

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**WASHINGTON, DC 20554**

In the Matter of )  
 )  
Protecting and Promoting the Open Internet ) GN Docket No. 14-28  
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**COMMENTS OF THE WRITERS GUILD OF AMERICA, WEST, INC.**

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## **I. Introduction**

Writers Guild of America, West, Inc. (WGAW) respectfully submits the following comments in response to the Federal Communications Commission's (FCC) May 15, 2014 Notice of Proposed Rulemaking (NPRM), GN Docket No. 14-28, "In the Matter of Protecting and Promoting the Open Internet."

WGAW is a labor organization representing more than 8,000 professional writers working in film, television and new media, including news and documentaries. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in film are written by WGAW members and the members of our affiliate, Writers Guild of America, East (jointly, "WGA"). Increasingly, the original video programming available on sites such as Netflix, Amazon, Hulu and Crackle, all made possible by the open Internet, are also written by WGA members. WGA members, as the creators of online video programming, are a key input for edge providers.

WGAW has been a strong supporter of the open Internet because writers recognize the importance of this platform for free speech, creativity, competition and diversity.<sup>1</sup> It is a means of reaching an audience directly, free from the filters of the few large companies that control film and television. The open Internet has reduced market entry barriers, resulting in new competitors for writers' ideas and content choices for consumers. This is a welcome development for an industry where writers effectively only have six companies they can sell to. The Internet has also become an important secondary market for film and television content, providing viewers with

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<sup>1</sup> See Comments of WGAW *In the Matter of A National Broadband Plan For Our Future*, GN Docket No. 09-51, July 21, 2009; see also Reply Comments of WGAW *In the Matter of A National Broadband Plan For Our Future*, GN Docket No. 09-51, December 16, 2009; Reply Comments of WGAW *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, April 26, 2010; Comments of WGAW *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, July 15, 2010; Reply Comments of WGAW *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, August 12, 2010, Comments of WGAW *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, April 24, 2014.

the opportunity to catch up on recent releases and discover entire series no longer airing on television. Online distributors of such content have flourished in the open Internet. Net Neutrality rules, which apply only to lawful content, have not inhibited efforts to diminish piracy.

The Internet is a tremendous engine for commerce, but it also serves a larger societal purpose. It is the modern town square. Not since the printing press has a technological development had such an impact on free speech. The rules that govern access to this essential platform should not be reduced to a standard such as commercial reasonableness. As Justice Frankfurter wrote in *Associated Press*,

“Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.”<sup>2</sup>

Internet access is not just a commercial service offered to consumers. It is a vital link to the world, necessary for education, employment and civic engagement. Open Internet rules must match this reality.

In 2010, we wrote about the potential for the open Internet to revive independent production and offer consumers a wide range of new entertainment programs.<sup>3</sup> As a result of the Commission’s rules, this potential has begun to be realized, with more than two dozen professional, television-length dramatic programs expected to be released online in 2014. If the Commission does not act now, however, the Internet could become like cable television, with a few companies seizing control of what consumers can watch. The companies that control both the multichannel video programming distributor (MVPD) and Internet service provider (ISP)

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<sup>2</sup> *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring).

<sup>3</sup> See Comments of WGAW *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, July 15, 2010.

markets, have a vested interest in preventing online video competition from developing. ISPs have demonstrated that they will limit Internet openness to advance their economic interests. Because the self-interest of ISPs is often contrary to the *public* interest, FCC rules to protect the open Internet remain vital, necessary and consistent with the best traditions of American policies protecting freedom of expression.

Indeed, the *status quo* is not enough. The clearest path towards implementing rules to protect Internet openness is to reclassify the transmission component of broadband Internet access services as a telecommunications service under Title II of the Telecommunications Act. Only reclassification will allow the Commission to take the necessary steps to strengthen Open Internet rules. As technology and business strategies have developed, so must Commission policies. Practices such as data caps that exempt affiliated content and discrimination at interconnection points highlight the need for stronger rules. Rather than weaken rules by permitting discrimination so long as it is “commercially reasonable,” the WGAW urges the Commission to avoid introducing such a standard, which will cripple the open Internet, and will advance only the economic interests of broadband Internet access providers, to the detriment of free speech, competition, and democratic discourse. Paid prioritization would fundamentally undermine the open Internet, and the Commission should rule the practice as *per se* unreasonable.

## **II. The Open Internet has Introduced Competition into the Media Landscape**

Over the past several decades, media consolidation has created oversized corporate gatekeepers, which have limited the diversity of programming available to Americans. Independent programming has declined from 76% of Fall broadcast primetime programming in

1989 to only 10% in 2013.<sup>4</sup> This change occurred as a result of the repeal of the Financial Interest and Syndication Rules (Fin-Syn) in 1995. The decades that followed saw consolidation on an unprecedented scale, with studios and networks combining to create the vertically-integrated companies that now control television production and exhibition. It began with Viacom's 1994 purchase of Paramount and the subsequent merger in 1999 with CBS, and continued with Disney's acquisition of Capital Cities/ABC in 1995, Time Warner's purchase of Turner Broadcasting in 1996, and NBC's combination with Universal in 2003 and acquisition by Comcast in 2010.<sup>5</sup>

At the time of the repeal, the broadcast networks argued that increased competition from cable networks justified retiring the rules. But in reality, the broadcast networks used retransmission consent to gain control of the basic cable market, requiring carriage of basic cable networks they owned as a condition of local station retransmission. As a result, the same companies that own the broadcast network also control cable television. Channels owned by Comcast-NBCU, Disney, Fox, Time Warner and Viacom account for 74% of basic cable viewers.<sup>6</sup> The same companies produce almost all the scripted programming airing on basic cable. Only 15% of basic cable comedies and dramas were produced independently in the 2012-2013 season.<sup>7</sup> The decline in independent programming has reduced the number of employers for

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<sup>4</sup> WGAW defines independent producers as studios or production companies that are not owned or affiliated with a major broadcast or cable network or an MVPD provider. Such a definition is essential because it exposes the true paucity of programming that reaches the air defying the market power or guaranteed distribution provided by vertical integration.

<sup>5</sup> CBS and Viacom split in 2005 with Paramount film production and distribution remaining with Viacom and Paramount television production with CBS; both remain controlled by Sumner Redstone through National Amusements.

<sup>6</sup> WGAW Analysis of Nielsen data. Average P2+ viewers in primetime, 2013.

<sup>7</sup> Figures revised from WGAW comments *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, March 21, 2014. Revised figure includes scripted dramas and comedies made for children and airing on Nickelodeon and Disney channels.

writers. In 1989, 89% of TV writing jobs and 88% of TV writing compensation came from independent producers. By 2013, those figures have declined to 25% and 14%, respectively.<sup>8</sup>

This excessive concentration has harmed the creative community. With tight control over both production and distribution, the vertically-integrated media companies possess all the power as employers of talent. To be hired on a television writing staff often requires writers to give the employer an exclusive first look on any idea they may have. Writers, who are the R&D of this industry, bear all the risk of developing new creative works while the media companies, through their control of distribution, reap the rewards.

Consumers fare no better in this equation. As the entertainment industry has consolidated, diverse viewpoints have been eliminated. If programming does not advance the economic interests of the media companies, it has little chance of airing.

Against the backdrop of a consolidated entertainment industry, the open Internet has significantly expanded the number of diverse and independent sources for news, information and entertainment. Online video has experienced a dramatic rise. The number of online videos viewed each month by Americans has increased from 7.2 billion in January of 2007 to 52.4 billion in December of 2013.<sup>9,10</sup> Meanwhile, the segment of Americans who watch or download videos has grown from 69% of adult internet users in 2009 to 78% in 2013.<sup>11</sup> YouTube and

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<sup>8</sup> These figures include all broadcast, cable and pay TV programming written by WGAW members, not just prime time.

<sup>9</sup> comScore, "Primetime' U.S. Video Streaming Activity Occurs on Weekdays Between 5-8 P.M." March 21, 2007, <http://www.comscore.com/Insights/Press-Releases/2007/03/Primetime-US-Online-Video>.

<sup>10</sup> comScore, "comScore Releases December 2013 U.S. Online Video Rankings," January 10, 2014, <http://www.comscore.com/Insights/Press-Releases/2014/1/comScore-Releases-December-2013-US-Online-Video-Rankings>.

<sup>11</sup> Kristen Purcell, "Online Video 2013," Pew Research Center, October 10, 2013, <http://www.pewinternet.org/2013/10/10/online-video-2013/>.

Netflix now make up half of all downstream Internet traffic in North America.<sup>12</sup> The number of people signing up for online video subscriptions is yet another indicator of consumer demand for new, innovative video offerings. Hulu Plus now counts more than 6 million paying subscribers and Netflix has nearly 36 million customers in the U.S.<sup>13,14</sup> The Interactive Advertising Bureau and PricewaterhouseCoopers report that advertisers spent almost \$3 billion on online video advertising.<sup>15</sup> Consumers spent another \$5.45 billion on online video subscriptions, rentals and purchases, with spending expected to reach \$10 billion by 2018.<sup>16</sup>

In response to this growth in demand, online platforms are making significant investments in original programming. Netflix spent \$100 million on the first two seasons of *House of Cards*.<sup>17</sup> It is estimated that Netflix will spend \$400 million on original series in 2014 and Amazon reportedly will spend upwards of \$500 million.<sup>18</sup> Hulu has committed to increasing the number of original shows on its service with six new series scheduled to debut in 2014. More online platforms are entering the original video market with Yahoo, Xbox and PlayStation set to become the next providers to offer TV length series from professional writers.<sup>19</sup>

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<sup>12</sup> Sandvine, *Global Internet Phenomena Report: 2H 2013*, <https://www.sandvine.com/downloads/general/global-internet-phenomena/2013/2h-2013-global-internet-phenomena-report.pdf>.

<sup>13</sup> Mike Hopkins, "Welcome Jenny Wall, SVP Marketing," Hulu Blog, May 13, 2014, <http://blog.hulu.com/2014/05/13/welcome-jenny-wall-svp-marketing/>.

<sup>14</sup> Rob Golum, "Netflix Rises to Record as Analyst Predicts Viewer Gains," *Bloomberg*, July 1, 2014, <http://www.bloomberg.com/news/2014-07-01/netflix-rises-to-record-as-analyst-predicts-viewer-gains.html>.

<sup>15</sup> PricewaterhouseCoopers, "IAB Internet Advertising Revenue Report: 2013 Full Year Results," April 2014, [http://www.iab.net/media/file/IAB\\_Internet\\_Advertising\\_Revenue\\_Report\\_FY\\_2013.pdf](http://www.iab.net/media/file/IAB_Internet_Advertising_Revenue_Report_FY_2013.pdf) and Marina Lopes, "Videos may make up 84 percent of internet traffic by 2018: Cisco," *Reuters*, June 10, 2014, <http://www.reuters.com/article/2014/06/10/us-internet-consumers-cisco-systems-idUSKBN0EL15E20140610>

<sup>16</sup> Deana Myers and Wade Holden, "Online video market remains hot," *SNL*, June 30, 2014, <http://www.sn.com/interactivex/article.aspx?id=28507994&KPLT=6>.

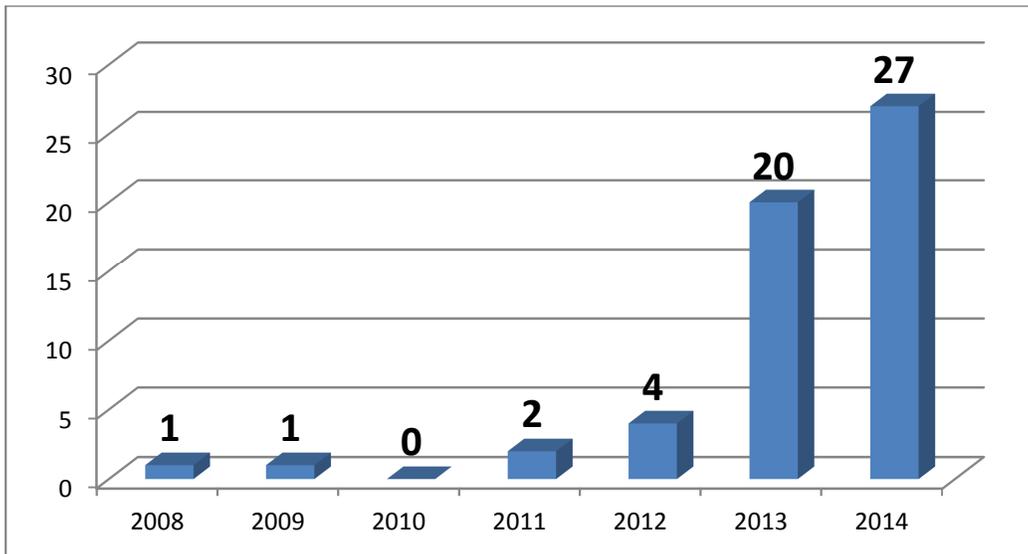
<sup>17</sup> Brad Reed, "Netflix has already recouped its \$100 million House of Cards investment," BGR.com, April 23, 2013, <http://bgr.com/2013/04/23/netflix-subscriber-growth-analysis-459720/>.

<sup>18</sup> Samantha Bookman, "A closer look at the billions of dollars Netflix, Amazon and Hulu are spending on original content," *FierceOnlineVideo*, June 4, 2014, <http://www.fierceonlinevideo.com/special-reports/closer-look-billions-dollars-netflix-amazon-and-hulu-are-spending-original>.

<sup>19</sup> Nellie Andreeva, "XBox Develops Pro Skater Comedy Series," *Deadline Hollywood*, December 6, 2013, <http://www.deadline.com/2013/12/xbox-develops-pro-skaters-comedy-series/>, and Marc Graser, "Microsoft to

All of this investment has led to an increase in the number of television-length, or long-form, original online video series.<sup>20</sup> According to WGAW research, in 2008, there was only one such series, *Dr. Horrible's Sing-Along Blog*. By 2014, the number of such online series set to be released has grown to 27. Online video has created space once again for independent producers. Many of the original series debuting on Netflix have come from independent producers who are not vertically integrated, including Media Rights Capital, Lionsgate, Sony and Gaumont International Television.

**Chart 1. Number of TV Length Programs Made for Online Platforms**



Online video is even extending the life of television series that began on broadcast and cable networks. Netflix has picked up new seasons of shows including *Arrested Development*, *Star Wars: The Clone Wars* and *The Killing*. Daytime serials *One Life to Live* and *All My*

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Launch First Original Shows on Xbox in Early 2014,” *Variety*, December 13, 2013 <http://variety.com/2013/digital/news/microsoft-to-launch-first-original-shows-on-xbox-in-early-2014-1200953110/#>, and Nellie Andreeva, “Xbox Developing 1990s Music Series Based on Rapper Nas’ Life,” *Deadline Hollywood*, February 11, 2014, <http://www.deadline.com/2014/02/xbox-developing-1990s-comedy-series-based-on-rapper-nas-life/>, and Bryan Bishop, “Sony’s first original TV series for Playstation will be ‘Powers,’” *The Verge*, March 19, 2014, <http://www.theverge.com/2014/3/19/5527878/sonys-first-original-tv-series-for-the-playstation-will-be-powers>, and Douglas MacMillan, “Yahoo Bets on Two New Web Comedy Series,” *Wall Street Journal*, April 28, 2014, <http://blogs.wsj.com/digits/2014/04/28/yahoo-bets-on-two-new-web-comedy-series/>.

<sup>20</sup> Long-form programming refers to television movies or miniseries.

*Children* both aired original episodes on Hulu in 2013. Recently, Yahoo announced that it has ordered a sixth season of the NBC sitcom *Community*.

As a result of new online video services, more than two hundred professional writers have worked on original online video programs, generating almost \$10 million in income. Writers have also benefited from services that offer consumers online availability of television series and feature films. Millions of consumers visit Hulu each month to catch up on recent television episodes. Subscription services such as Netflix and Amazon Prime offer entire television series and thousands of movies for an affordable monthly price. Amazon and iTunes also offer consumers the ability to rent or purchase individual titles. Writers have earned almost \$70 million in residual income from such online services licensing or selling television series and feature films.

These new programming choices also address consumer concerns about pricing and flexibility. A Netflix or Hulu Plus subscription is available for less than \$10 per month, and both offer thousands of on-demand video choices. These services are not substitutes for an MVPD, because they rely on a third-party for distribution and offer more limited content. Rather, they provide important, new competition to traditional television networks. Combining these entertainment offerings with the ability to watch news online through Bloomberg Television and subscribe to online sports packages from Major League Baseball and The Tennis Channel begins to create the possibility for consumers to build their own, more flexible content bundles. Such a development reclaims some control for consumers who would otherwise have no alternative but to pay the ever-increasing cost of a bundled cable and Internet package.

### III. Writers Support the Open Internet

Protecting Internet openness is vital to the creation of a video landscape that offers more independent and diverse programming from a wide range of viewpoints. The open Internet can, in addition, restore some measure of competition in the marketplace for content. Professional writers are well aware of the open Internet's potential and recently 245 television series creators and showrunners, including Vince Gilligan, creator of *Breaking Bad*, Shonda Rhimes, creator of *Grey's Anatomy*, *Private Practice* and *Scandal*, and Matt Weiner, creator of *Mad Men* signed a letter urging the Commission not to weaken rules and allow the Internet to become like cable television.<sup>21</sup> Although many of these prominent writers continue to create programming for traditional media platforms, they understand the importance of the open Internet, writing, "right now the Internet is opening up the media business to new competition. There are new buyers for what we as writers create. But if this new competition is unfairly pushed aside because the FCC adopts weak rules, *rather than allowing consumers to decide what they prefer*, neither innovation nor the best interests of society will be served."

The open Internet is essential to writers at every level, but the lower entry barriers have been especially helpful to new and less well-established writers. The stories of several such writers who have benefitted from the open Internet are provided below.

#### **Erica Oyama, Creator, *Burning Love***

I wrote a comedy short that I intended to shoot for the Internet. Shortly after writing it I realized it would make a great web series. I expanded on the short and brought my ideas to an experienced web producer friend. We pitched the idea to a few different companies before aligning with Red Hour Productions. With the help of Paramount Productions we shot a sizzle reel in one day that would serve as the calling card for what would be our series. Roughly a year later we were greenlit to produce our show, *Burning Love*.

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<sup>21</sup> See Appendix for letter and complete list of signatories.

The process was different from traditional TV in that we had so much creative freedom. We were able to cast who we wanted, fill the show with actors we knew personally, throw out the jokes we thought were funniest. As a result, it was an incredibly positive experience.

Having additional buyers and employers because of online platforms only gives me encouragement that there are so many more writers who will have a shot at establishing themselves in the business. I never dreamed a web series would open so many doors to me. It is a great way for aspiring writers to get their ideas out in a real way.

The public benefits from the possibilities of online content distribution because it is reflective of how we gain information today. Web series are current and have the potential to be just as beloved as content produced for traditional television. To put limitations on web content distribution would only stifle the growth of dramatic and comedic writing as a whole.

If paid prioritization were put in place, it would ruin the creative, free, inventive spirit of creating a series for the web. It would feel like a more insurmountable task to get ideas out into the world that might not see the light of day otherwise.

**Richard Keith, Co-Creator, *Untitled Half-Hour Comedy*, CWSeed.com**

For my writing partner, Erin Cardillo and me, the process of creating online video content was really great. It gave us, as relatively inexperienced writers, the chance to create, write and executive produce three half-hour hour episodes of our own series. This is an opportunity we would not have gotten in traditional television.

Having additional online platforms to create content for makes entertainment a less insular world. Now, it's not one of four people have to like your idea or its dead. The ability to create online content benefits both writers and consumers. With comedy there is less censorship online, so you're allowed to try new things and find your voice and your audience, then let the "networks" come on board, rather than the other way around, which is counter-intuitive and rarely productive. If paid prioritization were to occur online, the Internet would become no different than cable TV.

**Derek Griffith, Script Coordinator, *Graceland*, USA Network**

Writing web video content for the TV series *Graceland* kick started my professional writing career and provided an outlet for further storytelling. Online video propelled me into the category of "professional writer." Without such a platform, my writing career would have been stuck in the gray-zone between independent writing and being a professional assistant.

**Annie Wood, Creator, *Karma's a B\*tch***

I feel lucky to be a writer during this time where the Internet provides a place for me to show my work. The Internet means a lot to me as a writer as it has afforded me connections and attention that I would not have received otherwise. I have a place on the web that confirms that I am not “trying to be a writer” but that I am, indeed one. Fans of the show follow me on Twitter and on Instagram and other social networks. I feel that the web makes it easy for us to stay in direct contact with the viewers, which makes them feel more involved.

An open Internet is key in keeping me connected with the viewers who are interested in what I do. Anything that gets in the way of that defeats the purpose of creating content to begin with. I need eyes on my shows and an open Internet is the way for that to continue to happen.

**Molly Hale, Creator, *Olive and Mocha: Fast Times at Sugar High***

For me specifically, pitching a show which involved young female protagonists was a nearly impossible sell to network television. But on the Internet, I found an audience. This allows for work to exist where there otherwise isn't. It also shows that an audience exists for niche human experiences.

In a pre-Internet Hollywood you had to wait for someone else to submit your script for you. With the Internet, you can post it online and let the clients come to you. I have the ability to generate my own work, and take control of my own career in a way that I wouldn't be able to without the Internet.

**Ari Costa, Creator, *MotherLover* and *Leader of the Pack***

Online video encourages greater creativity because there is a bit more freedom. Online content distribution has benefitted me because my ideas tend to fall more in the cable space but I don't have a name big enough to sell ideas in the cable space yet. It's a good training ground to test out ideas and train as a show runner on a smaller scale. It's also an opportunity to play with content length and how to tell a story in a shorter amount of time. Having new buyers as a result of Internet video distribution is exciting because it's a bit of a Wild West type feel out there. Paid prioritization would create an Internet that is less exciting for me as a writer and a viewer, some of the most exciting ideas come from non-traditional forms of distribution. Creating prioritization online would be like a mini studio system, which is already a stale place to look for content.

#### **IV. Rules to Protect the Open Internet Have Never Been More Important**

Both content creators and consumers are benefiting from original, independent programming and new content outlets. Legitimate online video sites deter piracy by giving consumers the ability to watch a wide variety of lawful content at relatively low cost and at their convenience. As the online video market grows more robust, however, the need for strong Net Neutrality rules only becomes more important. Such protections are necessary because the broadband Internet access market is not competitive. Broadband providers, as a result, wield significant power as distributors and have a demonstrated history of abusing market power. Our nation's largest ISPs are also video distributors, who have both the incentive and ability to limit the development of a robust online video market.

Fixed broadband Internet access providers face little competition because the large capital expenditures necessary to build out broadband networks create an effective barrier to entry. According to the Commission, 28% of households have only one choice for ISP service fast enough to stream videos, and another 37% have only two providers to choose from.<sup>22</sup> With so few choices, the result is a concentrated market: four companies control 68% of the broadband market.<sup>23</sup> If both the Comcast–Time Warner Cable and AT&T–DirecTV mergers are approved, two companies will control half of the fixed Internet access service market.<sup>24</sup> Verizon and AT&T fiber offerings are only available in about 40% of the country. Google has entered the market but even if it were to expand into all of the 34 cities it recently expressed interest in, Google's fiber

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<sup>22</sup> FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2012*, December 2013, p 9.

<sup>23</sup> Leichtman Research Group, "2.6 Million Added Broadband from Top Cable and Telephone Companies in 2013," March 17, 2014, <http://www.leichtmanresearch.com/press/031714release.html>.

<sup>24</sup> Subscriber information from company filings and SNL Kagan.

network would only be available to 3.9 million households out of 119 million occupied U.S. households.<sup>25</sup>

ISPs have both the ability and incentive to interfere with online services that threaten their existing businesses. All major ISPs, in addition to providing Internet access, sell multichannel video services and telephone service and can use their control of Internet access to harm competition. The record shows that ISPs have taken advantage of their Internet gatekeeper position to unfairly harm their competitors.

For example, in 2005, Voice-over-Internet Protocol (VOIP) company Vonage filed a complaint with the FCC after Madison River Communications blocked internet voice calls over its DSL network. Another VOIP company, Nuvio, also reported that its calls were being affected by at least one cable ISP.<sup>26</sup>

Comcast has a history with limiting Internet openness dating back to 2007, when it was found to be degrading BitTorrent connections. In recent years, Comcast has also exempted its own online video service from data caps when streamed to an Xbox. Despite the company's claims that such traffic travels over a private channel, tests by a network engineer suggests that both general Internet and Comcast traffic were traveling over the same network channel.<sup>27</sup>

Of even more concern is that ISPs may have found a major loophole in the previous rules: interconnection between their networks and those of backbone providers or peers. As Internet use increases, ISPs can passively allow interconnection ports to become congested. As

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<sup>25</sup> Kamran Asaf, "Google targeting over 3 million households with its planned fiber expansion," *SNL Kagan*, March 4, 2014.

<sup>26</sup> Declan McCullagh, "Telco agrees to stop blocking VoIP calls," CNET, March 3, 2005, [http://news.cnet.com/Telco-agrees-to-stop-blocking-VoIP-calls/2100-7352\\_3-5598633.html](http://news.cnet.com/Telco-agrees-to-stop-blocking-VoIP-calls/2100-7352_3-5598633.html).

<sup>27</sup> Andrew Dugan, "An IP Engineer and Consumer View of Xfinity Traffic Prioritization," Level 3 Communications Blog, May 17, 2012, <http://blog.level3.com/internet-broadcast/an-ip-engineer-and-consumer-view-of-xfinity-traffic-prioritization/>.

these connections cause degraded quality of service to edge providers and Internet users, the ISP can then demand payments to open more ports into their networks. This is precisely what recently occurred between Comcast and Netflix at some interconnection points. Because Netflix has no way to reach Comcast subscribers other than through Comcast's network, it was forced to pay the ISP's toll despite the fact that Comcast's customers have already paid for that Internet traffic. It simply does not make sense to limit Open Internet rules to only "last mile" behavior and leave the rest of the Internet open to anti-competitive abuses.

Wireless companies have also undermined net neutrality by discriminating or blocking competing applications. AT&T has blocked the use of Skype, FaceTime and VOIP applications at various times.<sup>28</sup> Verizon, AT&T, and T-Mobile have blocked the use of Google Wallet while developing a competing payment system called Isis.<sup>29</sup> To date, mobile phone companies have failed to provide any evidence as to why their networks should be exempt from net neutrality. However, there have been reports of streaming video sites like ESPN negotiating with carriers to bypass data caps.<sup>30</sup> Similarly, T-Mobile recently announced it would exempt certain music streaming services from its data caps.<sup>31</sup> If mobile carriers have enough capacity to exempt certain services from data caps, which are purportedly used to manage congestion, claims that Net Neutrality rules cannot be instituted because capacity constraints should be treated as suspect.

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<sup>28</sup> Ryan Singel, "AT&T Relents, Opens iPhone to Skype, VoIP," *Wired*, October 6, 2009, <http://www.wired.com/2009/10/iphone-att-skype>.

<sup>29</sup> Sarah Perez, "Google Wallet Rolls Out To More Devices – Nope, Still No Love For Verizon, AT&T Or T-Mobile Owners," *TechCrunch*, May 16, 2013, <http://techcrunch.com/2013/05/16/google-wallet-rolls-out-to-more-devices-nope-still-no-love-for-verizon-att-or-t-mobile-owners/>.

<sup>30</sup> Andrew Leonard, "ESPN's plan to kill net neutrality," *Salon*, May 13, 2013, [http://www.salon.com/2013/05/13/espns\\_plan\\_to\\_bust\\_the\\_internet/](http://www.salon.com/2013/05/13/espns_plan_to_bust_the_internet/).

<sup>31</sup> Chris Morran, "T-Mobile Won't Count Streaming Music Against Data Caps; Offering Loaner Phones," *Consumerist*, June 19, 2014, <http://consumerist.com/2014/06/19/t-mobile-wont-count-streaming-music-against-data-caps-offering-loaner-phones/>.

## V. Open Internet Rules

The Internet's open architecture allows end users and edge providers to connect unimpeded by ISP interference, just like phone service. To prevent this vital communications platform from becoming controlled by an anti-competitive cartel like cable television, the Commission must adopt rules that comprehensively address the ways in which ISPs can restrict online speech, competition, innovation and diversity. Such action requires strengthening the 2010 rules. The Commission's revised rules should be applied equally to fixed and wireless broadband Internet access providers. Further, WGAW urges the Commission not to enact rules that clear the path for paid prioritization.

### 1. Scope of Rules

In 2010, the Commission chose not to apply Open Internet rules equally to fixed and wireless Internet service. It is appropriate for the Commission to reconsider this finding because wireless Internet access services have only become a more integral part of Internet access for U.S. consumers. Two-thirds of U.S. consumers own smartphones and 34% own a tablet such as an iPad.<sup>32</sup> Tablets, with wireless data plans, are a popular means of accessing Internet video services. According to Pew Research, 10% of Americans have a smartphone but no home broadband connection.<sup>33</sup> Wi-Fi offerings are a strategic priority for major ISPs. There should not be a second class of Internet access, where consumers are not guaranteed the right to the lawful content, services and applications of their choice.

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<sup>32</sup> Samantha Murphy Kelly, "Two-Thirds of U.S. Consumers Own Smartphones," *Mashable*, February 13, 2014, <http://mashable.com/2014/02/13/smartphone-us-adoption/>, and Kathryn Zickuhr, "Tablet Ownership 2013," *Pew Research*, June 10, 2013, <http://www.pewinternet.org/2013/06/10/tablet-ownership-2013/>.

<sup>33</sup> Pew Research, "Home Broadband 2013," August 26, 2013, <http://www.pewinternet.org/2013/08/26/home-broadband-2013/>.

At present, because of data pricing, wireless services are not a viable alternative for video distribution without a major portion of viewing routing through a Wi-Fi connection to a fixed Internet line. But, as technology advances and additional spectrum is put into use, the wireless video market will develop. If wireless distribution is not protected by the full complement of Open Internet rules, mobile carriers will be able to act as gatekeepers. The proposed AT&T–DirecTV merger heightens this concern. As the largest mobile carrier, AT&T controls access to a significant share of mobile Internet users. Under the Commission’s proposal, AT&T would be able to discriminate against and even block competing video services without violating Net Neutrality rules. If the AT&T-DirecTV merger is approved, the combined entity will have 26 million MVPD customers and be second in size only to a merged Comcast-Time Warner Cable. A merged AT&T–DirecTV will have a vested interest in protecting its MVPD business and will be able to use its dominance in the wireless market to harm video competitors.

Revised Net Neutrality rules must also be broad enough in scope to cover the various ways “last mile” broadband Internet access service providers may act to limit Internet openness. The Commission’s rules should, therefore, address ISP behavior at interconnection points where Internet traffic is exchanged. Such action is necessary because ISPs are now using interconnection points to discriminate against certain edge providers.<sup>34</sup> Comcast, operating under the 2010 Net Neutrality rules as a condition of the Comcast–NBCU Order, used its control of interconnection points to degrade Netflix service, forcing the company to pay an arbitrary toll in order to provide customers with high quality service.<sup>35</sup> That this behavior occurred under the previous rules further demonstrates the need to expand the scope of the rules. It is necessary for

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<sup>34</sup> See Comments of Netflix, Inc., *In the Matters of the Open Internet Remand*, GN Docket No. 14-28, and *Preserving an Open Internet*, GN Docket No. 09-191, March 20, 2014.

<sup>35</sup> Christopher Libertelli, Vice President, Global Public Policy, Netflix, Inc., “Letter to Senator Al Franken,” April 23, 2014.

the Commission to address interconnection to ensure that consumers can access the content, services and applications of their choice, at the level of service they subscribe to. If the Commission's revised rules do not address interconnection, ISPs will be able to move discrimination from the "last mile" to interconnection points, effectively circumventing the rules.

## 2. *Transparency*

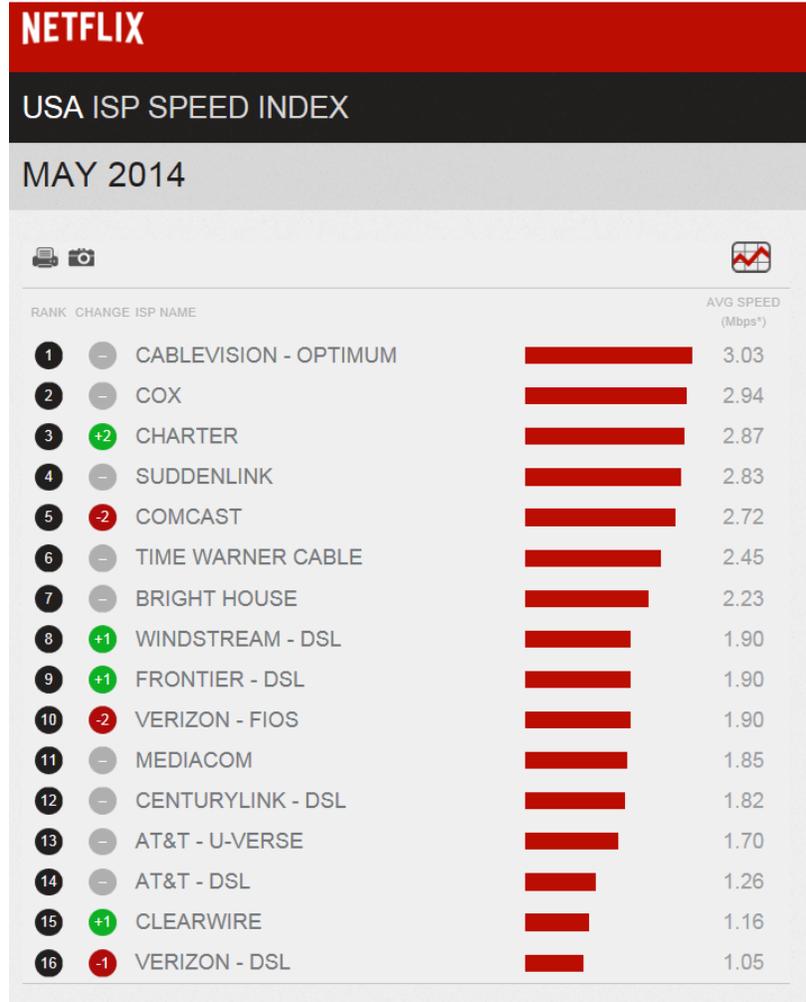
The Commission's rule requiring transparency in network practices, performance characteristics and commercial terms is an important complement to the rules governing ISP behavior. WGAW supports efforts to enhance transparency. The Commission can do so by requiring ISPs to provide additional information about performance and network management practices on their websites, along with pricing and maximum speed information. For example, ISP websites often list the monthly price for a certain maximum level of download and upload speeds. The Commission should require ISPs to also provide consumers with information on actual speeds delivered, particularly in peak traffic periods. Complementary to this information would be details on what the ISP does to manage congestion and how this may affect consumer service.

We would also welcome Commission efforts to collect and distribute additional information from a broad range of ISPs. The Commission's *Measuring Broadband America* Report is a useful tool for comparing ISP performance. The Commission could make this information more accessible to the public by producing easy to understand tables that compare ISP performance and by making such information available on the Commission's website. For instance, Netflix's ISP Speed Index displays comparative information that is easy to digest.<sup>36</sup>

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<sup>36</sup> Netflix, "USA ISP Speed Index," May, 2014, <http://ispspeedindex.netflix.com/usa>.

**Table 1. Netflix USA ISP Speed Index**



In addition to the speed test performed as part of the *Measuring Broadband America* report, the Commission should collect pricing information from the major ISPs and present such information in a comparative form. While consumers may only be able to choose from one or two providers in a local market, the act of comparing price and service conditions across ISPs on a nationwide basis will promote competition as consumers demand the best service options. This would also encourage ISPs to offer better pricing and service across their footprint, rather than only in markets where new competitors, such as Google, have entered.

The Commission should require disclosure specific to ISP data usage policies. This information is extremely important to consumers because exceeding a data cap results in additional charges. Further, because some ISPs have chosen to exempt affiliated traffic from existing data caps, it is critical that this information be clearly disclosed to consumers. ISPs should also provide users with reliable information on how much data is used for an hour of various online activities including video calls, streaming video and other more data intensive activities. The information on data usage and caps should be made available to consumers along with price and speed information. Further, the Commission should collect data usage information from ISPs, including caps and cost for exceeding the cap. The Commission should make this information available on its website. The Open Internet Advisory Committee (OIAC) investigated data caps and relied on press reports for the information. The table on the next page, produced by GigaOm is extremely useful. The Commission should offer information in a similar fashion.<sup>37</sup>

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<sup>37</sup> Stacy Higginbotham, “Want to know if your ISP is capping data? Check our updated chart,” *GigaOm*, November 15, 2013, <http://gigaom.com/2013/11/15/data-cap-2013/>.

**Table 2. GigaOm Broadband Caps**

U.S. Broadband Caps Detailed			
ISP	Cap	Details	Overage costs
Comcast	300GB per month	Comcast suspended its cap in May 2012 after raising it to 300GB. It's unclear what form the cap will take.	Comcast is testing an overage fee that lets you pay \$10 for 50 GB more.
AT&T	250GB or 150 GB per month	Subscribers to AT&T's faster Uverse product have a 250 GB cap while those subscribing to basic DSL have a 150 GB cap. The gigabit service will have a higher cap commensurate with its speed.	Customers pay \$10 for 50 GB
TWC	no		
Verizon	no		
CenturyLink	150 GB per month to 250 GB per month	Plans with speeds of 1.5Mbps have a 150 GB cap. Plans with speeds greater than 1.5Mbps have 250 GB cap.	None, you're encouraged to move to a higher tier.
Cox	50GB-400GB per month	Faster tiers have higher caps.	None, you're encouraged to move to a higher tier.
Charter	100 GB – 500 GB per month	Faster tiers have higher caps.	None, you're cut off.
Cablevision	no		
Frontier	no		
Windstream	no		
Suddenlink	150GB to 350 GB per month	Faster tiers have higher caps.	Customers pay \$10 for 50 GB after third time going over.
MediaCom	250 GB to 999 GB per month	Faster tiers have higher caps.	Customers pay \$10 for 50 GB.
Cable One	300 GB to 500 GB per month	Caps depend on the type of plan one chooses; Streaming, Premier, Ultra	None, you're encouraged to move to a higher tier.
FairPoint	no		
Cincinnati Bell	no		

3. *No-Blocking*

A rule prohibiting blocking is necessary to maintain the open Internet. As the Commission wrote in the 2010 *Open Internet Order* and restated in the NPRM, “the freedom to

send and received lawful content and to use and provide applications and services without fear of blocking is essential to the Internet’s openness.”<sup>38</sup> Because this remains a fundamental truth about what constitutes an open Internet, we do not support the Commission’s proposal, which requires the provision of only an undefined minimum level of access and permits negotiations for prioritized service. Instituting such a rule will create a tiered Internet. The Commission’s proposed rule would permit ISPs to degrade content to a certain minimum level of access and charge edge providers for better service, creating “fast” and “slow” lanes for content. Even if the minimum level of access was sufficient for many edge providers, giving ISPs, who already face little competition, the ability to charge for faster access will ensure that such a model becomes the norm. This change would raise anti-competitive entry barriers for online businesses and deter investment. The Commission is already well aware of this potential, finding in 2010 that ISPs have both the incentive and ability to limit Internet openness, and fees for prioritization could “reduce edge providers’ incentives to invest and innovate.”<sup>39</sup>

Rather than weaken this essential rule to avoid instituting regulations that constitute *per se* common carriage, the FCC should adopt the 2010 rule without creating a tiered Internet. A No-Blocking rule that allows paid “prioritization” is fundamentally inconsistent with an open Internet. Further, the No-Blocking rule must also cover more subtle practices that achieve the goal of blocking, such as throttling, or degrading access to legal content. The Commission appropriately recognized how such behavior can have the same effect as outright blocking in the *Open Internet Order*.<sup>40</sup> ISPs should also be prohibited from blocking access to legal content at Internet connection or exchange points. Such a rule would create the certainty necessary to

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<sup>38</sup> Promoting and Protecting the Open Internet, GN Docket No. 14-28, *Notice of Proposed Rulemaking*, FCC 14-61 ¶ 89 (rel. May 15, 2014). Hereinafter referred to as “NPRM.”

<sup>39</sup> *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010), ¶26.

<sup>40</sup> *Id.* ¶66.

promote investment and the “virtuous cycle” of innovation. This rule remains critical because many ISPs are also video distributors and phone service providers who have both the incentive and ability to limit the quality of service of competitors.

The Commission’s No-Blocking rule should apply equally to fixed and mobile broadband Internet access service. However, should the Commission continue to apply a different standard to wireless Internet access, unaffiliated video offerings that compete with a mobile provider’s video service should be included among the specific applications the Commission prohibits a mobile carrier from blocking. AT&T and Verizon, the two largest mobile providers, are also MVPDs, offering video service. AT&T, in its merger application to the Commission notes that, “consumers who subscribe to MVPD service increasingly want to access video programming from any device, including mobile devices, making mobile service a desirable bundle component as well.”<sup>41</sup> The Commission’s minimum level of protection in the wireless Internet access market should be to prohibit such carriers from blocking any competing video service.

#### 4. *No Unreasonable Discrimination*

The Commission’s 2010 No Unreasonable Discrimination rule was perhaps the most important element for protecting the open Internet. It stated that a fixed broadband Internet access service provider “shall not unreasonably discriminate in transmitting lawful network traffic over a consumer’s broadband Internet access service.”<sup>42</sup> The rule was based on the finding that ISPs “have incentives and the ability to discriminate in their handling of traffic in ways that can harm innovation, investment, competition, end users and free expression.”<sup>43</sup> Broadband

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<sup>41</sup> *Applications of AT&T Inc. and DirecTV for Consent to Assign or Transfer Control of Licenses or Authorizations*, MB Docket No. 14-90, June 11, 2014, p 2.

<sup>42</sup> *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010), ¶68.

<sup>43</sup> *Id.*

providers, as outlined in this filing, continue to abuse their market power, behaving in ways that limit Internet openness. As online video offerings grow increasingly robust, the incentive to limit this competitive threat increases.

The *Open Internet Order* stated, “A commercial arrangement between a broadband provider and a third party to directly or indirectly favor some traffic over other traffic... (*i.e.* ‘pay for priority’) would raise significant cause for concern.”<sup>44</sup> Rather than adopt similarly strong rules, the Commission now proposes to weaken the No Unreasonable Discrimination rule to allow precisely the behavior it found to be a concern in 2010. Prioritization of Internet traffic, even if deemed “commercially reasonable,” will undermine the open Internet. It will facilitate collusion between incumbent media companies and ISPs, which will enter into agreements to prioritize content and effectively lock out competition. The result will look like cable television, colonized by a few giant conglomerates. Rather than a free market where consumers decide what content they want, ISPs and those with the means to pay will be in control. This is not a theoretical concern. When cable television first emerged it had the potential to introduce competition in media. But incumbent broadcast networks used their power to gain control of the market. Entering into prioritized agreements, which the Commission is proposing to allow, would enable these companies to take over the next distribution platform, to the detriment of competition, content diversity and consumer choice.

The Commission also stated, “In evaluating unreasonable discrimination, the types of practices we would be concerned about include...discrimination...that harms end users (such as by inhibiting end users from accessing the content, applications, services, or devices of their

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<sup>44</sup> *Id.* ¶76.

choice)”.<sup>45</sup> This threat is greater than ever. Yet, the Commission’s revised proposal no longer prevents such discrimination. If a consumer were to pay for 25 Mbps download service but attempt to access an online video service which has not paid for this level of access, the end user may not be able to download the content at the speed they pay for. This is what happened to Comcast ISP customers who attempted to access Netflix content earlier this year.

Instead of weakening the rule, the Commission should make clear that ISP practices such as data caps constitute unreasonable discrimination because they make substitution of online video for traditional video unaffordable or discriminate between content provided by the ISP and unaffiliated providers. ISPs already implement usage-based pricing by offering different tiers of Internet service. Imposing data caps in addition to tiers would prevent online video from competing with MVPD video service that does not have equivalent caps. Prohibiting unreasonable discrimination also requires the Commission ensure that the designation of “specialized services” will not be used to allow preferential treatment of affiliated content or the content of companies willing and able to pay for special treatment. Allowing ISPs to charge for enhanced delivery of content on the Internet would provide an unfair advantage to dominant companies and foreclose opportunities for new entrants to the market. Specialized services must be carefully defined to prohibit such anti-competitive behavior.

## **VI. The “Commercially Reasonable” Standard Will Harm the Open Internet**

The Commission’s proposal to permit broadband providers to use “‘commercially reasonable’ practices in the provision of broadband Internet access service”<sup>46</sup> authorizes open-ended and unlimited price and commercial practice discrimination against edge providers by

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<sup>45</sup> *Id.* ¶75.

<sup>46</sup> NPRM. ¶ 116.

broadband Internet access providers. This will inevitably undermine the virtuous cycle that is the legal basis for the *Open Internet Order* itself. WGAW urges the Commission to reconsider the proposal.

The standard that the Commission proposes would allow broadband Internet access providers to discriminate among content providers. Such a system would not only undermine the foundation of the Internet's success—namely, its open and neutral architecture; it would also defeat the stated purpose of the entire regulatory undertaking. The Internet's open architecture is its essential feature. Users can reach all lawful content sources with equal ease and quality of experience. Creators can offer their content to all consumers on an equal footing with all other competitors. This mutual access is unimpeded by gatekeepers seeking to advance their individual economic interests.

Permitting “commercially reasonable” agreements would give broadband Internet access providers unlimited price discrimination power, allow them to favor their own content to the detriment of others and, through individual negotiations, make broadband providers – instead of the Commission – the arbiters of the regulatory standard. The proposed standard would thus not prohibit and, indeed, contemplates, a circumstance in which Verizon enters into an agreement with Viacom, for example, which defines the content Viacom will distribute through prioritized service. If Verizon and Viacom establish such terms, which would be entirely permissible, they will quite likely become, by definition, “commercially reasonable” under the Commission's proposal. As such, then, it is likely that “prioritization” would automatically work to the detriment of the less well capitalized and thus less-favored content providers, even as such agreements pass the Commission's “commercially reasonable” standard. Once prioritized, Viacom's content can be expected to gain popularity to the detriment of non-prioritized content

providers. Paid prioritization is, by its nature, anti-competitive. It would disadvantage new entrants and other independent edge providers and ultimately replicate the closed environment of cable television.

Prioritization agreements, even if commercially reasonable, would allow the broadband Internet access providers' voice – along with their preferred content providers – to be heard first and heard above everyone else's voice. The effect will be twofold: it will reduce diversity, and it will discourage innovation. Instead of being free to create, writers will have to cater to the wishes of the broadband Internet access providers for an opportunity to get their content prioritized, or pay them to do so.

In addition, the “commercially reasonable” standard that the Commission created in the *Data Roaming Order* and upheld by the D.C. Circuit in *Cellco Partnership* cannot be applied to broadband Internet access to the extent that it is to data roaming under *Cellco Partnership*.<sup>47</sup> It is a standard that the Commission created for data roaming agreements, with few applicable cases, and even less applicability to the relationship between broadband Internet access providers and content providers. Data roaming takes place between wireless carriers by express agreement, and the “commercially reasonable” standard governs such one-to-one agreements; by contrast, in the vast majority of cases, there is no contractual relationship between a broadband Internet access provider and the content provider whose traffic will be discriminated against to prioritize other content. The court in *Verizon*, for example, specifically cautioned that “were the Commission to apply the ‘commercially reasonable’ standard in a restrictive manner, essentially elevating it to the traditional common carrier ‘just and reasonable’ standard, the rule might impose obligations

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<sup>47</sup> See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile-data Services, *Second Report & Order*, 26 FCC Rcd. 5411, 5432 ¶ 43 (2011). The D.C. Circuit upheld the “commercially reasonable” standard in *Cellco Partnership v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012).

that amounted to common carriage *per se*,” thus contravening the express statutory mandate that the Commission refrain from applying Title II obligations to broadband Internet access providers.<sup>48</sup>

Finally, the Commission proposes to apply the “commercially reasonable” standard on a case-by-case basis. This will only add to the uncertainty that the standard introduces and favors large Internet access providers and other market participants that have the financial and legal resources to wage perpetual regulatory battles. Most independent content creators, of course, do not have such resources. The Commission therefore proposes to add further complexity to the labyrinth of regulatory processes that content providers would have to go through to achieve equality. It also gives too much power to the Commission to determine what agreements pass the commercially reasonable standard.

## **VII. Title II Is the Proper Legal Foundation for Safeguarding the Public Interest**

The Commission has twice used Section 706 to promulgate Open Internet rules, and the Court of Appeals has twice rejected its attempts. After years of regulatory action and responsive litigation, the Commission’s next course of action is clear: it should use its authority under Title II to promulgate a nondiscrimination rule. Title II is the most straight-forward and legally-sound path because it provides the Commission with concrete authority to protect consumers. Reclassification is, therefore, both the appropriate and required action that will preserve the open Internet and protect the public interest.

Existing case law provides the Commission with a solid jurisdictional basis for promulgating Open Internet rules under Title II. In *Brand X*, for example, the Supreme Court

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<sup>48</sup> *Verizon v. FCC*, 704 F.3d 623, 653 (D.C. Cir. 2014) (citations omitted).

held that the Commission can use its “expert policy judgment” to review a “subject matter [that] is technical, complex, and dynamic.”<sup>49</sup> At the time of its 2002 decision regarding classification, the Commission concluded that broadband Internet access providers should not be subject to common carrier regulation. But that does not preclude the Commission from changing its determination to accommodate changes in the industry. Indeed, the *Brand X* Court noted that the Commission could decide to treat ISPs as providers of telecommunications services, as long as it gave a “reasoned explanation” for doing so.<sup>50</sup>

The Commission’s decision to change policy regarding Internet classification would not be subject to a heightened standard of judicial review. The Supreme Court in *Fox* made this clear, observing that there is “no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subject to a more searching review” where the agency implements a change in regulatory policy.<sup>51</sup> Thus, as long as the Commission provides a reasoned explanation for its decision, it is within its authority to reclassify broadband Internet access providers under Title II. The D.C. Circuit has suggested the same path. In *Comcast*, the court stated that the Commission could use its Title II authority to regulate Comcast’s Internet management practices.<sup>52</sup> In *Verizon*, the court also concluded that “broadband [Internet access] providers furnish a service to edge providers, thus undoubtedly functioning as [content] providers’ ‘carriers.’”<sup>53</sup> From a legal perspective, it is thus clear that the Commission should proceed under Title II to promulgate Open Internet rules.

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<sup>49</sup> *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1002-03 (2005).

<sup>50</sup> *Id.* at 1000.

<sup>51</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009).

<sup>52</sup> *Comcast Corp. v. FCC*, 600 F.3d 642, 655-56 (D.C. Cir. 2010).

<sup>53</sup> *Verizon* at 653.

Apart from the solid jurisdictional basis, the Commission should use its Title II authority because it provides the clearest, most straight-forward path to protect an open Internet. First, Title II re-classification would remove the hurdle of the common carrier prohibition, and clearly establish the Commission’s authority to take the actions necessary to protect the open Internet. Using Section 706 – as the Commission proposes – instead of Title II is akin to using water buckets to douse a wildfire while fire trucks stand idle nearby. The Commission has attempted such half measures before, and they have failed. Specifically, Section 706 was rejected by the D.C. Circuit in both *Comcast* and *Verizon* decisions.<sup>54</sup> In *Verizon*, the court held that while the Commission “has reasonably interpreted [S]ection 706 to empower it to promulgate rules governing broadband providers’ treatment of Internet traffic, . . . it may not impose requirements that contravene express statutory mandates,”<sup>55</sup> such as a restrictive “commercially reasonable” standard. It is time for the Commission to accept that Section 706 is not the solution. Title II reclassification, on the other hand, provides the Commission with authority to enact *per se* rules to prohibit broadband Internet service providers from discriminating among content creators, which would ensure that consumers receive the Internet access they have paid for to enjoy the content they choose. This is especially important as the video marketplace trends away from the pre-selected menu of content that characterizes the cable market, toward the à la carte, consumer-friendly model as demonstrated by Netflix, Amazon, YouTube, Hulu, iTunes, and other online video services.

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<sup>54</sup> In *Comcast*, the D.C. Circuit held that under the Commission’s own precedent, Section 706 was not an independent grant of authority. Therefore, the Commission could not use it to impose sanctions on Comcast for degrading peer-to-peer traffic on its network. *Comcast* at 658. Similarly, in *Verizon*, the court held that Section 706 alone did not provide the Commission with sufficient authority to promulgate the essential open Internet rules—i.e., the no-blocking and non-discrimination rules. *Verizon* at 650.

<sup>55</sup> *Id.* at 628.

Second, Title II provides the Commission with authority to prohibit unreasonable discrimination and to identify broadband practices that are *per se* unreasonable. On the Internet, prioritization of traffic equals discrimination. In non-congested networks, broadband Internet access providers can prioritize one's content only by degrading or blocking another's content, thus discriminating against the latter.

Finally, the Commission need not require utility-style regulation of broadband Internet access providers. Under 47 U.S.C. § 160(b), "the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions . . . ." The purpose of the forbearance provision is to provide the Commission with regulatory flexibility. In the case of broadband Internet access providers, the Commission need not impose the whole gamut of Title II authority. Instead, it can employ a light regulatory touch by tailoring rules under Title II to the specific characteristics of Internet distribution.

### **VIII. Conclusion**

In a few short years, the rise of Internet video distribution has created the opportunity for a more diverse, competitive and independent market for content. Writers have new outlets to sell to and consumers have an expanded menu of content options to choose from. But the promise of vibrant video competition is threatened by incumbent control of distribution. Broadband providers have acted to limit Internet openness, abusing their market power. Without strong Open Internet rules, ISPs will become intractable content gatekeepers, turning the once open and neutral Internet into something akin to cable television, dominated by a few vertically-integrated conglomerates. Because the Internet is *the* essential communications platform of the 21<sup>st</sup> century,

we cannot allow the decisions about what content can be accessed and by whom to be made by those powerful interests, whose anti-competitive tendencies are already well documented.

In sum, Open Internet rules must limit the ways in which ISPs can discriminate against edge providers and contain express prohibitions against blocking lawful content. The Commission should not, as proposed, implement a “commercially reasonable” standard that enshrines, rather than prohibits, discriminatory behavior. Finally, the Commission should reclassify broadband Internet access services as Title II telecommunications services, providing a solid foundation for current and future regulatory action.

## IX. Appendix

### *1. Television Showrunner and Creator Letter to FCC Chairman Wheeler*



May 13, 2014

The Honorable Tom Wheeler, Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, D.C. 20554

Dear Chairman Wheeler:

We are writing to express our strong support for an open Internet. We are showrunners and creators of television and original Internet programs, and members of the Writers Guild of America, West.

The open Internet is the greatest technological catalyst to participatory democracy and free speech since the printing press. That's why totalitarian states around the world try to control it.

There are two basic directions that the Internet can go, and the choice is in the FCC's hands.

Currently, the open Internet works like the phone lines. Consumers can call whomever they want; nobody gets to limit who they can call. Likewise, consumers choose where they want to go on the Internet; no content can be given preferential treatment by their Internet provider.

If Net Neutrality is neutered, the Internet will become like cable television. A few corporate gatekeepers such as Comcast will be allowed to decide what content consumers can access and on what terms. The danger is that blocking, discrimination and paid prioritization could occur.

This puts decision making and power over the Internet in the hands of the few, especially those with money. The Internet is too vital to the free exchange of ideas to allow the few companies who control Internet technology to edit the ideas and content that flow through it.

Moreover, in this case what's bad for free speech and democracy is also bad economic policy. Economists across the political spectrum agree that when companies can construct barriers to entry, markets are not free and efficient. New competition is locked out, resulting in a form of monopoly that causes consumers to suffer from higher prices- like their cable bills- and fewer choices.

That is exactly what has occurred in our traditional film and television business. After decades of consolidation and mergers, seven corporations control 95% of television production and viewing.

But right now the Internet is opening up the media business to new competition. There are new buyers for what we as writers create. But if this new competition is unfairly pushed aside because the FCC adopts weak rules, *rather than allowing consumers to decide what they prefer*, neither innovation nor the best interests of society will be served.

An open Internet is essential for free speech and participatory democracy. An open Internet has also been a tremendous engine for the generation of new jobs and businesses, an engine that properly rewards creators who have something compelling to say.

The Commission has the authority to keep the Internet free and open. We urge you to take the steps necessary to ensure the free flow of ideas and content across the web, without the threat of blocking or discrimination.

Sincerely,

Courtney Kemp Agboh  
Mara Akil  
Chris Alberghini  
Adam Armus  
Jeffrey Astrof  
Neal Baer  
Hunt Baldwin  
Carol Barbee  
Mike Barker  
Jay Beattie  
John D. Beck  
Jeffrey Bell  
Roberto Benabib  
Dan Berendsen  
Amy Berg  
Jim Bernstein  
Jennifer Bicks  
Kevin Biegel  
Ken Biller  
Steve Blackman  
April Blair  
Raphael Bob-Waksberg  
Rob Bragin

Christopher Brancato  
Bradley Bredeweg  
Shane Brennan  
Scott Buck  
Jack Burditt  
Steve Callaghan  
Bill Callahan  
Clifton Campbell  
Dave Caplan  
Glenn Gordon Caron  
Bridget Carpenter  
Patti Carr  
Jeremy Carver  
Daniel Cerone  
Ilene Chaiken  
Adam Chase  
Mike Chessler  
Cynthia Cidre  
David X. Cohen  
Carter Covington  
Elizabeth Craft  
Alexandra Cunningham  
Carlton Cuse

Ed Decter  
Steven DeKnight  
Bill D'Elia  
Robert Doherty  
Garrett Donovan  
Chris Downey  
Tim Doyle  
James Duff  
Jay Duplass  
Pamela Eells  
Charles H. Eglee  
Lee Eisenberg  
John Eisendrath  
Diane English  
Dave Erickson  
Stephen Falk  
Kevin Falls  
Mark Fergus  
Dave Finkel  
Mickey Fisher  
Emily Fox  
Dana Fox  
Victor Fresco

Bryan Fuller  
Sera Gamble  
Alexander Gansa  
Greg Garcia  
Leila Gerstein  
Mike Gibbons  
Vince Gilligan  
Scott Gimple  
Sivert Glarum  
Neil Goldman  
Sara Goodman  
David A. Goodman  
Howard Gordon  
Al Gough  
Peter Gould  
David S. Goyer  
Susannah Grant  
Rob Greenberg  
Lyn Greene  
David Greenwalt  
Jonathan Groff  
Marc Guggenheim  
Aaron Guzikowski  
Aaron Harberts  
Chris Harris  
Ron Hart  
DeAnn Heline  
Felicia D. Henderson  
Tom Hertz  
Al Higgins  
Jody Hill  
Tod Himmel  
David Hoge  
David Holden  
Soo Hugh  
Armando Iannucci  
Lauren Iungerich  
Sean Jablonski  
Michael Jamin  
Al Jean  
Joanna Johnson

Jennifer Johnson  
Dee Johnson  
Jeff Judah  
Tom Kapinos  
Michael B. Kaplan  
Jason Katims  
Mitchel Katlin  
Mike Kelley  
Neal Kendall  
Jack Kenny  
Chris Keyser  
Nahnatchka Khan  
Callie Khouri  
Kyle Killen  
Marlene King  
Daniel Knauf  
Jay Kogen  
Aaron Korsh  
Eric Kripke  
Liz Kruger  
First Last  
Sam Laybourne  
Joni Lefkowitz  
Jennifer Levin  
Richard Levine  
Steven Levitan  
Paul Lieberstein  
Eric Lodol  
Chuck Lorre  
Rob Lotterstein  
Steven Maeda  
David Manson  
Jim Margolis  
Michael Mariano  
Andrew W. Marlowe  
Glen Mazzara  
Blake McCormick  
David McFadzean  
Brian McGreevy  
Matthew McGuinness  
Jamie McLaughlin

Jeff Melvoin  
Carol Mendelsohn  
Erica Messer  
Rina Mimoun  
Ronald D. Moore  
Chris Mundy  
Christopher Murphey  
Kevin Murphy  
Margaret Nagle  
DJ Nash  
Jan Nash  
Stephen Nathan  
Peter Nowalk  
Rockne S. O'Bannon  
Peter Ocko  
Peter O'Fallon  
Lara Olsen  
Peter Paige  
Lennon Parham  
James Parriott  
Jonas Pate  
Jim Patterson  
Robert Peacock  
Tony Phelan  
Judd Pillot  
Jeff Pinkner  
Greg Plageman  
Cameron Porsandeh  
Bill Prady  
Dawn Prestwich  
Matt Pyken  
Daniel Pyne  
Luvh Rakhe  
Andrew Reich  
Ethan Reiff  
Lukas Reiter  
Shonda Rhimes  
Jason Richman  
Scott Rosenbaum  
Melissa Rosenberg  
Mike Royce

Kirk Rudell  
Shawn Ryan  
Ajay Sahgal  
Nick Santora  
Scott Satin  
Karl Schaefer  
Patrick Schumacker  
Andy Schwartz  
Mike Scully  
Heath Seifert  
Michael Seitzman  
Naren Shankar  
Craig Shapiro  
Dan Signer  
Josh Silverstein  
Craig Silverstein  
Todd Slavkin  
Patrick Sean Smith

Jill Soloway  
Holly Sorensen  
Tom Spezialy  
Kathryn J. Steinberg  
Dan Sterling  
Bernie Su  
Veena Sud  
Craig Sweeny  
Darren Swimmer  
Tom Szentgyorgyi  
Janet Tamaro  
Matt Tarses  
Christian Taylor  
Betsy Thomas  
Rob Thomas  
Hans Tobeason  
Donald Todd  
Cyrus Voris

Greg Walker  
Matthew Weiner  
Lizzy Weiss  
Matt Weitzman  
John Wells  
Mark Wilding  
Vaun Wilmott  
Hilary Winston  
John Wirth  
Nicholas Wootton  
Craig Wright  
Rob Wright  
Nicole Yorkin  
Graham Yost  
David Zabel  
Aaron Zelman  
Ed Zuckerman  
David Zuckerman

2. List of Television Length Original Programs Made for Internet Distribution

Program	Year	Season	Episodes	Genre	Platform
Dr. Horrible's Sing-Along Blog	2008	1	4	Comedy	Drhorrible.com
Back on Topps	2009	2	17	Comedy	My Damn Channel
Booth at the End, The	2011	1	5	Drama	Hulu
Aim High	2012	2	9	Drama	Crackle
Battleground	2012	1	13	Comedy	Hulu
Paul The Male Matchmaker	2012	1	10	Comedy	Hulu
Booth at the End, The	2012	2	5	Drama	Hulu
Alpha House	2013	1	11	Comedy	Amazon
Betas	2013	1	11	Comedy	Amazon
Chosen	2013	1	6	Drama	Crackle
Chosen	2013	2	6	Drama	Crackle
Cleaners	2013	1	6	Drama	Crackle
Extraction	2013	1	Long-Form	Drama	Crackle
P.E.T. Squad Files, The	2013	1	6	Comedy	cwseed.com
All My Children	2013	1	40	Drama	Hulu
Awesomes, The	2013	1	10	Animation	Hulu
East Los High	2013	1	24	Drama	Hulu
Mother Up!	2013	1	13	Animation	Hulu
One Life To Live	2013	1	39	Drama	Hulu
Quick Draw	2013	1	8	Comedy	Hulu
Arrested Development	2013	1	15	Comedy	Netflix
Bad Samaritans	2013	1	5	Comedy	Netflix
Hemlock Grove	2013	1	13	Drama	Netflix
House of Cards	2013	1	13	Drama	Netflix
Orange Is The New Black	2013	1	13	Comedy	Netflix
Turbo: F.A.S.T.	2013	1	15	Children's	Netflix
Real Adult Feelings	2013	1	5	Comedy	Vimeo
Whatever This Is	2013	1	6	Drama	whateverthisis.com
Alpha House	2014	2	11	Comedy	Amazon
Annedroids	2014	1	13	Children's	Amazon
Creative Galaxy	2014	1	13	Children's	Amazon
Gortimer Gibbons	2014	1	12	Children's	Amazon
Tumbleleaf	2014	1	13	Children's	Amazon
Wishenpoof!	2014	1	TBD	Children's	Amazon
Chosen	2014	3	6	Drama	Crackle

Chosen	2014	4	6	Drama	Crackle
Cleaners	2014	2	12	Drama	Crackle
Sequestered	2014	1	12	Drama	Crackle
Awesomes, The	2014	2	10	Animation	Hulu
Deadbeat	2014	1	10	Comedy	Hulu
East Los High	2014	2	12	Drama	Hulu
Farmed and Dangerous	2014	1	4	Comedy	Hulu
Quick Draw	2014	2	10	Comedy	Hulu
Spooked	2014	1	4	Comedy	Hulu
Hotwives of Orlando	2014	1	7	Comedy	Hulu
We've Got Next	2014	1	6	Comedy	MyDamnChannel
Bojack Horsemen	2014	1	12	Animation	Netflix
Hemlock Grove	2014	2	10	Drama	Netflix
House of Cards	2014	2	13	Drama	Netflix
Killing, The	2014	4	6	Drama	Netflix
King Julien	2014	1	TBD	Children's	Netflix
Orange Is The New Black	2014	2	13	Comedy	Netflix
Puss in Boots	2014	1	TBD	Children's	Netflix
Veggie Tales in the House	2014	1	TBD	Children's	Netflix
Powers	2014	1	10	Drama	Playstation
Real Adult Feelings	2014	2	5	Comedy	Vimeo
Bosch	2015 and Beyond	1	10	Drama	Amazon
Mozart in the Jungle	2015 and Beyond	1	10	Comedy	Amazon
The After	2015 and Beyond	1	8	Drama	Amazon
Transparent	2015 and Beyond	1	10	Comedy	Amazon
The Throwaways	2015 and Beyond	1	Long-Form	Drama	Crackle
Tightrope	2015 and Beyond	1	TBD	Comedy	Crackle
Daredevil	2015 and Beyond	1	14	Drama	Netflix
Defenders, The	2015 and Beyond	1	TBD	Drama	Netflix
Dinotrux	2015 and Beyond	1	TBD	Children's	Netflix
Ever After High	2015 and Beyond	1	12	Children's	Netflix
Grace and Frankie	2015 and Beyond	1	13	Comedy	Netflix
House of Cards	2015 and Beyond	3	13	Drama	Netflix

Magic School Bus 360	2015 and Beyond	1	26	Children's	Netflix
Marco Polo	2015 and Beyond	1	10	Drama	Netflix
Marvel: Iron Fist	2015 and Beyond	1	13	Drama	Netflix
Marvel: Jessica Jones	2015 and Beyond	1	13	Drama	Netflix
Marvel: Luke Cage	2015 and Beyond	1	14	Drama	Netflix
Narcos	2015 and Beyond	1	14	Drama	Netflix
Orange Is The New Black	2015 and Beyond	3	13	Comedy	Netflix
The Crown	2015 and Beyond	1	TBD	Drama	Netflix
Halo	2015 and Beyond	1	Long-Form	Drama	Xbox
Halo (series)	2015 and Beyond	1	TBD	Drama	Xbox
Community	2015 and Beyond	8	13	Comedy	Yahoo
Other Space	2015 and Beyond	1	8	Comedy	Yahoo!
Sin City Saints	2015 and Beyond	1	8	Comedy	Yahoo!