

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

In the Matter Of)
)
Safeguarding and Securing the Open Internet) WC Docket No. 23-320
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**COMMENTS OF THE WRITERS GUILD OF AMERICA WEST, INC. AND
WRITERS GUILD OF AMERICA EAST**

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I. Introduction

Writers Guild of America West, Inc. (“WGAW”) and Writers Guild of America East (“WGAE”) (jointly, “WGA”) respectfully submit the following comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) September 28, 2023 Notice of Proposed Rulemaking (“NPRM”), WC Docket No. 23-320, “In the Matter of Safeguarding and Securing the Open Internet.”

WGAW is a labor union representing over 11,000 writers in the television, film, news, and streaming video industries. WGAE is a labor union representing over 7,000 members in film, television, news, podcasts, and online media. WGA members create nearly all of the scripted entertainment programming viewed on television today as well as the original scripted series and films offered by online video distributors such as Netflix, Hulu, Disney+, Amazon Prime Video, Paramount+, Max, Peacock, Apple TV+, and more.

WGA is an ardent supporter of the open Internet and has advocated for strong net neutrality rules in numerous proceedings before the Commission, including in the WGAW’s comments “In the Matter of Protecting and Promoting the Open Internet” (2014)¹ (“2014 Open Internet Comments”) and “In the Matter of Restoring Internet Freedom” (2017)² (“2017 Open Internet Comment”). WGA strongly supports the Commission’s new proposed rules, which rightfully

¹ Writers Guild of America West, Inc., Comment In the Matter of Protecting and Promoting the Open Internet (Jul. 15, 2014), https://www.wga.org/uploadedFiles/news_and_events/public_policy/FCC-Comments-on-Revised-Open-Internet-Rules.pdf; Writers Guild of America West, Inc., Reply Comment In the Matter of Protecting and Promoting the Open Internet (Sep. 15, 2014), https://www.wga.org/uploadedFiles/news_and_events/public_policy/Net-Neutrality-Reply-Comments.pdf.

² Writers Guild of America West, Inc., Comment In the Matter of Restoring Internet Freedom (Jul. 17, 2017), https://www.wga.org/uploadedfiles/news_and_events/public_policy/wgaw-comments-wc-docket-17-108.pdf.

restore the nationwide protections for an open Internet established by the *2015 Open Internet Order*.³

II. The Proposed Rules Appropriately Classify Broadband Internet Access as a Title II Telecommunications Service

The NPRM correctly proposes classifying broadband Internet access service (“BIAS”) as a telecommunications service under Title II of the Communications Act. The Internet has long fit the description of a telecommunications service; consumers use it to transmit and access information “without change in the form or content of the information as sent and received.”⁴ Broadband is the essential communications service of the twenty-first century, enabling free speech, commerce, and creative expression. For the majority of Americans, the Internet is the dominant medium used to communicate with each other, stream and upload videos, and more.

WGA has argued in numerous proceedings before the Commission—including in the WGAW’s 2014 and 2017 Open Internet Comments—that the FCC must correctly classify BIAS as a telecommunications service under Title II of the Communications Act in order to provide the necessary authority to enforce open Internet rules. This conclusion has also been affirmed by the courts, which rejected multiple FCC attempts to adopt and enforce net neutrality rules under

³ Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, (2015) (“*2015 Open Internet Order*”).

⁴ Communications Act, 47 U.S.C. §153 (“(50) TELECOMMUNICATIONS. The term “telecommunications” means 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... (53) TELECOMMUNICATIONS SERVICE. The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”).

other regulatory frameworks, namely Title I of the Communications Act.⁵ Only after the Commission tied its regulatory authority to Title II in the *2015 Open Internet Order* was its ability to enforce open Internet rules upheld by the D.C. Circuit.⁶ As the Court has made clear, if broadband service is not classified as a telecommunications service, the FCC cannot adopt the essential net neutrality rules.

The reclassification of BIAS as a Title II telecommunications service is necessary to allow the Commission to prohibit anti-competitive and harmful behavior by Internet service providers (“ISPs”). There is a well-documented history of ISPs abusing their gatekeeper power to interfere with consumers’ access to the content, services, and applications of their choice.⁷ Contrary to what the Restoring Internet Freedom Order (“*RIF Order*”) asserted, current antitrust and consumer protection laws neither disincentivize nor provide sufficient protections against blocking, throttling, and paid prioritization.⁸ As the NPRM notes,⁹ there is already evidence

⁵ Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010); *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd. 17905 (2010).

⁶ U.S. Telecom Association v. FCC, 825 F.3d 674, 697-698 (D.C. Cir. 2016).

⁷ See, e.g., Jonathan Krim, *Phone Company Settles in Blocking of Internet Calls*, THE WASHINGTON POST (Mar. 4, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/03/25/AR2005032501328.html>; Seth Schoen, *EFF Tests Agree with AP: Comcast Is Forging Packets to Interfere with User Traffic*, ELECTRONIC FRONTIER FOUNDATION DEEPLINKS BLOG (Oct. 19, 2007), <https://www.eff.org/deeplinks/2007/10/eff-tests-agree-ap-comcast-forging-packets-to-interfere>; Chris Ziegler, *AT&T Only Allowing FaceTime Over Cellular on Mobile Share Plans, No Extra Charge*, THE VERGE (Aug. 17, 2012, 1:29 PM), <https://www.theverge.com/2012/8/17/3250228/att-facetime-over-cellular-ios-6-mobile-share>.

⁸ Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017) (“*RIF Order*”) (“[T]he conduct rules are unnecessary because the transparency requirement we adopt, together with antitrust and consumer protection laws, ensures that consumers have means to take remedial action if an ISP engages in behavior inconsistent with an open Internet.”).

⁹ Safeguarding and Securing the Open Internet, WC Docket No. 23-320, Notice of Proposed Rulemaking, 88 FR 76048, para.129 (2023) (“*NPRM*”) (“We note that one 2019 study suggested that ISPs regularly throttle video content.”).

some ISPs, particularly mobile ISPs, have regularly engaged in throttling for video streaming since the *RIF Order* rolled back rules in the *2015 Open Internet Order* prohibiting such harmful behavior.¹⁰ WGA agrees with the Commission’s proposal to reinstate the *2015 Open Internet Order* rules that prohibit blocking, along with throttling and paid prioritization arrangements, and only Title II properly allows the Commission to enforce the necessary rules.

III. Strong Net Neutrality Protections Remain Necessary to Promote Competition

Consumers use BIAS for its basic transmission capabilities so that they may access third-party websites and services without interference by ISPs. Streaming video comprises a significant portion of Internet traffic; Sandvine reports that in 2022, 48% of all downstream traffic in the Americas was provided by video services Netflix, YouTube, Disney+, Amazon Prime Video, and Hulu.¹¹ Over the past decade, streaming video has grown to become the dominant distribution platform for professional entertainment programming and the largest market for WGA-covered series writer employment; WGA members have written hundreds of original scripted series for Netflix, Amazon Prime Video, Hulu, and other streaming services. However, these online video services rely on third parties for distribution to their end consumers; as a result, the online video market is vulnerable to ISP interference.

Practices like blocking, throttling, and paid prioritization give ISPs the ability to charge content providers for faster access to consumers, or vice versa, threatening “fast” and “slow” lanes for content. Such practices facilitate collusion between incumbent edge providers and ISPs,

¹⁰ Fangfan Li et al., A Large-Scale Analysis of Deployed Traffic Differentiation Practices, SIGCOMM '19: Proceedings of the ACM Special Interest Group on Data Communication (Aug. 2019), <https://wehe.meddle.mobi/papers/wehe.pdf>.

¹¹ SANDVINE, THE GLOBAL INTERNET PHENOMENA REPORT 29 (2023), https://www.sandvine.com/hubfs/Sandvine_Redesign_2019/Downloads/2023/reports/Sandvine%20GIPR%202023.pdf.

effectively locking out competition. ISPs and those edge providers with the means to pay will be in control. Paid prioritization is, by its nature, anti-competitive, disadvantaging new entrants and other independent edge providers. Data caps, which ISPs utilize in many states, can also hinder competition.¹² These caps restrict how much data a subscriber may consume before incurring additional charges on a broadband bill, presenting another lever for ISP control of content consumption. There are numerous examples of ISPs exempting prioritized or affiliated content or services from the caps (i.e. zero-rating), which diminishes competition among edge providers, particularly for data-heavy services like online streaming.¹³

To make matters worse, the online video market is already heavily consolidated and vertically integrated, increasing the potential for anti-competitive harm as a result of any ISP interference. Disney, Amazon, and Netflix have grown their market share and leverage through acquisitions, wielding their control of related markets, and underpricing their services in order to achieve dominance. These companies are now taking anti-competitive vertical integration to an extreme, turning their services into walled gardens for self-produced content, and increasing the likelihood of further consolidation, as WGAW detailed in a recent report, *The New Gatekeepers: How Disney, Amazon, and Netflix Will Take Over Media*.¹⁴ And while streaming video has

¹² *Is My Household Included in the Terabyte Internet Data Usage Plan?*, Comcast, <https://www.xfinity.com/support/internet/data-usage-find-area/> (last visited Nov. 16, 2023) (For example, Comcast now imposes a 1.2 terabyte data cap on markets in 26 states).

¹³ Jon Brodtkin, *Comcast Launches Streaming TV Service that Doesn't Count Against Data Caps*, ARS TECHNICA (Nov. 19, 2015, 8:33 AM), <https://arstechnica.com/information-technology/2015/11/comcast-launches-online-tv-service-that-doesnt-count-against-data-caps/>; Jon Brodtkin, *AT&T Exempts HBO Max from Data Caps but Still Limits Your Netflix Use*, ARS TECHNICA (Jun. 2, 2020, 11:26 AM), <https://arstechnica.com/tech-policy/2020/06/att-exempts-hbo-max-from-data-caps-but-still-limits-your-netflix-use/>.

¹⁴ WRITERS GUILD OF AMERICA WEST, *THE NEW GATEKEEPERS: HOW DISNEY, AMAZON, AND NETFLIX WILL TAKE OVER MEDIA* (Aug. 2023), https://www.wga.org/uploadedfiles/news_and_events/public_policy/GatekeepersReport23.pdf.

replaced cable and broadcast as the dominant platform for content, streaming lacks the traditional video markets' regulations or oversight despite many similar competitive concerns. In this context, ISPs' ability to interfere with Internet traffic, discriminate among edge providers, and charge for faster access would further harm competition in the streaming market.

Broadband providers wield significant power as distributors given the continuing lack of competition for home Internet services, and ISPs have a demonstrated history of abusing their market power, as detailed in the WGAW's 2014 and 2017 Open Internet Comments to the Commission.¹⁵ The number of new broadband households has stopped expanding; wired broadband penetration has hovered around 80% of U.S. households since at least 2019.¹⁶ This maturity gives ISPs an incentive to raise prices, either on consumers or edge providers, while vertically integrated ISPs such as Comcast, which owns the Peacock streaming service, have even more incentive to discriminate between competing edge providers. Strong net neutrality rules, including prohibitions on blocking, throttling, and paid prioritization, as well as a general conduct standard capable of addressing other potential anti-competitive behavior, will protect against further harm to competition among the edge providers who employ WGA members. As has been well-documented, this competition also supports investment in and deployment of wireline infrastructure through the virtuous cycle, benefitting consumers across the country.¹⁷

¹⁵ Writers Guild of America West, Inc., Comment In the Matter of Protecting and Promoting the Open Internet (Jul. 15, 2014), https://www.wga.org/uploadedFiles/news_and_events/public_policy/FCC-Comments-on-Revised-Open-Internet-Rules.pdf; Writers Guild of America West, Inc., Reply Comment In the Matter of Protecting and Promoting the Open Internet (Sep. 15, 2014), https://www.wga.org/uploadedFiles/news_and_events/public_policy/Net-Neutrality-Reply-Comments.pdf; Writers Guild of America West, Inc., Comment In the Matter of Restoring Internet Freedom (Jul. 17, 2017), https://www.wga.org/uploadedfiles/news_and_events/public_policy/wgaw-comments-wc-docket-17-108.pdf.

¹⁶ CRAIG MOFFETT, MOFFETT NATHANSON, BROADBAND: CAN CABLE KEEP GROWING BROADBAND ARPU?, (Jun. 20, 2023).

¹⁷ *NPRM*, 88 Fed. Reg. 76048 at paras. 8, 144, and 170.

IV. The Proposed Rules Should Serve as a Floor for State Open Internet Rules

The NPRM is designed to “provide the basis for a national regulatory approach toward BIAS.”¹⁸ The proposed rules should establish a floor, rather than a ceiling, for open Internet regulations that may be implemented by individual states. California adopted net neutrality rules in 2018, following the Commission’s rollback of national net neutrality rules and the adoption of the *RIF Order*. The FCC’s current NPRM is the fifth time in 20 years that the Commission has adopted new rules on an open Internet, and each time the federal rules have been rolled back, California consumers have been left with unsteady protections. California legislators introduced open Internet laws after their constituents voiced strong desire for such protections; they should not again be abandoned should a future Commission decide to overturn the proposed rules.

California’s net neutrality law offers enhanced regulations that promote the open Internet beyond those contemplated in the NPRM. Unlike the NPRM, California’s law prevents ISPs from discriminately exempting commercial arrangements from consumer data caps, also known as “zero-rating.”¹⁹ Additionally, California’s law prevents ISPs from charging interconnection fees.²⁰ These rules protect California consumers from discriminatory and anti-competitive behavior by ISPs, and the presence of these rules may have even had a chilling effect on anti-competitive practices in the absence of federal protections.²¹ California’s protections should not

¹⁸ *NPRM*, 88 Fed. Reg. 76048 at para. 115.

¹⁹ Nichol Turner Lee, *California’s Net Neutrality Law and the Case for Zero-Rating Government Services*, BROOKINGS (Apr. 19, 2021), <https://www.brookings.edu/articles/californias-net-neutrality-law-and-the-case-for-zero-rating-government-services/>.

²⁰ Jacob Kastrenakes, *California Governor Signs Nation’s Toughest Net Neutrality Bill into Law*, THE VERGE (Sep. 30, 2023, 5:35 PM), <https://www.theverge.com/2018/9/30/17913712/california-net-neutrality-bill-signed-law-jerry-brown>.

²¹ Marguerite Reardon, *AT&T Discontinues ‘Sponsored Data’ Due to California’s Net Neutrality Law*, CNET (Mar. 17, 2021, 3:01 PM), <https://www.cnet.com/home/internet/at-t-discontinues-sponsored-data-due-to-californias-net-neutrality-law/>.

be preempted by the Commission's proposed rules. In addition, the Commission should consider adopting similar prohibitions to California's on zero-rating and charging for interconnection.

V. Conclusion

The NPRM reinstates conduct rules that limit harmful, anti-competitive behavior and therefore advances the goals of innovation, investment, and free expression. Streaming video, a key source of downstream Internet traffic in the U.S., is already vulnerable to harm from anti-competitive consolidation and behavior; the possibility of ISP interference poses a significant threat that must be protected against with strong conduct rules. The history of the FCC's efforts in this area have made clear that Title II is the correct foundation for these highly necessary rules. WGA strongly supports the FCC's efforts to reclassify BIAS under Title II and its new proposed rules to ensure an open Internet.