

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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REPLY COMMENTS OF THE WRITERS GUILD OF AMERICA, WEST, INC.

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September 15, 2014

Summary

In our initial comments and again today, the Writers Guild of America, West (“WGAW”) calls on the Commission to do what is necessary to protect the open Internet and preserve the “virtuous circle of innovation.” Rules that enshrine openness will preserve opportunities for writers to create diverse and independent content and deliver it to consumers, unimpeded by the gatekeepers of traditional media or the Internet service providers (“ISPs”) that intend to become the gatekeepers of Internet-delivered media. As Jay Bushman, a WGAW member and writer/producer for the online series *The Lizzie Bennet Diaries* shares in this filing, “because the Internet was open, I had the ability to write and create projects myself and deliver them directly to the audience, without needing the approval of any gatekeepers.” Writers are an important part of the virtuous circle; as Ruth Livier, creator and writer of the web series *Ylse* describes the value of the open Internet, “It has empowered and motivated us to create content, knowing there is a distribution outlet for it.”

The Commission’s current proposal to rely on Section 706 authority and introduce commercially reasonable discrimination will undermine Internet openness and discourage edge provider investment and innovation. It will enhance the power of Internet service providers, which operate in a market that features little competition and high switching costs, over edge providers and consumers, and will allow ISPs, not consumers, to decide what content is available. This is not the appropriate course of action for the most important communications platform of the 21st century. Rather, to preserve free speech, competition and innovation the FCC must reclassify broadband Internet access service as a Title II telecommunications service.

Reclassification will allow the Commission to fulfill the goals of the 2010 *Open Internet* Order. It will ensure that ISPs are not allowed to institute discriminatory practices that will harm the virtuous circle. It will preserve competition in the online video market, where writers have new creative and economic opportunities and consumers have new content choices.

Reclassification will not, as ISPs suggest, deter investment, just as application of Title II has not harmed commercial mobile phone service. It will also not apply to edge providers, which offer information services and operate, in contrast to ISPs, in a competitive market. The Commission must also apply rules equally to fixed and wireless ISPs in order to avoid bifurcating Internet access and relegating mobile broadband to second class status. Finally, rules must not ignore interconnection points that serve as the only way onto “last-mile” Internet networks.

Table of Contents

I.	Introduction	4
II.	Artists Support Net Neutrality	6
III.	The Open Internet is Necessary to Preserve the Virtuous Circle and Will be Irreparably Harmed by the Commission’s Proposal.....	15
IV.	The Commission’s Proposed Commercial Reasonableness Standard will Fail to Protect and Preserve the Open Internet	18
	<i>A. The Commercial Reasonableness Standard Will Place High Costs on Start-ups and SMBs</i>	20
	<i>B. The New Standard Will Result in Greater Uncertainty and Risk of Litigation</i>	21
V.	Strong Net Neutrality Rules are Necessary because Market Conditions Provide Large ISPs with Significant Power Over Consumers and Edge Providers	23
	<i>A. High Switching Costs Limit Competition.....</i>	26
	<i>B. The Entrance of Google Fiber Undermines Claims of a Competitive ISP Market</i>	28
	<i>C. Monopoly Prices Reveal Extent of ISP Market Power</i>	29
	<i>D. Mergers Have Led to Increased Vertical Leverage</i>	30
	<i>E. Competition Alone Does Not to Ensure an Open Internet.....</i>	31
VI.	Title II is the Appropriate Classification of Internet Service.....	32
	<i>A. Reclassification Need Not Deter Investment.....</i>	34
VII.	Wireless Broadband Must Not Be Relegated to Second Class Status.....	35
VIII.	Failure to Address Interconnection Exposes a Loophole in Open Internet Rules	38
IX.	Conclusion	39

I. Introduction

Writers Guild of America, West, Inc. (“WGAW”)¹ respectfully submits the following reply comments in response to comments filed “In the Matter of Protecting and Promoting the Open Internet,” GN Docket No. 14-28.

Recent analysis conducted by the Sunlight Foundation confirms broad public support for rules that protect the open Internet. Ninety-nine percent of analyzed comments support net neutrality and two-thirds call for reclassification of broadband Internet access service (“BIAS”) as a Title II telecommunication service.² A wide range of organizations representing consumers, artists, and edge providers have also voiced clear support for reclassification as the necessary for strong rules that preserve Internet openness.³ It is, perhaps, unsurprising that the main opponents to reclassification are large and powerful Internet service providers (“ISPs”) that advocate for weak rules based on insufficient legal authority so that they may use their power to set the terms of access to “last-mile” networks.

In their comments, the largest ISPs, which include Comcast, AT&T and Verizon, foreshadow years of legal challenges if the Commission were to reclassify broadband Internet

¹ WGAW is a labor organization representing more than 8,000 professional writers of feature films, television series, news, documentaries and original online video programming.

² Brian Fung, “Sunlight: 99 percent of net neutrality comments wanted stronger FCC rules,” *The Washington Post*, September 2, 2014, <http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/02/sunlight-99-percent-of-net-neutrality-comments-wanted-stronger-fcc-rules/>.

³ See, e.g., *Comments of Free Press*, GN Docket No. 14-28 (July 17, 2014); *Comments of Public Knowledge*, GN Docket No. 14-28 (July 15, 2014); *Comments of Netflix*, GN Docket No. (July 15, 2015); *Comments of Internet Freedom Supporters*, GN Docket No. 14-28 (July 18, 2014); *Comments of Engine Advocacy*, GN Docket No. 14-28, (July 15, 2014); *Comments of Etsy*, GN Docket No. 14-28, (May 8, 2014); *Comments of Consumers Union*, GN Docket No. 14-28, (July 15, 2014); *Comments of Kickstarter*, GN Docket No. 14-28, (July 10, 2014).

access service.⁴ In raising this specter, these companies fail to mention that they will be the parties to issue such challenges, as they did when the Commission adopted its 2010 Open Internet rules. By issuing these not-so-thinly veiled threats, these commenters confuse coercion with persuasion. The Commission cannot decide the future of the Internet, the most important communications platform of the 21st century, based on threats.

Rather, it is clear that the FCC is faced with an important choice. It can continue to rely on Section 706 as the basis of authority for Net Neutrality rules, a decision which has already led the Commission to propose the creation of a tiered Internet with a minimum level of access that requires edge providers to negotiate with ISPs for enhanced service. This path will allow discrimination based on “commercial reasonableness,” a relatively untested standard that will undermine the “virtuous circle of innovation” by giving ISPs and incumbent media providers the ability to foreclose competition. ISPs already operate in a market with too little competition, a fact acknowledged by Chairman Wheeler, and will succeed in turning the open Internet’s model of innovation without permission into one resembling cable television, where distributors decide what content consumers can access.

Alternatively, the Commission can take the action supported by the overwhelming majority of commenters and reclassify broadband Internet access services under Title II of the Communications Act. Reclassification is the appropriate action, because at its core, this service involves simple telecommunications. Consumers subscribe to Internet service with the expectation that they can send and receive data without a service provider altering the form or content of the data. Reclassification, in addition, is the only way for the FCC to institute rules that prohibit ISPs from engaging in unjust and unreasonable discrimination. By appropriately

⁴ See *Comments of Verizon and Verizon Wireless*, GN Docket No. 14-28 (July 15, 2014), pp. 50-51; *Comments of Comcast Corporation*, GN Docket No. 14-28 (July 15, 2014), pp. 3, 49; *Comments of AT&T Services, Inc.*, GN Docket No. 14-28 (July 15, 2014), pp. 1, 40.

recognizing BIAS as a telecommunications service, the Commission will have the legal authority to prohibit harmful practices such as paid prioritization, preferential treatment of affiliated traffic and data caps that limit the growth of the online video market or discriminate against unaffiliated services. Reclassification would not apply to edge providers, which offer true information services and operate in competitive markets. Reclassification under Title II will not discourage network investment because the “virtuous circle of innovation” will remain intact and consumers will continue to demand faster and better Internet service. Classification of commercial mobile phone service under Title II has produced none of the results foreshadowed by ISPs in their comments and contradicts the argument that such regulation is meant only for monopolies or technology from bygone eras. Rather, reclassification will simply allow the Commission to institute rules prohibiting broadband providers from establishing “unjust and unreasonable” charges or practices⁵ or engaging in “any unjust or unreasonable discrimination.”⁶

II. Artists Support Net Neutrality

Strong Net Neutrality rules have widespread support among creative professionals, who understand the importance of the open Internet to diverse and independent content, competition and innovation. The Independent Film and Television Alliance (“IFTA”), which represents independent producers, echoed concerns raised by the WGAW about consolidation in traditional media and market foreclosure faced by independent producers as a result.⁷ While IFTA notes the importance of digital distribution to independent content, stating that “video on demand”

⁵ 47 U.S. Code § 20 (b).

⁶ *Id.*, 202 (b).

⁷ *Comments of The Independent Film & Television Alliance (IFTA)*, GN Docket No. 14-28, (July 15, 2014), p. 3.

(“VOD”) has become “an increasing revenue source for independent producers”⁸ its filing highlights how even this “market is dominated by programming owned by or affiliated with the vertically-integrated large media conglomerates.” To ensure that smaller VOD services that offer independent content can thrive online, IFTA calls on the Commission to “ensure a *permanently* open Internet.”⁹

WGAW and IFTA, in addition, joined with twenty other arts and cultural organizations to highlight the broad base of creative community support for the open Internet, who collectively urged the FCC to “do everything in its power to prevent paid prioritization and a ‘fast lane’ Internet for only the best-funded enterprises.”¹⁰ A number of groups representing minority media interests, including National Hispanic Media Coalition, Women In Media & News and the National Association of Latino Independent Producers have also filed in support of strong rules and action to reclassify broadband Internet service, stating, “rules that prevent blocking and discrimination are common carriage regulations and can only be enforced using Title II Authority.”¹¹ Online video creators are also voicing their support, with more than 15,000 creators who collectively account for more than 14 billion online video views signing on in favor of net neutrality.¹²

In the WGAW’s July comments to the Commission we included stories of writers who have benefitted from the open Internet. WGAW members have continued to share their

⁸ *Ibid.*

⁹ *Ibid.*, p. 4.

¹⁰ *Comments of National Arts and Cultural Organizations*, GN Docket No. 14-28, (July 15, 2014), p. 4.

¹¹ *Comment of Internet Freedom Supporters*, (July 15, 2014), p. ii.

¹² “The Internet is Ours,” <http://www.videocreatorsforinternetneutrality.org/#>, accessed September 13, 2014.

experiences and their support for strong Open Internet rules. We include their stories in this filing.

Margaret Dunlap, Writer and Co-Executive Producer, *The Lizzie Bennet Diaries*

In 2011, I was between television jobs when I got an offer to write for a modern-day web adaptation of *Pride and Prejudice*. It seemed like an interesting project, and a good way to fill my time for a few months.

Two years later I was on stage at the Creative Arts Emmy Awards as a co-executive producer of *The Lizzie Bennet Diaries*. Our little show had become a transmedia juggernaut, with nine and a half hours of video content told over fifty weeks, five YouTube channels, and close to forty social media accounts on platforms ranging from Twitter to LinkedIn. It was named "the best Austen adaptation around" by *The Guardian* newspaper and won multiple awards for its innovative storytelling, including the 2013 Emmy for Outstanding Achievement in Interactive Programming. It garnered millions of views, inspired two spin-off series, a novelization published by Simon and Schuster, and introduced a whole new generation of fans to Jane Austen's classic novel.

None of this would have been possible without an Open Internet.

When the show began, we had no corporate backing, no studio, no network partnerships at all. No industry player was interested in making scripted Internet content for a young, female audience that didn't revolve around fashion, beauty, or lifestyle topics, even on a miniscule budget like ours. And that meant that we were posting episodes of our show exactly the same way that someone would put up a video of their cat. But thanks to the Open Internet and Net Neutrality, our videos loaded just as quickly and played just as well as anything on Netflix, Hulu, or NBC.com. That level playing field allowed an underserved audience to find and embrace the content that spoke to them, no matter where it came from.

Personally, my work on *Lizzie Bennet* has led to career opportunities both on the web and in traditional media. But even more important, *Lizzie Bennet* has inspired its fans to make series of their own. We demonstrated to creators fresh out of film school that if they put out a quality product, the industry will take notice. And we showed young women with no connections to the entertainment industry at all that there was nothing stopping them from forming their own company, assembling their own writers' rooms, and putting their work out there for everyone to see. Not all of them will win Emmys, but the best will find their audience, and we will all be richer for it.

I mean that literally. Today's "kids on YouTube" are the next generation of American storytellers. They are the voices who will go on to create tomorrow's television shows and feature films, the very content that the companies arguing for privileged "fast lane" access will be so desperate to stream in a few years time.

Already this is happening with *The Lizzie Bennet Diaries*, which is now available on demand for Starz subscribers. Having an Open Internet ensures we will all be able to discover the next *Lizzie Bennet*. That isn't just a win for independent producers and marginalized voices. It's vital for the future of mainstream Hollywood.

Issa Rae, Writer/Creator, *The Misadventures of Awkward Black Girl*

I would never have had the opportunity to break into writing for television had it not been for the opportunities awarded to me by internet video platforms like YouTube. For years, I tried to break into the industry traditionally (writing spec scripts, meeting execs, going to networking events, pitching shows), and I was always told that my work and my voice didn't have an audience. Sometimes this was shorthand for, "it's too black," or "we're afraid to take a chance on this."

I created my third and most successful series, "The Misadventures of Awkward Black Girl" (ABG) based on what I was not seeing on television and writing for the series, producing it and distributing it for the 15-20 million viewers who tuned in was one of the most rewarding experiences of my life. Not only did I prove executives who thought I didn't have an audience wrong, but I wasn't limited to the formulaic, "safe writing" that television networks expected. I was allowed unlimited creative freedom and direct access to my audience.

When television called, I took my first opportunity to create/write a show for Shonda Rhimes and ABC, but simultaneously, when ABG was going into its second season, I was able to license the series to Pharell's internet channel, "i am OTHER." Over the last couple of years, I've been able to sell various shows to online platforms, while the television pilot development process continues to span its feet. In fact, over 3 years of two television pilot deals, I've been able to produce and sell nearly 10 internet shows to internet outlets.

If paid prioritization happens, not only will that jeopardize my opportunities as a writer to find opportunities outside a monopoly, but as a small, internet production company, I'll be shut out. This means that the audience that I (and my fellow content creator peers of color) cater to, an audience that is very much underwhelmed by what mainstream media has to offer, will suffer as well. This cannot happen ... again.

Christopher J. Smith, Writer/Creator, *My Dad's Tapes*

Writing for an online series is an amazing experience. It's faster, it's open to more creativity and finding an audience is much easier than writing for television. I created a web series as an experiment and it took off. The first episode was written, shot, edited and up for viewers all within the span of a week. The audience found it almost immediately and a series was born. As far as creativity,

there is no limit to what you can do. People can become famous from one video on YouTube and it's amazing to watch what hits and what misses. It's also much, much cheaper to create new and fresh content.

Having this new platform means my content is available. Twenty years ago, writers were pounding the pavement playing the lottery game. Even ten years ago, videos online were few and far between. Now content creators are free to work within their own boundaries and rules. Obviously we all have to work around a website's Terms of Service, but in the long run, those doing the writing are now free to find an audience, whereas before if a script wasn't sold it was shelved.

But paid prioritization would more than likely shut me down, online anyway. It would set everyone back decades. Let the audience be the ones that choose what is watched, not who has the most money to pump into a limited system.

I have explained this many times to people throughout my project, that television and broadcasting as we know it is going away. In the near future, everything will be streaming. Televisions will all be transformed into monitors that are hooked up to a computer and the internet. The distinction between a television show and web series will become blurred. As we move into this exciting future, audiences will no longer sit still for a show, but interact with it as well. As an episode plays out in front of them, all around will be open social media windows, whether that be Twitter or Facebook, or even a message board devoted to the series, the audience will interact with one another. Even now, fans of a show will join a chat room to discuss an episode as it streams. We are in an incredible time where interaction can grow exponentially on an open internet. The threat of losing net neutrality is a huge concern of mine and will definitely stifle the growth of entertainment and media.

Jay Bushman, Transmedia Producer/Writer, *The Lizzie Bennet Diaries*

Hyperbole is a hallmark of most political debates, and it's easy to slip into when trying to make a passionately held point. So let me say bluntly that this is not hyperbole – creating a paid prioritization scheme would be an extinction level event for an entire generation of creators who have used the equal access the Internet provides to create careers, push boundaries and invent new forms of storytelling. I am one such creator.

I started my career on a traditional trajectory, writing tv specs and producing indie short films. But with the rise of the Internet, I became fascinated with all the new ways you could tell a story, and changed my path to explore these new ways. I have spent years going into pitch meetings to discuss my work, only to be met with bewildered stares and refrains of “that will never work.” So I started to make projects on my own. And because the Internet was open, I had the ability to write

and create projects myself and deliver them directly to the audience, without needing the approval of any gatekeepers.

Jump ahead to today. A decade of experimenting with new ways of storytelling culminated in my work as a writer and Transmedia Producer of “The Lizzie Bennet Diaries” – the first YouTube-distributed series to be awarded a Primetime Emmy. Our show reached a huge audience – over 50 million and counting at this point, with 1 million new views a month a whole year after the end of the show. We did this with no studio or network backing, no marketing budget and no agency or brand support.

On an unequal internet, I would not have been able to do any of this work – the barriers to entry would be too high, and reaching an audience would be too difficult.

But even more importantly, the show inspired legions of new creators to make their own shows – many of them filming on webcams in their bedrooms and delivering content to growing online audiences. Many times I am asked by fans and new creators what advice I have for them, and I usually tell them this: 1) Start a project 2) Finish it 3) Start another 4) Repeat.

Removing open access to the Internet will stifle the launch of this entire next generation of creators. We cannot afford that.

There is a historical equivalent to this question. In the early days of motion pictures, the Trust led by Edison ruthlessly stamped down attempts at independent production. In order to escape, many independent producers relocated – to Hollywood. Our entire industry in this city was built on opposing this kind of land-grabbing, cynical attempt to consolidate power in the hands of the few that already possess it.

Today, there are no frontiers to move to across the continent – we’re all connected together by this vast Internet. It’s too important to let it be crippled.

Robin Schiff, Writer, *Romy And Michele's High School Reunion, Almost Perfect, Grosse Pointe*. Currently shooting a pilot that I wrote called *Down Dog* for Amazon

As opportunities have lessened for writers in broadcast and cable TV -- smaller staffs, less money -- the internet has become the place for writers to get started, be creative, showcase their talents and, now, make a living. Writers can self-finance or work for small companies, they can own their product, and they have no restrictions on what they create. But this is only partly why it's crucial for net neutrality to be preserved.

There used to be a separation of church and state in the entertainment business. But since the repeal of the Financial Interest and Syndication Rules the same companies are allowed to own and distribute creative product. As a result we now

have only seven multi-national companies that own nearly all of the media outlets, newspapers, magazines, film companies, broadcast and cable TV, in the U.S. This is dangerous because once you have the same people deciding what is going to be shown, what stories are going to be told and how they will be told, they have too much control over shaping those stories. Now, if these same people are allowed to own the internet, we will truly have no place to be individuals and have freedom of expression. Monolithic control over media is a frightening outcome, but that's what will happen if net neutrality isn't maintained.

I have been in the Writers Guild since 1980, and have served two terms on the Board of Directors of the Writers Guild. I care deeply about the opportunities for future generations of creative professionals. Shouldn't we preserve a space for individual creative expression and freedom, which now exists because of the Internet? Strong net neutrality rules are the only way to maintain the open Internet.

Peter Knight, Writer, *BoJack Horseman*

New video distributors like Netflix and Amazon means greater opportunity to bring your ideas to buyers who can fund them properly. I love the internet's DIY fervor and I will watch things people make for nothing on Vimeo, but at a certain point, it's nice to have (and see onscreen) some bells and whistles paid for by a company that believes they can get a return on their investment with your work. More buyers means more opportunity —and not just opportunity to make the things that could only work on network television. Healthy competition in the internet space (please don't tell anyone I respect that I used the phrase "internet space") will foster an appetite among buyers and viewers for more nuanced material and "pet projects".

As a fan and as a writer, I am genuinely grateful that there are studios who pay writers and directors and others to make movies and TV shows. And I know studios have a difficult job. They cannot guarantee the consistency of their product and they cannot guarantee their returns. I was a C+ Econ student and even I know that from a business perspective that's a nightmare. So what studios do is hedge. They make their product a little blander to avoid having to gamble on pricey, indulgent projects with seemingly limited appeal. I get this. I am complicit in this. But what must truly be maddening to the studios is that sometimes those pricey, indulgent projects are great and, worse still, sometimes they are even profitable. Paid prioritization just feels like another way to hedge. It would be so much easier for the studios if they made one kind of paste and could sell it at a fixed price. Instead they have countless projects of wildly varying costs and quality and a generation of end users who don't want to pay for any of it. That is a tough row to hoe. Creating a fast lane means they won't have to compete with anyone else who might be willing to take more chances creatively. So of course it's in their interests to do that and why they are pursuing it so tenaciously. I am in favor of Net Neutrality because anything that forces the studios out of the paste

business feels like a win for a writer. Especially if you aspire to prove everybody wrong about your pricey indulgent content with seemingly limited appeal.

Having worked on a Netflix show recently I am very pleased to say the experience was... (if I were sitting across from you I would fiddle with my coffee cup for a moment to build tension then I would look up and say...) the same as network television. It's real. There was money to make the show right. There were lunches and PAs and turkey jerky and all the perks that a true artist should be able to forego, but I cannot. It felt legitimate in every way. One difference was that nobody talked about ratings. We really only concerned ourselves with the quality of the show and executing creator showrunner, Raphael Bob-Waksberg's vision.

Ruth Livier, Writer & Creator, *YLSE*

Back in 2000, when I originally wrote *Ylse* as a TV spec, there was absolutely no chance of it being produced. At a conference designed to nurture and support Latino talent, I approached an executive for advice who basically asked me, "Who are you for anyone to produce your show?" Others asked condescendingly, "Who's going to watch *this*?" It was a slap in the face, especially from folks who had been invited to encourage us. The worst part was, their comments weren't based on my writing. They had not read a single word. Their immediate objections were based entirely on the concept of a bicultural, bilingual, Latina-driven dramedy written by someone with no track record. I mean, I clearly had no idea how the business worked. Who was I to think that anyone would take me seriously? Plus, how exactly was I supposed to prove that there was a market for this type of content? There was no way in so, I filed the script away.

Then, a few years later, everything changed. Technology advanced. Camera equipment was no longer cost prohibitive. The Internet suddenly put worldwide distribution at our fingertips. It all seemed too good to be true. But, it was true. And it was good. And it changed *everything*. We suddenly had unprecedented access to create, produce and distribute our content. In this exciting new frontier of a neutral non-discriminatory Internet, anyone could finally tell their stories from their point of view without getting discouraged, derailed or having their vision diluted. This was an empowering opportunity that had to be explored.

So in early 2008, with the encouragement of some amazingly talented artists who were also hungry to work on a project that portrayed Latinos in a more balanced and non-stereotypical light, I took that old script out of the files reconceived, rewrote, and produced the award-winning web series, *Ylse* (www.Ylse.net). *Ylse* features modern progressive Latinos, something rare, if ever seen, in traditional media. We provided jobs for a very diverse workforce in front of and behind the cameras. And, because we were union signatory, our directors earned points towards their DGA membership and I earned points towards becoming the first person to join the Writers Guild via work in New Media.

Joining the WGA was a personal honor, but it was significant in essence because it meant that Digital Media was in fact a viable alternative way in for the rest of us. It meant that programming on the web was not up to the same few decision makers who control traditional media. No longer would low-budgets, no track record or no connections mean there is no way in. Finally, thanks to the unprecedented open, neutral, non-discriminatory environment of the Internet, we independent artists finally had an unobstructed connection to a potential audience base, which meant that we could finally prove our market while encouraging others to follow suit.

As an artist, a woman, a Latina, an immigrant and an entrepreneur, the web has afforded me unprecedented opportunities to participate in content creation and distribution. Hopefully our work will empower the next generation to follow suit. I hope that, to them, having a platform where they can express themselves on an equal playing field with anyone else is nothing out of the ordinary. Because for us, it has been nothing short of revolutionary:

- The open Internet has given the rest of us an opportunity to work on and improve our crafts.
- It has given us the opportunity to provide jobs and creative outlets for a more diverse workforce.
- It has allowed us to define ourselves by telling stories from our points of view.
- It has allowed us to create more varied, complex and positive portrayals of our demos.
- It has given us the ability to connect directly with our audience and prove our markets.
- It has given us the ability to connect with like-minded people around the globe.
- It has empowered and motivated us to create content, knowing there is a distribution outlet for it.

The bottom line is, as long as the digital space remains neutral and does not go the way of traditional media, we will never again be disregarded by anyone who essentially asks, “Who are *you* to have your story be told?”

We all deserve to have our stories told. We all deserve to be heard, to be acknowledged, and to not have to sit in the shadows until someone else decides that our lives are worthy of being reflected in the media. The web is the great equalizer. It is a revolutionary platform of hope and opportunity where diverse voices can finally partake in the national conversation at all levels. *Ylse.net* was made possible only because of the neutral Internet.

III. The Open Internet is Necessary to Preserve the Virtuous Circle and Will be Irreparably Harmed by the Commission’s Proposal

The experiences shared by WGAW members in this filing and our July comments highlight the diversity of opportunity and the innovation without permission that are the hallmarks of the open Internet. Without the open Internet, this independent and diverse content would not have had the opportunity to find an audience. Similarly, however, without the content created by Guild members and others and offered by edge providers including Netflix, YouTube, Hulu, Amazon and iTunes, “last-mile” Internet networks would offer limited value to consumers. This content, therefore, is a key driver of the “virtuous circle of innovation,” where new content and services lead to increased demand for broadband, which spurs ISPs to invest in network improvements.¹³

In July, the WGAW commented extensively on the growth of online video services and original, professional video programming written by WGA members, both of which are key drivers of demand for Internet access and faster Internet speeds.¹⁴ We noted how Netflix and YouTube make up half of all downstream Internet traffic in North America, demonstrating the popularity of online video and its key role in driving the virtuous circle.¹⁵ These new services have emerged only because edge providers have direct access to consumers, who are allowed to choose what content and services they prefer. This model stands in stark contrast to that of cable television, where content providers must negotiate for distribution and MVPDs decide what is

¹³ Promoting and Protecting the Open Internet, GN Docket No. 14-28, *Notice of Proposed Rulemaking*, FCC 14-61 (rel. May 15, 2014) ¶ 26. (*NPRM*).

¹⁴ *Comments of the Writers Guild of America, West, Inc.*, GN Docket No. 14-28, (July 15, 2014), pp. 6-9.

¹⁵ Sandvine, *Global Internet Phenomena Report: 2H 2013*, <https://www.sandvine.com/downloads/general/global-internet-phenomena/2013/2h-2013-global-internet-phenomena-report.pdf>.

offered to consumers. Affordable, on-demand video services such as Netflix and Amazon Prime, which give consumers expanded control over where and when they can consume video, did not emerge from the traditional video distribution market, a fact that highlights how the presence of gatekeeping distributors stifles a virtuous circle of investment and innovation.

In the 2010 *Open Internet Order*, the Commission wrote that “[c]ontinued operation of this virtuous circle, however, depends upon low barriers to innovation and entry by edge providers, which drive end-user demand. Restricting edge providers’ ability to reach end users, and limiting end users’ ability to choose which edge providers to patronize, would reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure.”¹⁶ The Commission went on to note that “if permitted to deny access, or charge edge providers for prioritized access to end users, broadband providers may have incentives to allow congestion rather than invest in expanding network capacity.”¹⁷

Unfortunately, the Commission’s proposal will result in precisely the outcome it feared in 2010. The proposal to rely on Section 706 as the Commission’s source of authority and allow commercially reasonable discrimination, endorsed by our nation’s largest ISPs, will cause clear harm to the virtuous circle by allowing “last-mile” Internet distributors to become the Internet’s gatekeeper, raising entry barriers for edge providers and wresting choice and control from consumers. Requiring an ISP to provide only a minimum level of service, above which it can set terms for prioritized service, incentivizes network congestion rather than “virtuous circle”

¹⁶ See *Preserving the Open Internet, Report and Order*, 25 FCC Rcd. 17905, 17911 ¶ 14 (2010), *aff’d in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). (*Open Internet Order*).

¹⁷ *Ibid*, 17929 ¶ 40, (citations omitted).

investment to increase capacity. Enacting such a standard will, in addition, introduce uncertainty that will limit investments by edge providers and new entrants.

Preventing ISPs from blocking and discrimination are at the core of net neutrality but the court in *Verizon v. FCC* has made it clear that such principles cannot be enacted absent Title II reclassification. As Public Knowledge, Benton Foundation and Access Sonoma Broadband write, “The only alternative for the Commission under 706 is to allow discrimination and blocking, which will survive court scrutiny but fail to preserve meaningful net neutrality rules.”¹⁸

In contrast to this proposal, comments by WGAW, Engine Advocacy¹⁹ and numerous other organizations make clear that rules based on the Commission’s Title II authority are necessary to preserve the virtuous circle. The lack of competition in residential Internet service combined with the role that the largest ISPs serve as multichannel video programming distributors (“MVPDs”) of traditional television content creates both incentive and ability to institute practices that replicate a similar level of control over Internet content distribution. The Commission accurately notes, “Those threats are even more important today because Americans and American businesses have become even more dependent on the Internet.”²⁰ It is clear based on the actions of Comcast, Time Warner Cable, Verizon and AT&T to charge Netflix for interconnection²¹ and comments filed by providers that they intend to use their power as

¹⁸ *Comments of Public Knowledge, Benton Foundation, Access Sonoma Broadband*, GN Docket No. 14-28 (July 15, 2014), p. 34.

¹⁹ *Comments of Engine Advocacy*, (July 15, 2014), pp. 13-15.

²⁰ *NPRM*, ¶ 7.

²¹ Jon Brodtkin, “AT&T and Verizon finally giving customers decent Netflix quality,” *Ars Technica*, September 8, 2014, <http://arstechnica.com/information-technology/2014/09/att-and-verizon-finally-giving-customers-decent-netflix-quality/>.

terminating access monopolies to charge for access to end users.²² While ISPs claim they will not engage in such harmful practices because they would lose subscribers,²³ the status of competition in residential broadband service discussed later in this document reveals market forces are not an effective restraint on ISP behavior.

IV. The Commission’s Proposed Commercial Reasonableness Standard will Fail to Protect and Preserve the Open Internet

Commenters representing the creative community, consumers and edge providers have raised significant concerns regarding the Commission’s proposal to base revised rules on a standard of commercial reasonableness.²⁴ Because the Commission wishes to avoid a rule that would require ISPs “to hold themselves out to serve all comers indiscriminately on the same or standardized terms,”²⁵ it proposes to allow individualized negotiations for service above an undefined minimum level of access, which will introduce prioritized service and “commercially reasonable” discrimination. As many commenters have rightly noted, the revised No-Blocking rule, which would allow ISPs and edge providers to negotiate for enhanced service based on commercial reasonableness, will enshrine fast and slow lanes on the Internet. Although the NPRM asks if pay for priority access should be considered a *per se* violation of the commercially

²² *Comments of Verizon and Verizon Wireless*, (July 15, 2014), pp. 30-31; *Comments of Comcast Corporation*, (July 15, 2014), p. 24.

²³ *Comments of Verizon and Verizon Wireless*, (July 15, 2014), pp. 7, 26; *Comments of Comcast Corporation*, (July 15, 2014), p. 6; *Comments of AT&T Services*, (July 15, 2014), p. 18.

²⁴ *Comments of IFTA*, (July 15, 2014), p. 7; *Comments of Netflix*, (July 15, 2014), pp. 6-9; *Comments of Y Combinator*, GN Docket 14-28 (July 14, 2014); p. 3; *Comments of Consumers Union*, (July 15, 2014), pp. 7-10.

²⁵ *Verizon v. FCC*, 740 F.3d at 652, (quoting *Cellco*, 700 F.3d at 548) (internal quotations removed).

reasonable standard, Comcast suggests that such a requirement would amount to common carriage because it leaves no room for “individualized bargaining.”²⁶

More broadly, the reliance on a commercially reasonable standard for ISP conduct could permit the introduction of a host of other discriminatory practices such as exemptions from data usage caps or thresholds. The NPRM proposes to prohibit commercially unreasonable practices that “threaten to harm Internet openness and all that it protects,”²⁷ but the guidelines of determining if a negotiation is commercially reasonable, outlined in the *Data Roaming Order*, appear to set a low bar for ISP negotiations to offer an edge provider better service or exemption from data caps.²⁸ For example, the conditions include responding to a request for negotiation and making a credible offer. Such terms, or even stronger ones, do not mitigate the harm caused by requiring start-ups and other edge providers to buy their way onto a fast lane or exemption from data caps.²⁹ And, because ISPs are not classified as common carriers, they would not be required to offer similar terms to all edge providers seeking access. The standard, as a result, would be a significant grant of authority to ISPs to select winners and losers online. Without violating Commission rules, an ISP, through negotiations could grant more favorable distributions terms to one edge provider over another. This ability represents a significant threat to the virtuous circle because edge providers will no longer have unimpeded access to end users and will face significant uncertainty in what terms of access they may need to negotiate.

²⁶ *Comments of Comcast Corporation*, (July 15, 2014), p. 23.

²⁷ *NPRM*, ¶ 116.

²⁸ Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Second Report and Order*, 26 FCC Rcd. 5411, April 7, 2011, ¶ 86. (*Data Roaming Order*).

²⁹ *Ibid.*

A. *The Commercial Reasonableness Standard Will Place High Costs on Start-ups and SMBs*

The requirement that edge providers engage in individual negotiations with ISPs for a certain level of service and bring individual complaints to the FCC is overly burdensome, particularly for start-ups and small and medium sized businesses (“SMB”). The case-by-case process proposed in the NPRM creates the type of uncertainty that ISPs themselves decry and that will deter investment in new online services. Start-ups and other small businesses will be at a disadvantage in the online marketplace because they do not have the resources to hire an army of lawyers to handle drawn out proceedings at the FCC or engage in extensive litigation. Large ISPs such as Comcast and AT&T do not face such limitations, so it comes as no surprise that they do not object to such a standard.³⁰

The uncertainty caused by weak Net Neutrality rules will, in addition, deter investment in bandwidth-intensive applications like the burgeoning online video industry. In its comments, Engine Advocacy writes, “Disruptive startups—and the investors funding the billions of dollars necessary for their growth—need certainty rather than the threat of unreasonable technical and commercial discrimination and blocking.”³¹ It has already been reported that some venture capital funds are moving away from video and media start-ups due to the possibility of online traffic discrimination.³²

One of the most appealing aspects of the Internet for entrepreneurs is the relatively even playing field free from network interference. As one investor put it, “investment and innovation

³⁰ *Comments of AT&T Services, Inc.*, (July 15, 2014), p. 92; *Comments of Comcast Corporation*, (July 15, 2014), pp. 24-25.

³¹ *Comments of Engine Advocacy*, (July 15, 2014), p.1.

³² David Talbot, “Talk of an Internet Fast Lane Is Already Hurting Some Startups.” MIT Technology Review, May 7, 2014, <http://www.technologyreview.com/news/527006/talk-of-an-internet-fast-lane-is-already-hurting-some-startups/>.

in and on the Internet was growing exponentially because the Internet's layered architecture separated the applications from the network and allowed each to evolve independently...regulatory policy that continues to separate the network and applications layers by requiring ISPs to manage their networks in ways that are application agnostic will promote innovation not limit it.”³³ With government sanctioned fast lanes and other forms of preferential treatment, investors will think twice before investing in start-ups that must compete against large, entrenched incumbents that can purchase superior Internet traffic delivery or other forms of prioritized service.

B. The New Standard Will Result in Greater Uncertainty and Risk of Litigation

Unlike Title II, commercial reasonableness is a recently created standard with little or no case law to guide its application to broadband service. Ironically, while Title II’s detractors argue that its application would cause years of legal uncertainty, these commenters fail to mention that the commercial reasonableness standard is inherently more uncertain and would likely lead to more litigation than Title II. The commercial reasonableness standard has only been applied to data roaming negotiations since 2011 and consists of a multitude of factors that are not directly transferable to a broadband context.

The *Data Roaming* Order enumerates 16 factors the Commission may consider to determine if negotiations were conducted on a commercially reasonable basis, as well as an open-ended factor of “other special or extenuating circumstances.”³⁴ Many of these factors, however, relate to technical feasibility or compatibility between the networks of competitors,

³³ Letter from Gigi B. Sohn, Special Counsel for External Affairs, Office of Chairman Tom Wheeler, to Marlene Dortch, Secretary Federal Communications Commission, GN Docket No. 14-28, (July 16, 2014), p. 2.

³⁴ *Data Roaming Order*, ¶ 86.

which provides little guidance in how such a standard would be applied in negotiations between edge providers that, for survival, must have access to the networks of “last-mile” Internet distributors. The factors that relate to investment, competition and alternative providers are sufficiently vague and have yet to be tested. The combination of a newly created legal standard and applying it in a different market is a recipe for ambiguity and drawn out legal and administrative proceedings. In contrast, common carriage regulations have a long legal history including application to Internet access services such as dial-up and DSL.

The experience in the wireless market, in addition, does not bode well for implementation of the commercial reasonableness standard. Smaller mobile broadband providers that have engaged in roaming negotiations with the dominant carriers report little progress in obtaining reasonable terms despite the introduction of the standard.³⁵ T-Mobile has explained to the Commission that the major carriers offer fees that are orders of magnitude higher than their retail rates to their own customers and that requests for roaming are met with long delays.³⁶ Sprint adds that consolidation in the wireless market has allowed AT&T and Verizon to eliminate alternatives and charge exorbitant rates.³⁷ If companies as large as Sprint and T-Mobile have trouble negotiating terms that are commercially reasonable, nascent edge providers with less resources are not likely to do better.

³⁵ Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, filed, May 27, 2014, p.6.

³⁶ *Ibid.*

³⁷ Phil Goldstein, “Sprint takes T-Mobile’s side in data roaming dispute with AT&T, Verizon,” *Fierce Wireless*, August 22, 2014, <http://www.fiercewireless.com/story/sprint-takes-t-mobiles-side-data-roaming-dispute-att-verizon/2014-08-22>.

V. Strong Net Neutrality Rules are Necessary because Market Conditions Provide Large ISPs with Significant Power Over Consumers and Edge Providers

Chairman Wheeler recently said, “The underpinning of broadband policy today is that competition is the most effective tool for driving innovation, investment, and consumer and economic benefits.”³⁸ In that same speech, the Chairman also recognized what the American public is well aware of, that “meaningful choice”³⁹ and competition for broadband Internet access service is lacking. In this proceeding many ISPs have claimed that vigorous competition exists in the market and will serve as an effective restraint on the incentive to engage in harmful practices.⁴⁰ Because ISPs have asserted such claims in support of limited rules, a review of the facts is necessary because information on competition, switching costs, ISP behavior in the limited circumstances where competition exists and Internet service pricing reveals the power ISPs have over consumers and edge providers. This information is vital to the discussion of Open Internet rules because the lack of sufficient competition and resulting market power grants ISPs the ability to institute practices that harm consumers and edge providers knowing both have few, if any, alternatives. At the same time, greater competition alone is not sufficient to ensure net neutrality and is not a substitute for common carriage. As Free Press states in its comments, “Common carriage as embodied in Title II is most certainly not a framework for monopolies offering telephone service, but a framework for competition and consumer protection in two-way communications networks.”

³⁸ Tom Wheeler, “The Facts and Future of Broadband Competition,” Prepared Remarks of FCC Chairman Tom Wheeler, September 4, 2014, p. 1, http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf.

³⁹ *Ibid.*

⁴⁰ *Comments of the National Cable & Telecommunications Association (NCTA)*, GN Docket No. 14-28, (July 15, 2014), p. 13; *Comments of AT&T Services*, (July 15, 2014), p. 17; *Comments of Comcast Corporation*, (July 15, 2014), p. 6.

The majority of Americans have limited choice for wired Internet access. At a download speed of 10 Mbps, a necessary speed for streaming online video, 82% of households have an option of *only* one or two providers.⁴¹ At a download speed of 50 Mbps, 61.4% of households are served by only one provider and 21% are not offered such a high-speed service.⁴² These figures reflect the fact that cable and fiber to the home (“FTTH”) are the only technologies that can provide truly high-speed Internet, both now and in the future. Cable broadband is the most widely available option for high-speed Internet service, available to 93% of households.⁴³ Because it offers faster speeds and is widely available, cable broadband represents 74.6% of connections of at least 10 Mbps downstream.⁴⁴ FTTH offerings are available to a minority of households and are much more limited because of the high cost of investment. Verizon FiOS currently serves 18.9 million households⁴⁵ but Verizon has indicated that it will not expand FiOS beyond current service areas until capital costs are recouped.⁴⁶

Internet service providers that offer DSL service or rely on a hybrid of fiber and copper to reach homes, like AT&T’s U-verse service, cannot match the increasing speeds of cable and fiber. U-verse is currently limited in most markets to no more than 45 Mbps,⁴⁷ which means that it cannot match the higher speeds offered by cable or fiber technology. Those areas with older

⁴¹ Wheeler, *supra* note 39, p. 2.

⁴² *Ibid.*

⁴³ National Cable & Telecommunications Association, “Industry Data,” <https://www.ncta.com/industry-data>, accessed August 18, 2014.

⁴⁴ FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, “Internet Access Services: Status as of June 30, 2013,” June 2014, p. 28.

⁴⁵ Chris Young, “Telco video sub growth improves in Q2,” SNL Kagan, August 7, 2014, <http://www.snl.com/interactivex/article.aspx?id=28773064&KPLT=6>.

⁴⁶ Sean Buckley, “Verizon’s Shammo: We’ll look at FiOS expansions once it returns the cost of capital,” *FierceTelecom*, March 10, 2014, <http://www.fiercetelecom.com/story/verizons-shammo-well-look-fios-expansions-once-it-returns-cost-capital/2014-03-10>.

⁴⁷ AT&T, “AT&T U-verse High Speed Internet,” <http://www.att.com/shop/internet/u-verse-internet.html#fbid=kmEXbGrjLDo>, accessed September 10, 2014.

versions of DSL are limited to even slower speeds. For example, AT&T's fastest speed offering through IPDSL is 18 Mbps, but only 6 Mbps for legacy DSL customers.⁴⁸ The Commission's broadband data, in addition, shows that only 10.6% of DSL connections offer speeds of 10 Mbps and faster.⁴⁹ The Commission's Measuring Broadband America report also recently noted that DSL service generally delivers less than advertised speeds during peak hours.⁵⁰ Consumer preference for faster speeds is reflected in market share data. For example, cable broadband already controls a greater share of new residential broadband subscribers than telephone ISPs. In the fourth quarter of 2013, cable companies had a 59% market share of all wired broadband subscribers and 87% of new subscribers.⁵¹

Even with such limited competition, incumbent broadband Internet access providers have campaigned to restrict any new competition from municipal broadband systems. They have spent millions of dollars to pass bans and restrictions against such systems in 20 states.⁵² They have also launched wasteful litigation, for example, against the City of Lafayette, Louisiana where the incumbents refused to install a fiber system and the City had to spend \$4 million to defend against three lawsuits when it chose to build its own.⁵³

⁴⁸ *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. 12.

⁴⁹ FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, "Internet Access Services: Status as of June 30, 2013," June 25, 2014, p. 28.

⁵⁰ Adrienne Jeffries, "DSL subscribers are more likely to be cheated on Internet speeds, FCC says," *The Verge*, June 18, 2014, <http://www.theverge.com/2014/6/18/5822220/dsl-subscribers-are-more-likely-to-be-cheated-on-Internet-speeds-fcc>.

⁵¹ Ian Olgairson and Chris Young, "Cable takes big bite of HSD share in 2013 despite smallest gain in more than a decade," *SNL Kagan*, March 13, 2014, <http://www.snl.com/interactivex/article.aspx?id=27257710&KPLT=6>.

⁵² Allan Holmes, "How big telecom smothers city-run broadband," *The Center for Public Integrity*, August 28, 2014, <http://www.publicintegrity.org/2014/08/28/15404/how-big-telecom-smothers-city-run-broadband>.

⁵³ *Ibid.*

A. *High Switching Costs Limit Competition*

For those consumers fortunate enough to have some choice between ISPs, high switching costs further restrain competition. Internet providers have instituted numerous practices to discourage switching. For instance, if a subscriber has a contract with an ISP, they must often pay an early termination fee to end their service. If the Internet service was part of a bundled purchase, the subscriber would likely lose any bundling discount, which further increases switching costs.⁵⁴ Consumers must also spend time researching any available alternatives in their local market. Switching between cable and DSL services may require the purchase of a new modem or a modem rental fee. The consumer may also have to bear the costs of physically returning a modem to an ISP office and waiting for installation of new service, which includes taking time off work or foregoing other activities. If the subscriber uses an ISP email account, they must set up a new account and inform their contacts of the change. As Public Knowledge, Benton Foundation and Access Sonoma Broadband noted in their filing, “This significantly reduces the overall ability of customers to switch broadband providers even when faced with objectionable ISP behavior or policy.”⁵⁵

The recent exchange between a Comcast customer service representative and an AOL executive and his wife provides a vivid example of the difficulty in trying to cancel Internet service. During the approximately eighteen-minute call, a request to cancel Internet service became an extended interrogation of the subscribers regarding their motivation to leave

⁵⁴ Barbara Van Schewick, *Network Neutrality and Quality of Service: What a Non-Discrimination Rule Should Look Like*, forthcoming, *Stanford Law Review*, Volume 67, Issue 1 (2015).

⁵⁵ *Comments of Public Knowledge, Benton Foundation, Access Sonoma Broadband*, (July 15, 2014), p. 17.

Comcast.⁵⁶ Despite Comcast's claims that the call is not consistent with the way it trains its staff, leaked copies of the company's training materials reveal that, "20 percent of a call center employee's rating for a given call is dependent on effectively selling the customer new Comcast services" and the manual instructs representatives to "overcome objections" from callers.⁵⁷ In another example of ISP customer service, a Comcast client attempting to cancel service after installation technicians failed to show up was put on hold for three hours until a recording let him know that the office had closed for the day.⁵⁸

Such examples of poor customer service are possible because of the limited competition in the ISP market. The American Customer Satisfaction Index (ACSI) ranks ISPs as the worst industry for customer satisfaction out of the 43 industries it tracks.⁵⁹ In addition, ACSI says customer satisfaction for ISPs dropped 3.1% from 2013 to 2014. Major ISPs also had dismal scores in a recent Consumers Union survey. Time Warner Cable and Comcast had scores of 63 and 62 out of 100, respectively, below average even among other ISPs.⁶⁰ The reality of ISP customer treatment stands in stark contrast to the claims of "significant and still-growing level of

⁵⁶ Casey Johnston, "Call to cancel Comcast service descends into desperate, hysterical fireworks," *Ars Technica*, July 15, 2014, <http://arstechnica.com/business/2014/07/call-to-cancel-comcast-service-descends-into-desperate-hysterical-fireworks/>.

⁵⁷ Lee Hutchinson, "Leaked Comcast employee metrics show what we figured: Sell or perish," *Ars Technica*, August 19, 2014, <http://arstechnica.com/business/2014/08/leaked-comcast-employee-metrics-show-what-we-figured-sell-or-perish/>.

⁵⁸ Maya Kosoff, "A Comcast Customer Tried To Cancel His Account But Was Put On Hold Until Comcast Closed For The Day," *Business Insider*, August 13, 2014, <http://www.businessinsider.com/comcast-customer-was-put-on-hold-until-comcast-closed-2014-8>.

⁵⁹ Joan Engebretson, "ACSI: ISPs Rate Poorly on Customer Satisfaction," *Telecompetitor*, May 21, 2013, <http://www.telecompetitor.com/acsi-isps-rate-poorly-on-customer-satisfaction/>.

⁶⁰ Todd Spangler, "Comcast, Time Warner Cable Remain Among Least-Liked TV Providers: Survey," *Variety*, March 25, 2014, <http://variety.com/2014/biz/news/comcast-time-warner-cable-remain-among-most-hated-tv-providers-survey-1201145921/#>.

competition in the broadband marketplace” that ISPs such as Comcast would like to portray in their filings.⁶¹

B. The Entrance of Google Fiber Undermines Claims of a Competitive ISP Market

While ISPs claim that the residential Internet service market is competitive, their response to Google Fiber’s entrance in a limited number of markets indicates that only direct competition from FTTH competitors affects price and speed offerings. For example, the announcement that Google Fiber would be coming to Austin, Texas, has spurred AT&T to not only introduce its own residential gigabit service but to do so at a lower price per megabit than its previous tiers. AT&T previously offered U-verse Internet service at 24 Mbps for \$55 per month with a \$200 installation fee, but will soon offer 1 Gbps for \$70, matching Google’s price, if subscribers agree to search tracking.⁶² The service does come with a 1 terabyte data cap, however.⁶³ Time Warner Cable responded to Google and AT&T’s plans by increasing its speeds at no additional costs. The standard tier of TWC service in Austin went from 15 to 50 Mbps, and its highest tier increased from 50 to 300 Mbps.⁶⁴ In Kansas City, a consumer reported that Time Warner Cable not only increased the speed of his basic tier from 10 to 15 Mbps but lowered the

⁶¹ *Comments of Comcast Corporation*, (July 15, 2014), p. 6.

⁶² Stacey Higginbotham, “A quick look at Google Fiber pricing v. the incumbents,” Gigaom, April 8, 2013, <http://gigaom.com/2013/04/08/a-quick-look-at-google-fiber-pricing-v-the-incumbents/> and Sean Buckley, “AT&T’s \$70 a month FTTH service comes with a privacy catch,” FierceTelecom, December 11, 2013, <http://www.fiercetelecom.com/story/atts-70-month-ftth-service-comes-privacy-catch/2013-12-11>.

⁶³ Jeff Baumgartner, “AT&T Backs Up Its All-Fiber Bet In Austin,” Multichannel News, January 22, 2014, <http://www.multichannel.com/distribution/att-backs-its-all-fiber-bet-austin/147814>.

⁶⁴ Michael Theis, “Austin fiber wars continue as Time Warner boosts Internet speeds,” Austin Business Journal, June 4, 2014, <http://www.bizjournals.com/austin/blog/techflash/2014/06/austin-fiber-wars-continue-as-time-warner-boosts.html>.

price from \$44.94 to \$29.99.⁶⁵ However, as noted in our July comments, even if Google were to expand into all of the 34 cities it recently expressed interest in, Google's fiber network would only be available to 3.9 million households out of 119 million occupied U.S. households.⁶⁶

C. Monopoly Prices Reveal Extent of ISP Market Power

The high cost of U.S. broadband service to consumers, both in comparison to municipal offerings and international markets, confirms the exercise of market power by the largest broadband Internet access service providers. For example, Time Warner Cable advertises a promotional rate for its Standard 15 Mbps of \$34.99 plus \$5.99 per month for modem rental, however, the regular price is now reported to be \$57.99.^{67,68} Verizon FiOS 15 Mbps service costs \$49.99 per month for the first year and \$69.99 for the second.⁶⁹ Comcast's lowest-priced, widely-available standalone Internet offering is \$49.95 per month for 6 Mbps.⁷⁰ These rates are significantly higher than rates charged by public U.S. systems or international ISPs per megabyte. For example, Lafayette Utility System Fiber in Louisiana charges \$33.95 per month for symmetrical 20 Mbps service while Chattanooga's EPB utility charges \$57.99 for

⁶⁵ Laura Northrup, "Time Warner Boosts My Speed, Cuts My Bill: I Just Happen To Live Near Google Fiber," *Consumerist*, January 30, 2013, <http://consumerist.com/2013/01/30/time-warner-boosts-my-speed-cuts-my-bill-i-just-happen-to-live-near-google-fiber/>.

⁶⁶ Kamran Asaf, "Google targeting over 3 million households with its planned fiber expansion," *SNL Kagan*, March 4, 2014.

⁶⁷ "High Speed Internet Plans and Packages," Time Warner Cable, <http://www.timewarnercable.com/en/Internet/Internet-service-plans.html>, accessed July 16, 2014.

⁶⁸ Rick Moriarty, "Time Warner Cable raising TV, Internet rates, imposing 'broadcast TV' fee," *Syracuse.com*, February 25, 2014, http://www.syracuse.com/news/index.ssf/2014/02/time_warner_cable_price_increase_broadcast_tv_fee_internet_cable_tv.html.

⁶⁹ "FiOS Internet Most Popular Internet Plans," Verizon, <http://www.verizon.com/home/fios-fastest-Internet/>, accessed July 16, 2014.

⁷⁰ Comcast website, Non-promotional rate, accessed August 1, 2014.

symmetrical 100 Mbps service.^{71,72} Meanwhile, residents of Seoul, South Korea can purchase symmetrical 1000 Mbps Internet service for about \$36.31 and Parisians can buy 100 Mbps service for \$39.42.⁷³ The high costs to US consumers are also reflected in the industry's disproportionate profit margins. According to top Wall Street telecom analyst Craig Moffett, the gross profit margins on broadband are about 97%, a figure he described as "almost comically profitable."⁷⁴ SNL Kagan reports that even taking into account overhead, labor and marketing costs, major cable ISPs' profit margins are about 60% and have been steadily increasing for the last several years.⁷⁵

D. Mergers Have Led to Increased Vertical Leverage

The ongoing consolidation in the telecommunications industry magnifies the threat of a non-neutral Internet. As more and more Internet users subscribe to the same handful of ISPs, edge providers must pass through a smaller number of edge networks to reach them. The incentive to act as a toll-collecting gatekeeper is greater because while edge providers may be able to withstand degraded delivery to a relatively small number of users, they cannot ignore inferior service to a large proportion of their customers. It should not be surprising then, that

⁷¹ "LUS Fiber Pricing Guide," LUS Fiber, <http://www.lusfiber.com/index.php/Internet/pricing-guide>, accessed July 16, 2014.

⁷² "EPB Fiber Optics Custom Bundle Pricing for Fi-Speed Internet," EPB Fiber Optics, <https://epbfi.com/Internet/>, accessed July 16, 2014.

⁷³ Hibah Hussain et al., *The Cost of Connectivity 2013*, (Washington, DC: New America Foundation, October 2013), http://oti.newamerica.net/publications/policy/the_cost_of_connectivity_2013. International rates are in U.S. Dollars/Purchasing Power Parity.

⁷⁴ David Talbot, "When Will the Rest of Us Get Google Fiber?," MIT Technology Review, February 4, 2013, <http://www.technologyreview.com/news/510176/when-will-the-rest-of-us-get-google-fiber/>.

⁷⁵ Tony Lenoir, "Per-sub video margins fall to record low in Q1; Time Warner Cable in single-digit territory," SNL Kagan, May 12, 2014, <http://www.snl.com/interactivex/article.aspx?id=28053232&KPLT=6>.

Netflix is now paying some of the largest ISPs for a peering connection but not smaller ISPs.⁷⁶

This is particularly troubling because a peering connection with either an edge provider or Content Delivery Network (CDN) generally saves an ISP money since such large levels of traffic would otherwise have to be transported over a paid transit connection. As Columbia computer scientist Vishal Misra put it, "If there is competition on the content side but not on the eyeball side that increases the leverage that the eyeball side has on the content side."⁷⁷

E. Competition Alone Does Not to Ensure an Open Internet

Even in markets with higher levels of broadband competition, the incentive to block or degrade competing services has led to instances of discriminatory behavior, which suggests that competition alone does not solve the problem of ISP acting as gatekeepers. According to the OECD, "all European Union countries have made available local loop unbundling, shared access and bitstream products for alternative operators. In fact, some 75% of DSL subscriptions by entrants rely on either full local loop unbundling or on shared access."⁷⁸ Such unbundling or shared access has allowed multiple firms to compete over the same physical infrastructure. However, a study conducted by European regulators found significant levels of blocking or throttling of P2P and VoIP traffic and, to a lesser extent, restrictions on specific applications

⁷⁶ Brodtkin, *supra* note 22.

⁷⁷ Timothy B. Lee, "Beyond Net Neutrality", Vox.com, May 2, 2014, <http://www.vox.com/2014/5/2/5665890/beyond-net-neutrality-the-new-battle-for-the-future-of-the-internet>.

⁷⁸ OECD (2013), "Broadband Networks and Open Access", OECD Digital Economy Papers, No. 218, OECD Publishing, <http://dx.doi.org/10.1787/5k49qgz7crrm-en>.

such as gaming and streaming.⁷⁹ Similarly, a government investigation in Canada found ISPs throttling or blocking P2P traffic.⁸⁰

VI. Title II is the Appropriate Classification of Internet Service

At its core, despite the claims of ISP commenters, broadband Internet access service (“BIAS”) involves simple telecommunications; it allows subscribers to send and receive data of their choosing without alteration of its content either in form or substance.⁸¹ When consumers purchase broadband Internet service, they do not anticipate their provider will alter the form or content of the data they send or receive over the Internet, and broadband Internet access service providers (“BIAPs”) do not espouse any editorial discretion with regard to the content that travels across their networks.⁸²

The information processing capabilities involved in the use of a broadband service are either not information services or not provided by the BIAP itself. The data-processing services provided as part of BIAS exclusively involve “the management, control, or operation of a telecommunications system,” which are expressly excluded from the definition of an “information service.”⁸³ Domain Name System (DNS) services, for example, simply manage the process by which the uniform resource locator (“url”) address used by the subscriber is matched

⁷⁹ Body of European Regulators for Electronic Communications and the European Commission, *A view of traffic management and other practices resulting in restrictions to the open Internet in Europe*, May 29, 2012, p. 8.

⁸⁰ Schewick, *supra* note 55, p. 69.

⁸¹ See 47 U.S.C. § 153(50) (defining telecommunications as “as the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received”).

⁸² *Open Internet Order*, 17982 ¶141, (citations omitted) (“[B]roadband providers typically are best described not as ‘speakers,’ but rather as conduits for speech. . . . Internet end users expect that they can obtain access to all or substantially all content that is available on the Internet, without the editorial intervention of their broadband provider.”).

⁸³ 47 U.S.C. § 153(24).

to the destination's IP address—a basic telecommunications network routing function.⁸⁴ By contrast, the information processing involved in browser- and app-based activities generally occurs at each end of the transmission (by the consumer and the content provider) not in the middle (by the BIAP).

While BIAPs sometimes bundle this telecommunications capability with true information services—such as email services, web-hosting, newsgroups, or anti-virus software—those services are not fundamental to the BIAS service itself. Consumers can and often do obtain those information services from third parties. But more importantly, the BIAS service's functionality would in no way be diminished if a provider failed to provide any of those services, and it is unclear that most subscribers would even notice their absence.

Because the telecommunications component is separable from these information service components in the BIAS bundle of services, reclassification does not require the Commission to regulate any information services under Title II. The Commission would not have statutory authority to do so, of course. The Commission's authority is expressly limited to “regulating interstate and foreign commerce in communication by wire and radio so as to make available . . . efficient, nationwide, and world-wide wire and radio communications service,” not edge providers.⁸⁵ The Commission's Title II authority, by contrast, is restricted only to the offering of telecommunications for a fee directly to the public, which edge providers generally are not.⁸⁶

⁸⁴ In any event, DNS is available from third parties and so need not be provided by the BIAS provider. Google, Public DNS, <https://developers.google.com/speed/public-dns/>; OpenDNS <http://www.opendns.com/>.

⁸⁵ 47 U.S.C. § 151.

⁸⁶ *Id.* §§ 153(50), (51), (52). Even where edge providers also offer BIAS services, the FCC has authority over them “only to the extent that it is engaged in providing telecommunications services.” *Id.* § 153(51).

Nor is there any justification for reaching so far beyond the Commission's jurisdiction. Competition among edge providers is vibrant. The key feature of the Internet is that it significantly decreases barriers to entry into any given market, allowing small companies to challenge companies far larger and more entrenched. Unless BIAPs are given the power to choose the winners and losers in this process, competition among edge providers is likely to continue unabated and in perpetuity. Given the significant innovation and healthy competition characterizing the edge-provider marketplace, and the clear mandate of the Communications Act, there is no legal or policy-based reason for the Commission to regulate edge-based providers.

A. Reclassification Need Not Deter Investment

The major opponents of reclassification, which include our nation's largest ISP and their industry associations, have commented extensively on how any attempt to reclassify the Internet as a telecommunications service would significantly undermine *their* incentive to invest.⁸⁷ The NCTA is currently running an advertising campaign with the tagline, "The Internet Wasn't Created in the 1930s... But Some Are Trying To Regulate It Like It Was."⁸⁸ Yet all these arguments fail to mention that commercial mobile phone service, a technology decidedly not from the 1930s, is classified as a Title II telecommunications service and regulated as a common carrier. It is regulated this way, and yet it continues to thrive and shows no sign of deterred investment or market failure. This is because the FCC appropriately applied Title II, while forbearing from certain provisions. Similarly, FCC action to reclassify broadband Internet access

⁸⁷ See, e.g., *Comments of Verizon and Verizon Wireless*, (July 15, 2014), p. 52; *Comments of Comcast Corporation*, (July 15, 2014), p. 46; *Comments of AT&T Services, Inc.*, (July 15, 2014), p. 39; *Comments of NCTA*, (July 15, 2014), p. 3.

⁸⁸ NCTA website, https://www.ncta.com/TitleII?utm_source=home&utm_medium=banner&utm_content=learnmore&utm_campaign=tiles, accessed September 9, 2014.

service as a Title II telecommunications service and forbear from unnecessary provisions will not deter investment. With the virtuous circle intact, edge providers will continue to enter the market, invest and innovate, which will continue to drive consumer demand for Internet service.

VII. Wireless Broadband Must Not Be Relegated to Second Class Status

With much of the attention focused on reclassification, regulatory parity between fixed and wireless Internet service has been given short-shrift. The major wireless carriers continue to advocate for weaker rules on the basis of “operational constraints” faced by mobile providers.⁸⁹ A letter and paper recently filed by The Wireless Association (“CTIA”) asserts that mobile networks face vastly different technical challenges than fixed Internet networks and “need more flexibility to manage their networks.”⁹⁰ CTIA writes, therefore, “mobile operators should be free from any anti-discrimination or commercial reasonableness requirement.”⁹¹ While asserting that the wireless industry is competitive, despite clear evidence that it is a duopoly, with AT&T and Verizon controlling 67% of all wireless service revenue,⁹² CTIA claims that network management requires the ability to block applications and engage in other behavior harmful to consumers and edge providers and the virtuous circle.⁹³

⁸⁹ *Comments of AT&T Services, Inc.*, (July 15, 2014), p. 23. Quoting *Open Internet Order*, ¶ 95.

⁹⁰ *Letter from Scott Bergmann, Vice President – Regulatory Affairs, CTIA*, GN Docket No. 14-28, (September 4, 2014); Dr. Jeffrey H. Reed and Dr. Nishith D. Tripathi, “Net Neutrality and Technical Challenges of Mobile Broadband Networks,” GN Docket No. 14-28, (September 4, 2014).

⁹¹ *Letter from Scott Bergmann, Vice President – Regulatory Affairs, CTIA*, (September 4, 2014), p. 3.

⁹² FCC, *In the Matter of Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 11-186, released March 21, 2013, ¶ 52, Table 12.

⁹³ Bergmann, *supra* note 85.

The paper also highlights the “scarce spectral resources”⁹⁴ that limit network capacity as a key reason why the Commission must not apply Net Neutrality rules to mobile broadband providers. AT&T offers a similar argument in its filing, noting “spectrum constraints” and “shared access of ‘last-mile’ radio access network” as factors that “create capacity and quality-of-service challenges.”⁹⁵ These arguments, however, are contrary to industry developments that encourage unlimited use of certain applications of a mobile broadband providers’ choice, calling into direct question the claims of network capacity constraints.

For instance, T-Mobile has chosen to exempt 14 music streaming services of its choice from LTE data caps by the end of 2014.⁹⁶ Although limited to subscribers of certain plans, the move to allow unlimited usage of music streaming services provides clear evidence that capacity constraints are not a barrier to a carrier’s decision to offer services of *its* choice. T-Mobile is using its role as the wireless distributor to determine for consumers which music streaming services are most attractive to use. Such action raises mobile broadband entry barriers and suggests that, absent full Net Neutrality rules, mobile providers will be the ones who determine what services consumers can access. While AT&T’s comments highlight its constrained network, the company fails to mention its “Sponsored Data” service, which allows AT&T wireless customers to use certain applications on its mobile network without impacting data usage.⁹⁷ This service requires content providers and applications to pay for the data usage, but

⁹⁴ Dr. Jeffrey H. Reed and Dr. Nishith D. Tripathi, “Net Neutrality and Technical Challenges of Mobile Broadband Networks,” GN Docket No, 14-28, (September 4, 2014), p. 27.

⁹⁵ *Comments of AT&T Services, Inc.*, (July 15, 2014), p. 23.

⁹⁶ Jon Brodtkin, “T-Mobile exempts Grooveshark, Rdio from data caps—Google Music is next,” *Ars Technica*, August 28, 2014, <http://arstechnica.com/business/2014/08/t-mobile-exempts-grooveshark-rdio-from-data-caps-google-music-is-next/>.

⁹⁷ Jon Brodtkin, “AT&T turns data caps into profits with new fees for content providers,” *Ars Technica*, January 6, 2014, <http://arstechnica.com/business/2014/01/att-turns-data-caps-into-profits-with-new-fees-for-content-providers/>.

does nothing to address the capacity constraints so widely touted as problematic by wireless carriers. What is clear from the arguments and actions of mobile broadband providers is that they wish to exercise their gatekeeper control over mobile broadband users through limited Open Internet rules that give them the power to prefer applications and services of their choice.

If the Commission does not apply the full complement of Net Neutrality rules to mobile broadband, wireless carriers will be able to pick winners and losers. They will have the power to decide what applications and services are available to consumers and on what terms. They have already demonstrated a tendency towards such behavior. The two largest wireless carriers, AT&T and Verizon, are both MVPDs that have a particular incentive to favor their own video services at the expense of unaffiliated competitors. This will cause irreparable harm to the online video market. Real-time entertainment traffic, which includes audio and video streaming, already accounts for 40% of mobile network traffic.⁹⁸ YouTube, in addition, notes that 40% of its video views come from mobile devices.⁹⁹ Much of YouTube content comes from independent creators who are able to create content and reach consumers because of the low entry barriers of online video. But they will be harmed if the Commission exempts mobile broadband from its full rules. Such action by the Commission will handicap the development of competition in the mobile market. Data caps and current pricing models have not yet made mobile Internet service a viable substitute for all video consumption, but the failure to apply rules equally dooms the platform.

⁹⁸ Sandvine, *Global Internet Phenomena Report: 1H 2014*, <https://www.sandvine.com/downloads/general/global-internet-phenomena/2014/1h-2014-global-internet-phenomena-report.pdf>, p. 5.

⁹⁹ Josh Constine, "40% of YouTube Traffic Now Mobile, Up From 25% in 2012, 6% in 2011," *TechCrunch*, October 17, 2013, <http://techcrunch.com/2013/10/17/youtube-goes-mobile/>.

VIII. Failure to Address Interconnection Exposes a Loophole in Open Internet Rules

Verizon points out that, “Internet traffic can reach an ISP in many ways” but it does not address the problems that result from ISPs having a terminating access monopoly over their subscribers.¹⁰⁰ Though there may be many ways to reach Verizon’s network, there is only one way to reach a Verizon Internet subscriber, through its network. This monopoly power enables ISPs to degrade any applications that compete with the ISPs’ own services and to act as a gatekeeper that extracts tolls from any traffic addressed to its subscribers.

The MIT/UCSD study that Verizon cites in its comments actually confirms the congestion found by Level 3 at a Dallas interconnection point with an edge network.¹⁰¹ The study further reports, “peering links carrying Netflix traffic that appear to be congested for 18 hours a day, and we also see all of this apparent congestion vanish essentially overnight as new interconnection links are put in place, presumptively as a result of the new business arrangement between Comcast and Netflix.”¹⁰² This observation confirms that congestion is occurring at the entrance to edge networks and can be easily resolved through marginal upgrades at interconnection points.

As stated earlier, consolidation in the ISP market combined with a terminating access monopoly increases the leverage ISPs have over content providers and their transit suppliers on the Internet. As Level 3 points out, “Notably, all chronically congested peers are large mass-market retail ISPs.”¹⁰³ The growing power imbalance between ISPs and edge providers increases

¹⁰⁰ *Comments of Verizon and Verizon Wireless*, (July 15, 2014), p. 70.

¹⁰¹ MIT Information Policy Project, “Measuring Internet congestion: A preliminary report,” 2014, <https://ipp.mit.edu/sites/default/files/documents/Congestion-handout-final.pdf>, p. 4.

¹⁰² *Ibid*, p. 1.

¹⁰³ *Comments of Level 3 Communications*, GN Docket No. 14-28, (July 15, 2014), p. 11.

the likelihood that artificial congestion will be used to extract monopoly rents in the future. The conflicts we see today between Netflix and large ISPs are only a preview of what is to come if Net Neutrality rules fail to address interconnection.

IX. Conclusion

Strong Net Neutrality rules, based on Title II authority, will protect content investment and competition on the Internet, thereby preserving the virtuous circle of innovation. The Commission should stand by its analysis that unmitigated ISP power threatens the very openness and vitality of the Internet. It should properly classify broadband Internet access as a Title II service to ensure that edge providers continue to have access to a level playing field online, free from unjust and unreasonable discrimination, and consumers continue to have access to the content, services and applications of *their* choice. Reclassification would appropriately recognize the telecommunications service provided by ISPs to consumers. These rules must, in addition, apply equally to fixed and wireless broadband providers to avoid creating a second class of Internet service. They must extend to the interconnection points that mark the start of “last-mile” broadband networks. Without strong action, the Internet will become the closed environment of cable television. The FCC has the authority to ensure a permanently open Internet, and we urge the Commission to take the appropriate action. Consumers and content creators are depending on it.