITU into Internet governance, it is obviously unfortunate that it is associated in the minds of many of our allies with a trade agreement negotiated and championed by the U.S. Trade Representative (USTR), without any of the openness or transparency we seek to champion in the Internet governance context.

This mistake continues to be made in the ongoing negotiations of the Trans Pacific Partnership trade agreement, and in the past has resulted in trade policies that restrict innovation online and

censor lawful material for public use. As a consequence, our efforts to negotiate international trade agreements have suffered (the ACTA Treaty, for example, was rejected by the European Union) and our credibility as a champion of Internet freedom, transparency, and multi-stakeholderism are repeatedly undermined by our own USTR.

To ensure that civil society and smaller developing countries can participate fully in international conferences, the U.S. State Department and Congress should lead by example by creating a fund to support the travel and registration of both civil society groups and small countries that are unable to afford to participate. In addition, USTR should follow the lead of the State Department by actively embracing engagement with global civil society and enhancing the openness and transparency of its processes.

Epilogue: No One Brought Up Net Neutrality In Dubai

Finally, in order to show our nation's unity and resolve around global Internet freedom it is critical that this international process is not hijacked for a debate over domestic rules preserving an open Internet. It is important to note that during my entire trip to Dubai I did not hear any questions from participants over the FCC's open Internet regulations. A search of the archives of the Plenipotentiary sessions and Committee 5 likewise finds no reference to these issues. If this were as potent an argument as some apparently believe, it seems unlikely that our opponents would have so utterly failed to challenge us on it publicly – especially when members of our own government have shown no such restraint.

I would also note that many of our allies, such as Canada and the European Union, classify certain sorts of Internet access service as “telecommunications,” but do not believe that Internet governance is suitable for international regulation at the ITU (or national regulation, for that matter). Similarly, many in this Congress who have raised concerns about Title II classification have not hesitated to introduce or support legislation related to issues such as cybersecurity and privacy. But the United States equally opposed consideration of cybersecurity and privacy at the ITU, arguing that these were matters for sovereign governments in the first instance, and multi-stakeholder cooperation internationally. If we are to accept the that any matter unfit for ITU consideration is equally unfit for national regulation, than we must give up all hope of addressing a lengthy list of issues considered critical on both sides of the aisle.

In short, the effort to leverage the debate over the future of Internet governance internationally for domestic political agendas needs to end immediately. Those who repeatedly urge that an open Title II docket at the FCC or network neutrality rules somehow invites the ITU to regulate the Internet are writing a script for countries that would seek to divide us not only on the global network, but also as a U.S. delegation.

Thank you to the members of the subcommittees for your time and I look forward to the opportunity answer your questions.