

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Restoring Internet Freedom)	WC Docket No. 17-108
)	

COMMENTS OF THE WRITERS GUILD OF AMERICA WEST, INC.

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SUMMARY

While the Notice of Proposed Rulemaking (“NPRM”) begins with the statement, “Americans cherish a free and open Internet,”¹ what the Federal Communications Commission (“FCC” or “Commission”) now proposes will result in the end of the public’s nondiscriminatory access to the online content, services and applications of their choice. If enacted, the proposal will reverse the Commission’s bipartisan policy to protect the rights of consumers to use the Internet free from censorship by Internet service providers (“ISPs”). Decisions by the U.S. Court of Appeals for the D.C. Circuit (“D.C. Court”) have clearly established that information services cannot be subject to the anti-discrimination rules that are necessary to protect the open Internet.

Contrary to the NPRM’s assertions, the 2015 *Open Internet Order* (“*Order*”) was the logical conclusion to a decade of FCC policymaking. The *Order* appropriately recognized the true telecommunications nature of broadband Internet access service (“BIAS”) and established rules to permanently protect the open Internet, which the D.C. Court has since upheld. The Commission has thoroughly documented discriminatory behavior by ISPs and the incentive and ability to exercise gatekeeper power to harm online competition that make such rules necessary.

In its quest to justify repeal, the NPRM both ignores the importance of the virtuous cycle of investment and innovation and threatens its continued existence. With unfettered access to consumers, edge providers have invested billions in new content, services and applications. A repeal of these rules will eliminate the level playing field that has generated such investment.

The proposal is of particular concern to the online video market, which represents a competitive

¹ Restoring Internet Freedom, WC Docket No. 17-108, *Notice of Proposed Rulemaking*, 32 FCC Rcd. 4434, 4435 ¶ 1 (2017) (“*NPRM*”).

threat to ISPs that also distribute video programming. In contrast to the tightly-controlled model of cable television, the open Internet has enhanced competition, increased consumer choice and expanded the availability of independent and diverse content from a wide range of sources. As Nicole Yorkin, co-creator of the Amazon series *Z* states in this filing, “As a 27-year-veteran writer, who started out in television in the days when there were only three BIG networks and one smaller one (Fox), I can honestly say that an open internet has created a revolution in creative content the likes of which I’ve never before witnessed.” Ben Watkins, creator of the Amazon series *Hand of God*, adds, “I have seen the emergence of streaming platforms push all of television into new terrain. The overwhelming response of audiences to embrace adventurous storytelling has forced network and cable television to rethink their approach, and lean into taking bigger risks.” The NPRM threatens this progress because it will hand control of the Internet to ISPs who will once again have the power to decide what reaches the public. We urge the Commission to abandon this ill-conceived proposal.

TABLE OF CONTENTS

I.	Introduction	1
II.	The FCC Appropriately Classified Broadband Internet Access as a Title II Telecommunications Service	4
III.	Open Internet Rules are Necessary and Must Remain Under Title II	8
	<i>a. There is a Well-Documented History of ISP Violations of Open Internet Principles</i>	8
	<i>b. ISPs have Increased Technical Ability to Engage in Discriminatory Conduct</i>	12
	<i>c. ISPs have Increased Incentive to Engage in Discriminatory Conduct</i>	14
	<i>d. Net Neutrality Rules Absent Title II Have Failed</i>	17
IV.	The NPRM will Harm the Virtuous Cycle and Undermine the Competitive Online Video Market	18
	<i>a. Writers Support Open Internet Rules Based in Title II</i>	25
V.	The Commission Improperly Assesses Investment to Justify Repeal	29
VI.	Conclusion	34

I. Introduction

Writers Guild of America West, Inc. (“WGAW”) respectfully submits the following comments on the Federal Communication Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”) in the Matter of Restoring Internet Freedom, WC Docket No. 17-108.

WGAW is a labor union that represents more than 8,000 professional writers working in film, television, news, documentaries and digital media. Our members and the members of our affiliate, Writers Guild of America East (jointly, “WGA”) create nearly all of the entertainment programming viewed on television today as well as the original scripted series now offered by online video distributors (“OVDs”) such as Netflix, Hulu, Amazon, YouTube, Crackle and more.

The 2015 *Open Internet Order* (“*Order*”) provides the appropriate and necessary protection for the open Internet. The Commission adopted legally-enforceable rules that had been FCC policy under both Democratic and Republican leadership for a decade. Prior decisions by the U.S. Court of Appeals for the D.C. Circuit (“D.C. Court”) made clear that only by correctly classifying broadband Internet access service (“BIAS”) as a Title II telecommunications service would the FCC have the authority to enforce these open Internet rules. In taking this action, the FCC fulfilled its statutory obligation to promote broadband access and the Congressional mandate “to preserve the vibrant and competitive free market that presently exists for the Internet.”²² By prohibiting Internet service providers (“ISPs”) from engaging in discriminatory conduct, the *Order* protects the virtuous cycle. The rules provide

²² 47 U.S.C. § 230(b)(2).

certainty to edge providers, who have continued to invest and innovate in online content, services and applications, which in turn drives consumer demand for broadband.

What the Commission now proposes will undermine its mandate to promote broadband access and will ultimately result in the end of the open Internet. Reclassifying BIAS as an information service ensures this outcome because the D.C. Court has twice overturned the FCC's open Internet rules when enacted under Title I. The court has explicitly stated that the FCC cannot institute rules that treat information services like common carriers and therefore must allow discriminatory behavior by such services.³

The NPRM offers a revisionist history of the Commission's open Internet rulemaking that discounts the numerous ISP violations of net neutrality. It also omits any discussion of ISP incentives to abuse their control of access to consumers, which the Commission has extensively documented over the course of its open Internet rulemaking and in several merger reviews. The NPRM also fails to mention the current realities of the broadband market, which make ISP anti-competitive behavior more likely. ISPs now have technical tools that make traffic discrimination much easier and more precise than was previously possible. Further, the concentration and lack of competition in the broadband market at both the national and local level give ISPs significant gatekeeper power. Finally, the continued growth of the online video market constitutes a competitive threat to pay-TV operators, almost all of whom are also ISPs.

The open Internet has been pivotal to re-introducing competition and increasing choice in the entertainment industry. After several decades of consolidation, a handful of companies control television production and distribution, deciding what stories reach the public. In contrast,

³ Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).

the open Internet's non-discriminatory access to viewers has produced a wealth of innovative content from new sources. The public's response has been overwhelming: Netflix, Amazon and YouTube now account for the majority of downstream Internet traffic. The growth of this market has been a pro-competitive and pro-consumer development. Consumers have access to more content choices in new ways and often for lower prices. Writers have more creative and economic opportunities. In 2017 alone, upwards of 100 original series created and written by WGA members will be released online.

The Commission's proposal threatens this progress and promises to turn the Internet into cable television. Without rules governing their business practices, ISPs will have the power to act as gatekeepers of Internet content, deciding what reaches consumers. This is precisely what happened as the cable television market developed; cable operators leveraged their access to consumers to extract conditions such as ownership in new cable networks. Cable operators then favored channels they owned over independent outlets. There is already strong evidence to support this outcome. Prior to the adoption of the 2015 rules, Comcast, Time Warner Cable, Verizon and AT&T all degraded Netflix traffic even though their customers had paid to access the content.⁴ The likelihood of further anticompetitive behavior has only increased as more consumers choose online video services that compete with the traditional offerings of pay-TV operators.

As the main evidence for repealing the open Internet rules, the Commission offers an inaccurate analysis of investment after the 2015 *Order*. A review of capital expenditures by the

⁴ Drew Fitzgerald & Shalini Ramachandran, *Netflix-Traffic Feud Leads to Video Slowdown*, The Wall Street Journal (Feb. 18, 2014), <https://www.wsj.com/articles/netflixtraffic-feud-leads-to-video-slowdown-1392772268>.

largest broadband operators over a three-year period is an inappropriately simplistic analysis that makes no attempt to control for the myriad other factors that drive investment decisions.

Reliance on such an analysis to justify the reversal of Commission policy will not withstand legal scrutiny. In addition, the Commission completely ignores the investment occurring by edge providers, which drives the virtuous cycle of investment and innovation. From this context, the open Internet rules have been critical to continued investment.

In this filing, the WGAW outlines the necessity of the 2015 *Order* and explains how the Commission's new approach to the open Internet will harm free speech, competition and consumers.

II. The FCC Appropriately Classified Broadband Internet Access as a Title II Telecommunications Service

The 2015 *Order* settled a decade of bipartisan open Internet policymaking by correctly classifying BIAS as a Title II telecommunications service. The *Order* recognized that Internet service has become the essential communications service of the 21st century, enabling free speech, commerce and creative expression. In the context of communications, common carriage regulation protects individuals and organizations from arbitrary discrimination in accessing vital infrastructure such as the Internet. After the development of an extensive record, the *Order* also recognized the true telecommunications nature of modern broadband service. Ironically, while the NPRM attacks the nondiscriminatory principles of common carriage as outdated, it clings to an antiquated view of the Internet that bears no resemblance to what today's consumers expect when they purchase Internet service or use the Internet. The idea that Internet service is not a telecommunications service is as accurate as the claim that the majority of Americans still use

dial-up modems. Contrary to the fallacious assertions of the NPRM, most consumers do not purchase broadband Internet access service to use an ISP-provided email address or to have their websites of choice “edited” or slowed down by Comcast or AT&T. Unsurprisingly, the NPRM does not provide any credible evidence for these implausible claims.

To put it simply, Internet service is the epitome of telecommunications. Consumers use BIAS for its straightforward transmission capabilities so that they may access *third-party* websites and services without interference by their ISP. Extensive data confirm this fact. For example, according to Quantcast, 90% of the top 20 most popular websites are independent of a major ISP.⁵ The two that are not – Yahoo and BuzzFeed – were popular sites long before ISP investment. Similarly, Sandvine reports that in 2016, 57% of all peak period downstream Internet traffic was provided by three video services: Netflix, YouTube and Amazon.⁶ None of these online video providers are owned by a major ISP or is technically required to be tied to a vertically-integrated BIAS provider.

As the 2015 *Order* acknowledged, “Although broadband providers in many cases provide broadband Internet access service along with information services, such as email and online storage, we find that broadband Internet access service is today sufficiently independent of these information services that it is a separate ‘offering.’ We also find that domain name service (DNS) and caching, when provided with broadband Internet access services, fit squarely within the telecommunications systems management exception to the definition of ‘information

⁵ *Top Websites*, Quantcast, <https://www.quantcast.com/top-sites> (last visited Jun. 13, 2017).

⁶ Sandvine, *Global Internet Phenomena: Latin America & North America* at 4 (2016), <https://www.sandvine.com/downloads/general/global-internet-phenomena/2016/global-internet-phenomena-report-latin-america-and-north-america.pdf>.

service.’ Thus, when provided with broadband Internet access services, these integrated services do not convert broadband Internet access service into an information service.”⁷

The *Order’s* point concerning DNS and caching is particularly germane. Both of these functions facilitate telecommunications but do not constitute a separate, distinct service to the average consumer’s perception. Both DNS and caching comprise “any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”⁸ They are therefore exempt from classification as information services. Additionally, even if such functions are bundled with telecommunications service, they are clearly separable because they are also available from third parties. Several services that are unaffiliated with an ISP offer DNS routing including: OpenDNS, Norton ConnectSafe, Neustar’s Free Recursive DNS and Google Public DNS. Likewise, there is a plethora of non-ISP content delivery networks (“CDNs”) and reverse proxies that cache content closer to Internet users to increase quality of service and reduce traffic loads on edge provider servers.⁹

The D.C. Court agreed with the *Order* when it wrote that “the Commission concluded that consumers perceive broadband service both as a standalone offering and as providing telecommunications. See 2015 Open Internet Order, 30 FCC Rcd. at 5765 ¶ 365. These conclusions about consumer perception find extensive support in the record and together justify the Commission’s decision to reclassify broadband as a telecommunications service.”¹⁰ The D.C.

⁷ In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601, 5757-5758, ¶ 356 (2015) (“*Open Internet Order*”).

⁸ 47 U.S.C. § 153(24).

⁹ See, e.g., Akamai (www.akamai.com), Cloudflare (www.cloudflare.com), and Limelight Networks (www.limelight.com).

¹⁰ *U.S. Telecom Association v. FCC*, 825 F.3d 674, 697-698 (D.C. Cir. 2016) (“*USTA v. FCC*”).

Court added, “The Commission found, moreover, that broadband consumers not only focus on the offering of transmission but often avoid using the broadband providers’ add-on services altogether, choosing instead ‘to use their high-speed Internet connections to take advantage of competing services offered by third parties.’ 2015 Open Internet Order, 30 FCC Rcd. at 5753 ¶ 347... Based on the providers’ emphasis on how useful their services are for accessing third-party content, the Commission found that end users view broadband service as a mechanism to transmit data of their own choosing to their desired destination—i.e., *as a telecommunications service.*”¹¹ Nothing has changed in the marketplace or with how consumers view BIAS to warrant the proposed reversal of how broadband is classified.

In addition, as Justice Scalia wrote in his dissent in *NCTA v. Brand X* (joined by Justices Souter and Ginsburg), “[T]he telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on offer—especially when seen from the perspective of the consumer or the end user, which the Court purports to find determinative, *ante*, at 2704, 2706, 2709, 2710. The Commission’s ruling began by noting that cable-modem service provides *both* ‘high-speed access to the Internet’ and other ‘applications and functions,’ *Declaratory Ruling* 4799, ¶ 1, because that is exactly how any reasonable consumer would perceive it: as consisting of two separate things...Broadband Internet service provided by cable companies is one of the three most common forms of Internet service, the other two being dial-up access and broadband Digital Subscriber Line (DSL) service. *Ante*, at

¹¹ *Id.* at 698, 699 (emphasis added).

2695–2696. In each of the other two, the physical transmission pathway to the Internet is sold—indeed, *is legally required* to be sold—separately from the Internet functionality.”¹²

Despite the current NPRM’s attempt to undo one of the most robust rulemakings in the Commission’s history, the fact remains that consumers use Internet access service to communicate with third-party services, including ones where they view programming written by WGAW members. Furthermore, other ISP services, whether email, DNS routing or caching, are both distinguishable from the transport function of BIAS and fall under the telecommunications systems management exception of the Communications Act.

III. Open Internet Rules are Necessary and Must Remain Under Title II

The open Internet rules adopted in the 2015 *Order* were a direct response to repeated actions by ISPs to deny their subscribers access to the kind of innovative services that drive broadband adoption, often because they directly compete with services offered by ISPs. In addition, the Commission has thoroughly documented the incentive and ability of ISPs to undermine the open Internet. The threat of ISP abuse has only increased as online video competition has grown and technology that can be used for network discrimination has improved. These facts make legally-enforceable open Internet rules more necessary than ever.

a. There is a Well-Documented History of ISP Violations of Open Internet Principles

Contrary to the NPRM’s assertions, there is extensive evidence of ISP’s abusing their gatekeeper power to interfere with consumers’ access to the content, services and applications of their choice. Among the early cases of ISPs limiting Internet access is the decision by Comcast

¹² Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1008 (2005) (“*NCTA v. Brand X*”).

and Cox to ban virtual private networks (“VPNs”) and AT&T’s decision to limit the number of computers that could connect to the Internet, which AT&T labeled “theft of service.”¹³

In 2005, the Republican-led Commission took action to stop Madison River Communications, a telephone company, from blocking customer access to Voice over Internet Protocol (“VoIP”) service on its Internet service.¹⁴ Customers who relied solely on their VoIP telephone service were even blocked from making 911 emergency calls. Madison River Communications was not the only ISP discriminating against competing Internet phone service providers; another VoIP provider told The Washington Post that two cable companies had also been degrading their service. This provider’s CEO explained that “when his customers complained to their cable companies, they were told that if they switched to the cable company’s voice service, the problems would disappear.”¹⁵

In 2007, Comcast was caught blocking BitTorrent traffic using “a technique also used by Internet censorship systems in China” after it denied engaging in such blocking.¹⁶ Once again, the Republican-led Commission took action to protect the open Internet by issuing an order reprimanding Comcast for violating the FCC’s *Internet Policy Statement*. In the order, the Commission noted that “[p]eer-to-peer applications, including those relying on BitTorrent, have become a competitive threat to cable operators such as Comcast because Internet users have the

¹³ Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. on Telecomm. & High Tech. L. 141, 159 (2003).

¹⁴ 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>.

¹⁵ *Id.*

¹⁶ 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>.

opportunity to view high-quality video with BitTorrent that they might otherwise watch (and pay for) on cable television.”¹⁷

AT&T also has a history of violating net neutrality in order to harm competition. In 2009, it was discovered that AT&T had asked Apple to block Skype calls on the iPhone’s cellular Internet connection.¹⁸ According to PCWorld, “Jim Cicconi, AT&T’s top public policy executive, says AT&T has ‘every right’ not to promote the services of a wireless rival. ‘We absolutely expect our vendors’ – Apple, in this case – ‘not to facilitate the services of our competitors,’ he says. ‘Skype is a competitor, just like Verizon or Sprint or T-Mobile,’ he says, adding, Skype ‘has no obligation to market AT&T services. Why should the reverse be true?’”¹⁹ It is worth noting that AT&T abandoned the policy just as the FCC announced that it was considering extending net neutrality rules to wireless ISPs.²⁰

However, in 2012 AT&T once again blocked subscribers from using their cellular Internet connection to use Apple’s FaceTime unless they subscribed to certain plans.²¹ AT&T’s actions prove that ISPs intend to act as gatekeepers for what Internet users can access and will use this power to find new ways to charge subscribers and edge providers. As Verizon’s counsel

¹⁷ Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,” File No. EB-08-IH-1518, WC Docket No. 07-52, *Memorandum Opinion and Order*, 23 FCC Rcd. 13028, 13030, ¶ 5 (2008).

¹⁸ Bill Snyder, *Why AT&T and Apple Are Handcuffing Skype Users*, PCWorld (Apr. 9, 2009), http://www.pcworld.com/article/162864/skype_iphone.html.

¹⁹ *Id.*

²⁰ Ryan Singel, *AT&T Relents, Opens Phone to Skype, VOIP*, Wired (Oct. 6, 2009), <https://www.wired.com/2009/10/iphone-att-skype/>.

²¹ Chris Ziegler, *AT&T only allowing FaceTime over cellular on Mobile Share plans, no extra charge*, The Verge (Aug. 17, 2012), <https://www.theverge.com/2012/8/17/3250228/att-facetime-over-cellular-ios-6-mobile-share>.

told the D.C. Court regarding prioritizing certain Internet sites or services, “I’m authorized to state from my client today that but for these rules we would be exploring those types of arrangements.”²²

In merger proceedings, the FCC has also documented ISP incentives and ability to harm the open Internet. In the Comcast-NBCU merger, the Commission noted that “the Applicants’ internal documents and public statements demonstrate that they consider OVDs to be at least a potential competitive threat. The record here is replete with e-mails from Comcast executives and internal Comcast documents showing that Comcast believes that OVDs pose a potential threat to its businesses...”²³ In response to concerns that Comcast would have an increased incentive to degrade or block traffic from competing OVDs, the Commission noted that although these concerns affect all ISPs, there was an increased risk of Comcast engaging in this behavior as a result of its acquisition of NBCU programming assets.²⁴ Since the Comcast-NBCU merger, vertical integration between ISPs and traditional video and online content providers has only increased. Verizon has purchased both AOL and Yahoo while AT&T, one of the largest wired and wireless broadband operators, is in the process of acquiring Time Warner.

The Commission’s concern with ISP gatekeeper power over the Internet has surfaced in several other mergers. After the Comcast-Time Warner Cable merger was abandoned, then-FCC General Counsel Jon Sallet spoke of what had led FCC staff to conclude that the risk of harm outweighed potential merger benefits, stating, “[T]he core concern came down to whether the

²² Timothy Karr, *Net Blocking: A Problem in Need of a Solution*, Free Press Blog (Aug. 20, 2014), <https://www.freepress.net/blog/2014/08/20/net-blocking-problem-need-solution>.

²³ Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, MB Docket No. 10-56, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4272 ¶ 85 (2011).

²⁴ *Id.* at 4275, ¶ 93.

merged firm would have an increased incentive and ability to safeguard its integrated Pay TV business model and video revenues by limiting the ability of OVDs to compete effectively, especially through the use of new business models.”²⁵ In the order approving the merger of AT&T and DirecTV, the Commission found “that post-transaction AT&T has an increased incentive to discriminate against unaffiliated OVDs.”²⁶ The Commission noted that the combined entity would “have increased incentive to limit subscriber demand for competitors’ online video content” and could do so “through data caps that discriminate against third-party content by exempting its own content from the data cap.”²⁷ Similarly, in the Charter-Time Warner Cable merger, the FCC found the combined entity would have an increased incentive to discriminate against OVDs and “that New Charter will have greater incentives to harm those OVDs that serve as a substitute for, and therefore compete with, New Charter’s video services.”²⁸ Without open Internet rules, ISPs will be unrestrained in their ability to act on the well-established incentive to harm online video competition.

b. ISPs have Increased Technical Ability to Engage in Discriminatory Conduct

In addition to ignoring the Commission’s own findings on ISP violations of net neutrality and broadband provider incentives to limit Internet openness, the NPRM also omits any

²⁵ Jon Sallet, General Counsel, FCC, Prepared Remarks for the Telecommunications Policy Research Conference: The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews, at 11 (Sept. 25, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-335494A1.pdf.

²⁶ Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 30 FCC Rcd. 9131, 9207 ¶ 205 (2015).

²⁷ *Id.* at 9210, ¶ 210.

²⁸ Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 15-149, *Memorandum Opinion and Order*, 31 FCC Rcd. 6327, 6343 ¶ 39 (2016).

discussion of technological advancements in network discrimination. Specifically, the NPRM makes no mention of deep packet inspection (“DPI”). Not only do today’s ISP-multichannel video programming distributors (“MVPDs”) have an incentive to discriminate against competing businesses, they now have the technical ability to do so, something that was not always feasible in the history of the Internet. The ability to read the content of Internet packets, not just the header information, provides ISPs with a new level of control over their paying subscribers’ use of the Internet. As DPI vendor Sandvine states, ISPs can use their technology for “network management, user service enablement, security functions, subscriber communications, congestion management, fair-use policies, data mining capabilities.”²⁹ The NPRM fails to mention that such technology is not only a serious violation of Internet users’ privacy, but changes the fundamental nature of the Internet to one that allows ISP gatekeepers to favor certain websites or Internet services over others or charge additional fees for users who do not want their ISP to pick favorites for them. This is in sharp contrast to the early years of the Internet when ISPs’ routers largely just forwarded packets to their destinations.

As previously discussed, Comcast blocked an entire class of Internet traffic, BitTorrent, which led the Commission to say, “Comcast's practices are not minimally intrusive, as the company claims, but rather are invasive and have significant effects.”³⁰ Comcast used deep packet inspection technology from Sandvine to carry out its surreptitious blocking but it could have chosen from numerous other DPI vendors that now sell the technology. The existence of

²⁹ *Deep Packet Inspection (DPI)*, Sandvine, <https://www.sandvine.com/technology/deep-packet-inspection.html> (last visited Jul. 7, 2017).

³⁰ David Kravets, *Comcast Discloses Throttling Practices-BitTorrent Targeted*, Wired (Sep. 19, 2008), <https://www.wired.com/2008/09/comcast-disclos-2/>.

such technology makes it all the more important to protect consumers from ISPs' attempts to tip the scales of online competition.

c. ISPs have Increased Incentive to Engage in Discriminatory Conduct

As the MVPD market matures, the companies that deliver both television programming and Internet service are looking for ways to slow the number of TV subscribers that are cutting the cord while continuing to increase total revenue. According to SNL Kagan ("SNL"), in 2016 MVPDs lost a total of 1.9 million subscriptions and it predicts a loss of another 2.9 million this year.³¹ Meanwhile, SNL expects the number of households that use only on-demand online video services and those that subscribe to virtual MVPDs to increase by about 4 million in 2017.³² The success of the online video market increases the incentive for ISP-MVPDs to exploit their gatekeeper power to discriminate against competing video distributors and find new ways to monetize Internet access service.

For example, Comcast now imposes a one terabyte data cap on markets in 27 states.³³ If a Comcast customer uses more than one terabyte of data in a month, for more than two months, they will be charged an additional \$10 per month for each additional 50 Gigabytes (GB) used, up to \$200.³⁴ This practice continues despite the fact that ISPs already use price discrimination to charge more for higher bandwidth and have admitted that data caps are not implemented to

³¹ Ali Choukeir, Chris Young and Ian Olgeirson, *Multichannel cedes ground to OTT, VSPs in US video segmentation outlook*, SNL Kagan (Jun. 19, 2017), <http://www.snl.com/InteractiveX/articleabstract.aspx?ID=41023462&KPLT=2>.

³² *Id.*

³³ *Is my household included in the Terabyte Internet Data Usage Plan?*, Comcast, <https://www.xfinity.com/support/internet/data-usage-find-area/> (last visited Jul. 5, 2017).

³⁴ *What is the Terabyte Internet Data Usage Plan?*, Comcast, <https://www.xfinity.com/support/internet/data-usage-what-is-the-terabyte-data-usage-plan/> (last visited Jul. 11, 2017).

address any network congestion.³⁵ These fees simply raise the cost of substituting Comcast video services for competing online video offerings.

ISP-MVPDs have also responded to online video competition by starting their own Internet Protocol (“IP”) video services. However, some of these services are exempt from ISP data caps, while competing services are not or must pay to be exempt. For example, AT&T’s DirecTV Now service does not count against AT&T mobile users’ data caps.³⁶ Likewise, Verizon’s online streaming video service, Go90, is exempt from Verizon’s mobile Internet data caps.³⁷ Comcast’s Stream TV is exempt from its fixed Internet service data caps because the company claims that the service, though delivered through IP, does not travel over the public Internet.³⁸ It is worth noting that even if Stream TV does not travel over the same channel as Internet service in Comcast’s hybrid fiber-coaxial network, it travels over the same wire/fiber and represents an expansion of bandwidth that cannot be used for delivering Internet service. These are clear examples of ISPs exploiting their control of broadband distribution to favor their own video services.

³⁵ See, e.g., Mike Masnick, *Cable Industry Finally Admits That Data Caps Have Nothing To Do With Congestion*, Techdirt (Jan. 23, 2013), <https://www.techdirt.com/articles/20130118/17425221736/cable-industry-finally-admits-that-data-caps-have-nothing-to-do-with-congestion.shtml>; and Chris Morran, *Leaked Comcast Doc Admits: Data Caps Have Nothing To Do With Congestion*, Consumerist (Nov. 6, 2015), <https://consumerist.com/2015/11/06/leaked-comcast-doc-admits-data-caps-have-nothing-to-do-with-congestion/>.

³⁶ Micah Singleton, *AT&T users will be able to stream DirecTV Now without using their data*, The Verge (Nov. 28, 2016), <https://www.theverge.com/2016/11/28/13768612/att-users-directv-now-data-free>.

³⁷ Jon Brodtkin, *Verizon’s mobile video won’t count against data caps—but Netflix does*, Ars Technica (Feb. 5, 2016), <https://arstechnica.com/business/2016/02/verizons-mobile-video-wont-count-against-data-caps-but-netflix-will/>.

³⁸ Jon Brodtkin, *Comcast launches streaming TV service that doesn’t count against data caps*, Ars Technica (Nov. 19, 2015), <https://arstechnica.com/business/2015/11/comcast-launches-online-tv-service-that-doesnt-count-against-data-caps/>.

Despite this Commission’s expression of support for economic analysis, the NPRM does not address these economic incentives for anti-competitive behavior by ISP-MVPDs. As Tim Berners-Lee, inventor of the World Wide Web, recently wrote, “Today, with billions of dollars at stake in the competition for views, sales and clicks, the incentives for ISPs to violate net neutrality for profit have never been greater. Yet the FCC is now proposing to roll back the rules that were put in place to neutralize those perverse incentives.”³⁹

To make matters worse, the market for Internet access service remains concentrated among a few major corporations, while mergers continue to reduce competition. Although national figures underestimate the severity of the problem due to local division of markets, they illustrate the paucity of choices for Internet access. For instance, the top four U.S. retail ISPs control 72% of the market in wired broadband access.⁴⁰ The Commission itself has noted that “[a]pproximately 51 percent of Americans have one option for a provider of 25 Mbps/3 Mbps fixed broadband service, 38 percent of Americans have more than one option for 25 Mbps/3 Mbps fixed broadband service, and approximately 10 percent of Americans have no options for 25 Mbps/3 Mbps fixed broadband service.”⁴¹ This lack of competition strengthens ISPs’ gatekeeping power over the Internet and explains what one top Wall Street analyst called “almost comically profitable” gross margins.⁴² The baseless claim that the ISP market is competitive is

³⁹ Tim Berners-Lee, *In Defense of Net Neutrality*, The Wall Street Journal (Jun. 22, 2017), <https://www.wsj.com/articles/in-defense-of-net-neutrality-1498171158>.

⁴⁰ Leichtman Research and WGAW calculations. See <http://www.leichtmanresearch.com/press/051917release.html>.

⁴¹ In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act, GN Docket No. 15-191, *2016 Broadband Progress Report*, 31 FCC Rcd. 699, 736 ¶ 86 (2016).

⁴² David Talbot, *When Will the Rest of Us Get Google Fiber?*, MIT Technology Review (Feb. 4, 2013), <https://www.technologyreview.com/s/510176/when-will-the-rest-of-us-get-google-fiber/>.

belied by both its high profit margins and its last place ranking among 43 industries according to a recent customer survey.⁴³ As the American Customer Satisfaction Index recently wrote, “Low user satisfaction is the result of slow and unreliable service, compounded by limited competition.”⁴⁴ The lack of market forces such as competition to prevent ISPs from engaging in discriminatory conduct make the open Internet rules critically important.

d. Net Neutrality Rules Absent Title II Have Failed

Since the early days of broadband, there has been bipartisan support for net neutrality rules and their enforcement. ISP violations and legal challenges have been another key feature of open Internet rules, regardless of how broadband was classified. In 2004, then-FCC Chairman Michael Powell declared his support for a voluntary set of principles to protect Internet openness.⁴⁵ A Republican-controlled Commission then adopted similar principles in the *Internet Policy Statement*.⁴⁶ The *Statement* included the principles that “consumers are entitled to access the lawful Internet content of their choice” and “consumers are entitled to competition among network providers, application and service providers, and content providers.”⁴⁷ The Commission

⁴³ Aaron Pressman, *The Cable TV Industry Is Getting Even Less Popular*, *Fortune* (May 25, 2017), <http://fortune.com/2017/05/25/cable-tv-comcast-verizon/>.

⁴⁴ Press Release, American Customer Satisfaction Index, ACSI: Wireless Competition Boosts Customer Satisfaction While Pay TV Fades (May 23, 2017), <http://www.theacsi.org/news-and-resources/press-releases/press-2017/press-release-telecommunications-2017>.

⁴⁵ Michael K. Powell, Chairman, FCC, Prepared Remarks at the Silicon Flatirons Symposium: Preserving Internet Freedom: Guiding Principles for the Industry (Feb. 8, 2004), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

⁴⁶ In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Computer III Further Remand Proceedings, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, and Internet Over Cable Declaratory Ruling, CC Docket Nos. 02-33, 01-33, 98-10, 95-20, GN Docket No. 00-185, CS Docket No. 02-52, *Policy Statement*, 20 FCC Rcd. 14986 (2005) (“*Internet Policy Statement*”).

⁴⁷ *Id.* at 14988, ¶ 4.

later attempted to enforce the *Internet Policy Statement* in the case of Comcast's interference of BitTorrent traffic, using its claimed ancillary authority of Title I services. However, after Comcast sued, the Commission's attempts to tie its ancillary authority to a statutory responsibility failed in the D.C. Court.⁴⁸

In 2010, the Commission again tried to adopt new net neutrality rules based on Section 706 of the Telecommunications Act of 1996 and again was sued by a major ISP.⁴⁹ The *2010 Open Internet Order's* anti-discrimination and anti-blocking rules were ultimately struck down by the D.C. Court after Verizon filed suit against the rules.⁵⁰ As the D.C. Court has made clear, if broadband service is not classified as a telecommunications service, the FCC cannot adopt net neutrality rules. Now, this Commission chooses to ignore the extensive record of anti-competitive and anti-consumer violations of net neutrality and federal case law in favor of unenforceable promises.

IV. The NPRM will Harm the Virtuous Cycle and Undermine the Competitive Online Video Market

The open nature of the Internet, which allows innovation without permission, has been integral to the medium's success. With the ability to reach consumers without ISP interference, edge providers have invested billions in content, applications and services. The online video market has quickly become one of the most robust segments of the Internet, accounting for the majority of Internet traffic. But, as outlined in this filing, ISPs have strong incentives to interfere

⁴⁸ Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

⁴⁹ In the Matter of Preserving the Open Internet Broadband Indus. Practices, GN Docket No. 09-191, WC Docket No. 07-52, *Report and Order*, 25 FCC Rcd. 17905 (2010) ("*2010 Open Internet Order*").

⁵⁰ Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

in the online video market and have acted to harm competition in the past. Without open Internet rules, ISPs will be free to exercise their gatekeeper power over the online video market to augment their bottom lines, to the detriment of competition and consumer welfare. The ability of ISPs to discriminate against edge providers, treating certain content preferentially or requiring payment for prioritization, will introduce uncertainty to the market and deter investment. The result will be the replication of cable television, with a few powerful distributors and programmers controlling content.

Over the course of the Commission’s open Internet rulemaking, the WGAW has commented on the importance of this new platform to reintroducing competition and expanding consumer choice in video programming. As a result of deregulation that ushered in decades of vertical and horizontal consolidation among producers, networks and distributors, the television business has been dominated by a handful of companies who decide what consumers watch. This stranglehold has reduced creative and economic opportunities for writers and limited consumer choice.

The WGAW has documented in numerous FCC proceedings how this consolidation has all but eliminated independently-produced scripted programming from television.⁵¹ Independent

⁵¹ See Writers Guild of America West Inc., Comments in the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41, *Notice of Proposed Rulemaking* (Jan. 26, 2017); Writers Guild of America West Inc., Comments in the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41, *Notice of Inquiry* (Mar. 30, 2016) (“*Diverse and Independent Programming NOI Comments*”); Writers Guild of America West Inc., Comments in the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Notice of Proposed Rulemaking* (Jul. 15, 2014); Writers Guild of America West Inc., Comments in the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 14-16, *Notice of Inquiry* (Mar. 21, 2014); Writers Guild of America West Inc., Comments in the Matter of Amendment of Section 73.3555E of the

productions⁵² accounted for only 5% of scripted series on primetime broadcast television in the 2014-2015 season.⁵³ Basic cable and pay TV networks offered consumers only slightly more independence, with 12% of all scripted series originating from independent sources.⁵⁴ Vertical integration between networks and studios has also resulted in the majority of scripted programming on a network originating from an affiliated studio, which further limits competition and diverse viewpoints on television. Among scripted series airing in the 2014-2015 season, 73% on pay TV, 68% on network primetime, and 60% on basic cable originated in-house.⁵⁵

The control of television by a handful of companies has also been documented by the Government Accountability Office (“GAO”). In a 2010 report the GAO found that the major broadcasters produced the overwhelming majority of prime time programming hours and that broadcasters and cable operators owned half or more of the top 20 cable networks during the period reviewed.⁵⁶ The WGAW has also found that of the 99 cable networks that reached 50 million or more households in 2015, 80% were affiliated with a broadcast network owner or an MVPD.⁵⁷

The open Internet, in contrast, has presented few of the barriers of the traditional video marketplace. What began in the Commission’s 2010 open Internet proceeding as a discussion of the promise of an open Internet to deliver more competition and choice in video programming

Commission’s Rules, National Television Multiple Ownership Rule, WC Docket No. 13-236, *Notice of Proposed Rulemaking* (Nov. 4, 2013).

⁵² Independent productions are defined as series produced and owned by a company that is neither affiliated with an MVPD nor with a large media conglomerate.

⁵³ *Diverse and Independent Programming NOI Comments* at 13.

⁵⁴ *Id.*

⁵⁵ *Id.* at 14.

⁵⁶ U.S. Gov’t Accountability Office, GAO-10-369, *Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio* at 15-16 (2010).

⁵⁷ *Diverse and Independent Programming NOI Comments*, at 9.

has become an indisputable fact. Without the requirement to negotiate carriage by an MVPD or to have a broadcaster choose to air their programming, edge providers have delivered a wealth of online video services and content directly to the public. Consumers have responded enthusiastically to this new market. Streaming audio and video services account for 70% of downstream traffic during peak times in North America, with Netflix accounting for 37% alone.⁵⁸ The CEO of Sandvine noted that “streaming video has grown at such a rapid pace in North America that the leading service in 2015, Netflix, now has a greater share of traffic than all of streaming audio and video did five years ago.”⁵⁹ According to a survey from IBB Consulting, almost half of U.S. broadband customers pay for at least one subscription OVD service and one-third subscribe to two.⁶⁰

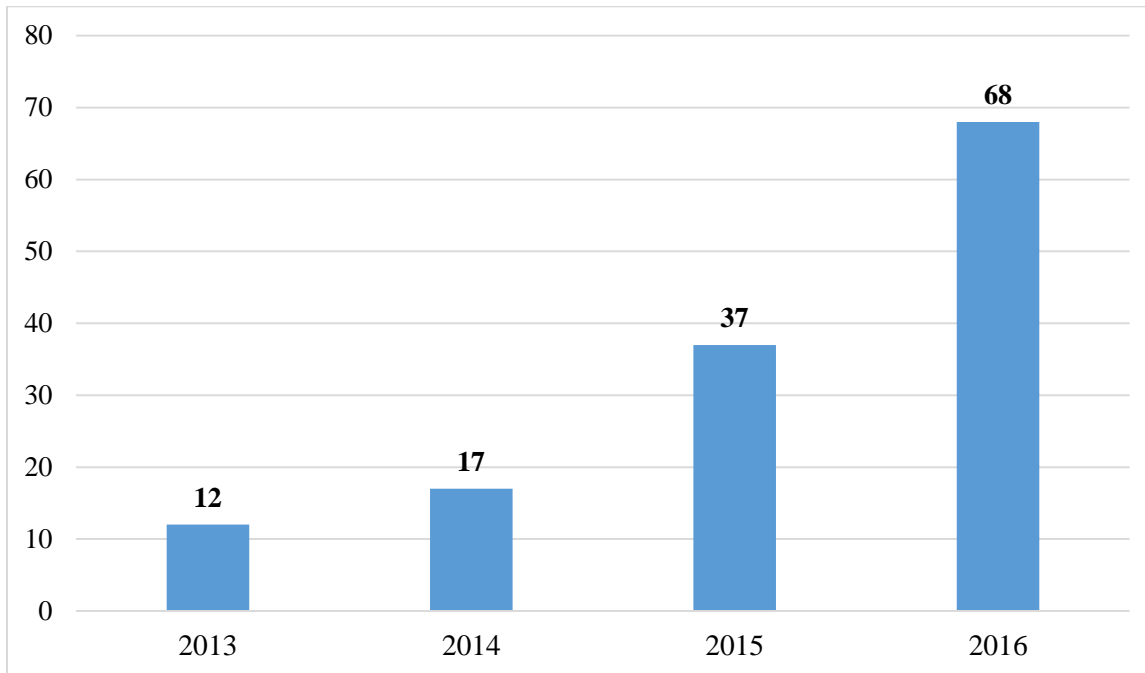
Consumer adoption of online video has led to the development of a new and robust market for original video programming. Since the premiere of *House of Cards* in February of 2013, the growth of the original online video market has been staggering. In a few short years, this nonexistent market has grown to one approaching network primetime in terms of number of original scripted series. Almost 400 WGAW members wrote on 68 original online video series in 2016 and we project upwards of 100 series will be released in 2017.

⁵⁸ Emil Protalinski, *Streaming services now account for over 70% of peak traffic in North America, Netflix dominates with 37%*, VentureBeat (Dec. 7, 2015), <https://venturebeat.com/2015/12/07/streaming-services-now-account-for-over-70-of-peak-traffic-in-north-america-netflix-dominates-with-37/>.

⁵⁹ *Id.*

⁶⁰ Jeff Baumgartner, *Nearly Half of Broadband Consumers Subscribe to a Video OTT Service: Study*, Multichannel News (Jun. 15, 2017), <http://www.multichannel.com/news/content/nearly-half-broadband-consumers-subscribe-video-ott-service-study/413387>.

Chart I. WGA Covered TV-Length Online Video Series



Netflix, Amazon, YouTube and Hulu have become significant distributors of original programming. SNL estimates that Netflix, Amazon and Hulu alone spent almost \$9 billion on content in 2016, with \$1.2 billion going to original productions for these services. SNL projects that spending will continue to grow, with more than \$4 billion to be spent on original programming in 2020.⁶¹ News reports have indicated that Apple and Facebook are set to be the next companies to enter the original scripted programming market online, further boosting investment, competition and consumer choice.⁶²

⁶¹ Ali Choukeir, *Profile: Hulu*, SNL Kagan (Feb. 22, 2017), <https://www.snl.com/web/client?auth=inherit#news/article?id=39463088&KeyProductLinkType=2>; Ali Choukeir, *Profile: Amazon Prime Video (U.S.)*, SNL Kagan (Jan. 30, 2017), <https://www.snl.com/web/client?auth=inherit#news/article?id=39180532>; Ali Choukeir, *Profile: Netflix (U.S.)*, SNL Kagan (Mar. 6, 2017), <https://www.snl.com/web/client?auth=inherit#news/article?id=39683539>.

⁶² Peter Kafka, *Apple has hired two well-regarded TV execs to ramp up its original video plans*, Recode (Jun. 16, 2017), <https://www.recode.net/2017/6/16/15814908/apple-tv-sony-jamie-erlicht-zack-van-amburg-eddy-cue>; Joe Flint & Deepa Seetharaman, *Facebook is Going*

The online video market has also led to an increase in the availability of independent programming. As the WGAW noted in its filing in the Commission’s inquiry on diverse and independent programming, independent producers accounted for 49% of TV-length original scripted series released by OVDs in the 2014-2015 season.⁶³ OVDs offered consumers the largest number of independently produced original TV-length scripted series of any media platform. Fourteen independent production companies released series through OVDs in the 2014-2015 season, including smaller studios such as Media Rights Capital (*House of Cards*), Gaumont International Television (*Narcos*), and The Tornante Company (*BoJack Horseman*).⁶⁴

The growth of the online video market has generated pro-competitive responses from traditional programmers. The success of Netflix’s business model has led HBO, Showtime, Starz and CBS to offer standalone subscription access to online consumers. Virtual cable bundles are now offered by Hulu, AT&T, Sony, Dish, YouTube and others, often at lower costs than traditional cable packages.

The rapid ascendance of online video provides strong evidence to suggest that the closed system of cable television, where networks and MVPDs act as gatekeepers, has failed to meet consumer demand for new and different programs and services. The open Internet, in contrast, has made the video programming market more competitive and responsive to consumers. But this has only been possible because OVDs have the ability to speak directly to consumers without fear of ISP censorship when protected by open Internet rules.

Hollywood, Seeking Scripted TV Programming, The Wall Street Journal (Jun. 25, 2017), <https://www.wsj.com/articles/facebook-is-going-hollywood-seeking-scripted-tv-programming-1498388401>.

⁶³ *Diverse and Independent Programming NOI Comments*, at 13.

⁶⁴ *Id.* at 15.

Without rules we can expect a replication of the cable television model, where a few powerful gatekeepers determine what content reaches the public. The major ISPs have already shown a willingness to abuse their power to undermine online video competition. Comcast, AT&T, Verizon and Time Warner Cable all degraded Netflix traffic by refusing to provide sufficient interconnection capacity. Customers of these ISPs received poor video quality when using Netflix, even though they had paid their ISP for Internet access. Netflix's connections were improved only after the company agreed to pay the ISPs.

The history of the cable television market provides further evidence of the future of the web without open Internet rules. The development of the cable market featured a high degree of vertical integration and carriage preference for affiliated networks. An FCC report in 1990 found that 50% of national cable programming networks were owned, in whole or in part, by cable operators.⁶⁵ The report also noted that vertical integration had increased following the 1984 Cable Act, and that vertically-integrated channels launched after passage of the law had higher subscribership and ratings than non-vertically owned channels.⁶⁶ Cable industry research in the 1990s confirmed that cable operators tended to favor affiliated networks, sometimes at the expense of rival networks.⁶⁷ While channel capacity expanded, research in the 2000s continued to find that vertically-integrated MVPDs tended to carry affiliated networks more frequently than

⁶⁵ In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600, *Report*, 5 FCC Rcd. 4962, 5007-5008 ¶¶ 79-80 (1990).

⁶⁶ *Id.* at 5008, ¶ 80.

⁶⁷ David Waterman & Andrew A. Weiss, *Vertical Integration in Cable Television* 88 (1997).

rival networks and that affiliated networks were available on more widely-distributed programming tiers.⁶⁸

An Internet with fast and slow lanes, which is precisely what will happen should the Commission reclassify broadband as an information service, is not unlike the cable television model where certain networks, usually those owned by MVPDs or powerful programmers, are given preferential access to consumers in the form of channel positioning or inclusion in the basic package or new, smaller bundles. Consumers do not make these choices; instead the decision is made by the gatekeeper, distorting the free market that this Commission supposedly champions.

a. Writers Support Open Internet Rules Based in Title II

Recently, more than 350 showrunners and series creators of television and digital media programming submitted a letter to the Commission in support of the existing open Internet rules and the importance of classifying broadband as a telecommunications service.⁶⁹ These writers are the creative force behind most of the scripted programming on television and the Internet and understand the need for open Internet rules to protect upstream content markets from anticompetitive practices by ISPs. In addition, several writers have composed individual comments on what an open Internet, protected by strong anti-discrimination rules, means for them as writers. We include their stories in this filing.

⁶⁸ Dong Chen & David Waterman, *Vertical Ownership, Program Network Carriage, and Tier Positioning in Cable Television: An Empirical Study*, 30 Rev. Indus. Org. 227, 249 (2007).

⁶⁹ WGAW Showrunner and Show Creator Letter to FCC Chairman Pai, WC Docket No. 17-108 (filed Jul. 12, 2017).

Ben Watkins, *Hand of God, Burn Notice*

I've had many positive experiences within the traditional network/cable structure, but a major part of the attractiveness of online platforms to viewers and writers is their willingness to take risks and expand the spectrum of the stories being told and the people telling them. The internet itself has changed the playing field, and this rewards risk-takers.

When I created *Hand of God*, I found a space with Amazon to explore the kind of wide-ranging and provocative stories that don't always fit on traditional television outlets. *Hand of God* pushes buttons on the topics of religion, race, grief, greed, the ambivalence of modern society and anything else you're not supposed to talk about at a cocktail party (or on TV). Yet I have the freedom to explore these ideas in depth with an excellent and diverse ensemble cast. And as an African-American showrunner, this freedom to make choices that promote diversity is a high priority. At Amazon, I have been able to experiment, while working in an atmosphere that's free from the kind of limits that can come from working with outlets that have become associated with certain types of content, or are beholden to certain types of audiences and advertisers. In addition, I have seen the emergence of streaming platforms push all of television into new terrain. The overwhelming response of audiences to embrace adventurous storytelling has forced network and cable television to rethink their approach, and lean into taking bigger risks. I really think expanding the envelope this way is going to be better for audiences, storytellers and networks.

Nicole Yorkin, *Z, The Killing*

I'm the Co-Creator and Showrunner (with my writing partner Dawn Prestwich), of the Amazon streaming series *Z*, with Christina Ricci, which premiered this year. As a 27-year-veteran writer, who started out in television in the days when there were only three BIG networks and one smaller one (Fox), I can honestly say that an open internet has created a revolution in creative content the likes of which I've never before witnessed. Where else but on the internet would a studio decide to produce a dramatic series like ours, about a famous *woman*, Zelda Fitzgerald, the wife of American author and icon F. Scott Fitzgerald?

Net neutrality and the open Internet gave us the freedom to create *Z*, a niche series, sell it to Amazon and have it seen by the viewing public, solely based on the merits of our series idea, and not some media company's idea of what the public should be watching.

Just as importantly, with the open internet and the growth of online platforms, there's been a renaissance in opportunities for women showrunners and diversity in content, allowing new and different voices to be heard, which only benefits the public, as well as the creative community.

Zander Lehman, *Casual*

I am the creator and showrunner of *Casual*, a 30-minute television series that is financed and distributed by Hulu, an internet content platform. The online space is currently one of the most exciting and creatively fulfilling places to create content. It is a place where we can tell important adult stories, uncensored and reflective of the world we live in. It is a place where we can hire whoever we want to execute our vision. In the case of my show, that means a majority of female writers and directors and multiple members of the LGBT community. The internet is, quite simply, the new frontier for storytellers of all kinds, creeds, colors and voices. A repeal of the open internet rules represents the most significant threat to that space that I can imagine. Changing the open internet rules will mean ceding creative control to the few. It will give unprecedented power to ISPs who have already profited handsomely through lack of competition. For the sake of the 200+ Americans that are employed to produce my show, whose jobs are now at risk, I ask you to reject these changes.

Luisa Leschin, *Just Add Magic, East Los High*

New online platforms have meant additional buyers for our content, giving writers many more opportunities for work; both at the entry level and higher levels. My experience working for Amazon on *Just Add Magic*--considered a huge success for them--was excellent. We were given all the support needed to be creative. We received notes but only from our executives. As a Co-Producer number 2, I was given tremendous freedom to come up with stories that were original and not something you would find on network television. With a higher budget per episode we were able to produce exceptional product.

The public ultimately benefits because it is given some fresh entertainment options. They are able to choose to watch content from new voices or experienced voices that have not been able to put forth their best ideas. The show creator is given the opportunity to create a series that isn't weighed down by having to appeal to the largest common denominator. Programming is becoming more customized, benefitting content creators and viewers alike.

Without the open Internet creative freedom will be severely limited. I don't understand who benefits from this. With streaming and Internet the consumer -- more than in any other delivery system -- has the choice of what they watch, without being dictated to by an outside monitoring force. As we have already experienced, with increased competition from new platforms, quality shows rise to the top via viewer demand.

Shawn Ryan, *Timeless, Mad Dogs, Last Resort, Terriers, The Unit, The Shield*

I am a television writer and creator who has worked for broadcast network, basic cable and streaming outlets over the past twenty years. When my career started, there very few places to sell ideas to and viewers were extremely limited in what they could watch and when. In recent years, having worked on projects for both Netflix and Amazon, it is incredible to see how the internet has increased the options not only for content creators, but also for consumers. The airwaves are no longer controlled solely by the same 5-6 companies. Diversity of thought is promoted and a much wider range of entertainment programming is available to people. This has only become possible through an open internet. Dismantling the 2015 Open Internet Rules would threaten this very freedom for creators and viewers by allowing companies to control (and weaken) the viewing experience of consumers by allowing less preferential treatment to those who aren't willing to pay for what now comes for free -- equal treatment online for their product. Please allow my industry to continue to grow. Please allow maximum choice for the American public. Please keep the 2015 Open Internet Rules intact.

Amy Aniobi, *Insecure, Awkward Black Girl*

I wrote for a web series called "Awkward Black Girl" that was created by Issa Rae and eventually bought by Pharell's YouTube channel - I didn't create it, but I can speak to writing for it. Of course writing an online series encourages greater creativity. There are fewer execs and fewer checks and balances and smaller audience segments to please - plus lower financial risks, which means less fear on the side of the developers. That means artists can say what they want, how they want, usually without fear of "low ratings." Unlike on network television, where content must appeal to a broad audience to survive, on the internet, specificity of voice is king. That leads to greater content diversity - as well as talent diversity. I know that working on the web and creating my own content is a lot of why I have progressed quickly as a writer. I learned how to do it in my voice, first. And as a writer, it's essential to know your voice.

Online platforms encourage diversity and the public benefits by seeing diversity. When writers don't have to be confined to the 22-minute, ad-friendly pace and structure of network television, they can create unique stories told in unique ways. And when audiences are able to find those shows that speak directly to them, they're more invested in watching. Network television is scared of the "binge-viewer" - but more and more, I see audiences binge programming because they love it. It's easier to binge online - so audiences are more likely to fall in love with characters, worlds, themes and stories presented online. In other words, with new possibilities to consume content online, audiences have new opportunities to fall in love with TV again.

Leann Bowen, *Dear White People*

As a writer for television, I absolutely support net neutrality and an open internet. Keeping the internet open, free from ISP discrimination and the implementation of preferential access ensures a greater diversity of voices and contributors to our culture. I have seen a boom in diversity because of our open internet. The internet has added acres of “landscape” with which we have populated with very high quality shows. Because of this, show runners and producers are taking risks and have minimized oversight to create truly groundbreaking art.

Any person, in any corner of the country, has an opportunity contribute to the cultural landscape with the same access as anybody else. Because of this, new and unique voices, marginalized voices, have pushed upward through the woodwork to create great and influential content. Some of the biggest shows from African-Americans this year past have roots in the internet. *Atlanta*, which is arguably the best new show on the scene, was created by Donald Glover. Donald Glover started his career making comedy videos with his sketch group and uploading them to YouTube. His popularity landed him writing jobs for television. He transitioned to rapping, the subject of his show. The title of one of his rap albums is “Because the Internet.” He literally recognizes the influence the internet has had on his career and his art. The second big show created by an African American artist is *Insecure*. A wonderful show on HBO, it began as a web series, again on YouTube. The show I write for, *Dear White People*, which explores race in America, began as a Kickstarter campaign to fund a burgeoning young filmmaker’s vision.

I started my career writing and directing for internet platforms. The increase in outlets have exponentially given opportunities to new artists that were previously not there.

Changing the landscape of the internet and allowing companies to put value on what was previously an egalitarian entryway to our internet and discriminate against content will make for an uneven playing ground and limit the ability of marginalized and underrepresented viewpoints to contribute to our culture. Art thrives in diversity. Creativity thrives in freedom of exploration. Ending an open internet will threaten both.

V. The Commission Improperly Assesses Investment to Justify Repeal

To reach its foregone conclusion that the open Internet rules must be repealed, the Commission relies almost solely on a faulty and narrow analysis of investment after Title II reclassification. This analysis does not establish causation between the *Order* and ISP capital expenditures and has been disputed. Further, by taking an inappropriately narrow view of investment, the NPRM ignores the virtuous cycle and the broader investment growth occurring

in the Internet economy. As the Commission noted in the 2015 *Order*, “[T]o the extent our decision might in some cases reduce providers’ incentives, we believe any such effects are far outweighed by positive effects on innovation and investment in other areas of the ecosystem that our core broadband policies will promote.”⁷⁰ In its 2016 ruling upholding the *Order*, the U.S. Court of Appeals for the D.C. Circuit found this conclusion to be reasonable and within the agency’s discretion and expertise.⁷¹

In the NPRM, the Commission constructs an analysis of investment that is designed to reach the conclusion that the *Order* has harmed investment. Its main evidence are selectively chosen comments from ISPs who opposed Title II in prior open Internet proceedings and a study comparing capital expenditures just prior to and immediately after the 2015 *Order*.⁷² While the Commission cites threats of foregone investment made in comments from some ISPs, it fails to mention other comments by ISPs and public statements made by executives of some of the largest broadband providers that contradict these threats. In a 2015 letter to the Commission, Sprint’s Chief Technology Officer Stephen Bye stated that the company “does not believe that a light touch application of Title II, including appropriate forbearance, would harm the continued investment in, and deployment of, mobile broadband services.”⁷³ When speaking to investors in 2014, Verizon CFO Francis Shammo said that Title II would not affect Verizon’s investment, stating, “...we’re going to continue to invest in our networks and our platforms, both in wireless

⁷⁰ *Open Internet Order* at 5791, ¶ 410 (internal citations omitted).

⁷¹ *USTA v. FCC*, 825 F.3d at 707.

⁷² *NPRM*, ¶ 45.

⁷³ Letter from Stephen Bye, Chief Technology Officer, Sprint, to FCC Chairman Wheeler, GN Docket No. 14-28, at 1 (filed Jan. 15, 2015).

and wireline FIOS and where we need to. So nothing will influence that.”⁷⁴ Also in 2014, The Washington Post reported a Time Warner Cable spokesman as saying “that regardless of what the FCC does on net neutrality, the company finds the broadband market ‘very attractive’ in the short and long terms.”⁷⁵ In May of 2015, Comcast Cable President and CEO Neil Smit told investors that “...Title II, it hasn’t affected the way we’ve been doing business or will do our business.”⁷⁶ Statements, particularly those made to investors, who publicly-traded companies have a duty to accurately report information to, reveal how ISPs actually view the 2015 *Order’s* effect on investment.

The Commission’s other piece of evidence is a comparison of broadband capital expenditures by the top twelve ISPs in the years 2014 through 2016.⁷⁷ The data show a relative decline in capital expenditures in 2015 and 2016 compared to 2014. The use of this simplistic analysis of a small data set to justify the reversal of Commission policy is highly problematic and will not survive legal scrutiny. Simply adding up annual capital expenditures of the nation’s top ISPs and comparing the year prior to reclassification with 2015 and 2016 results does not amount to determining the impact of Title II on investment. Investment decisions and the amount spent on capital expenditures in a given year are the result of numerous factors including competition

⁷⁴ Jon Brodtkin, *Verizon admits utility rules won’t harm FiOS and wireless investments*, Ars Technica (Dec. 10, 2014), <https://arstechnica.com/business/2014/12/verizon-admits-utility-rules-wont-harm-fios-and-wireless-investments/>.

⁷⁵ Brian Fung, *Comcast, Charter and Time Warner Cable all say Obama’s net neutrality plan shouldn’t worry investors*, The Washington Post (Dec. 16, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/12/16/comcast-charter-and-time-warner-cable-all-tell-investors-strict-net-neutrality-wouldnt-change-much/?utm_term=.921df30629df.

⁷⁶ Comcast Earnings Call, Q2, 2015 Results, Transcript courtesy of Seeking Alpha (May 4, 2015), <https://seekingalpha.com/article/3136756-comcasts-cmsa-ceo-brian-roberts-on-q1-2015-results-earnings-call-transcript?part=single>.

⁷⁷ Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era*, Hal Singer Blog (Mar. 1, 2017), <https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era/>.

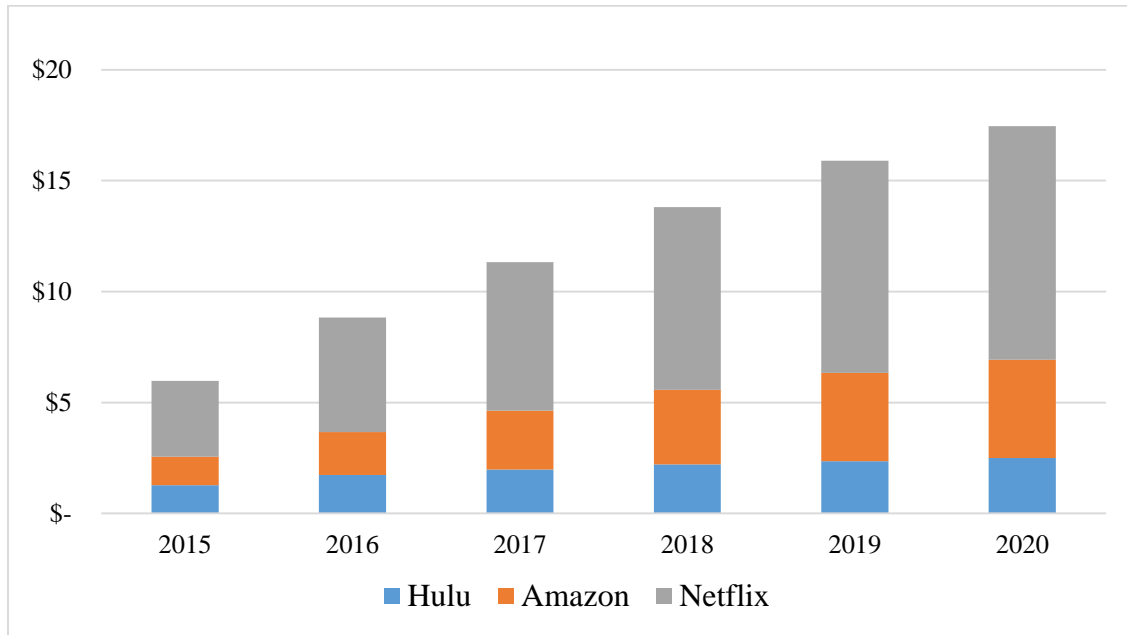
and product life cycle, and the analysis makes no attempt to adjust for any such factor. In addition, this analysis has been disputed. In its report on broadband investment in the Title II era, Free Press finds that capital expenditures for the industry have continued to increase and that company-specific declines in capital investment were explained by other factors.⁷⁸

Another critical flaw of the Commission's analysis of investment is that it completely ignores the edge provider investment that is critical to the virtuous cycle. From this more appropriate lens it is undeniable that investment continues to grow. In this filing the WGAW has outlined the growth of investment in online video, noting that just three OVDs – Netflix, Amazon and Hulu – spent a reported \$9 billion licensing content in 2016. The table on the following page provides industry analyst SNL's estimates for online video content spending by these three firms, which it projects to grow to a combined \$17.5 billion by 2020.⁷⁹ These three OVDs represent only a piece of the online video market, which is only one segment of the Internet economy.

⁷⁸ S. Derek Turner, *It's Working: How the Internet Access and Online Video Markets are Thriving in the Title II Era*, Free Press (May 15, 2017), <https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf>.

⁷⁹ Ali Choukeir, *Profile: Hulu*, SNL Kagan (Feb. 22, 2017), <https://www.snl.com/web/client?auth=inherit#news/article?id=39463088&KeyProductLinkType=2>; Ali Choukeir, *Profile: Amazon Prime Video (U.S.)*, SNL Kagan (Jan. 30, 2017), <https://www.snl.com/web/client?auth=inherit#news/article?id=39180532>; Ali Choukeir, *Profile: Netflix (U.S.)*, SNL Kagan (Mar. 6, 2017), <https://www.snl.com/web/client?auth=inherit#news/article?id=39683539>.

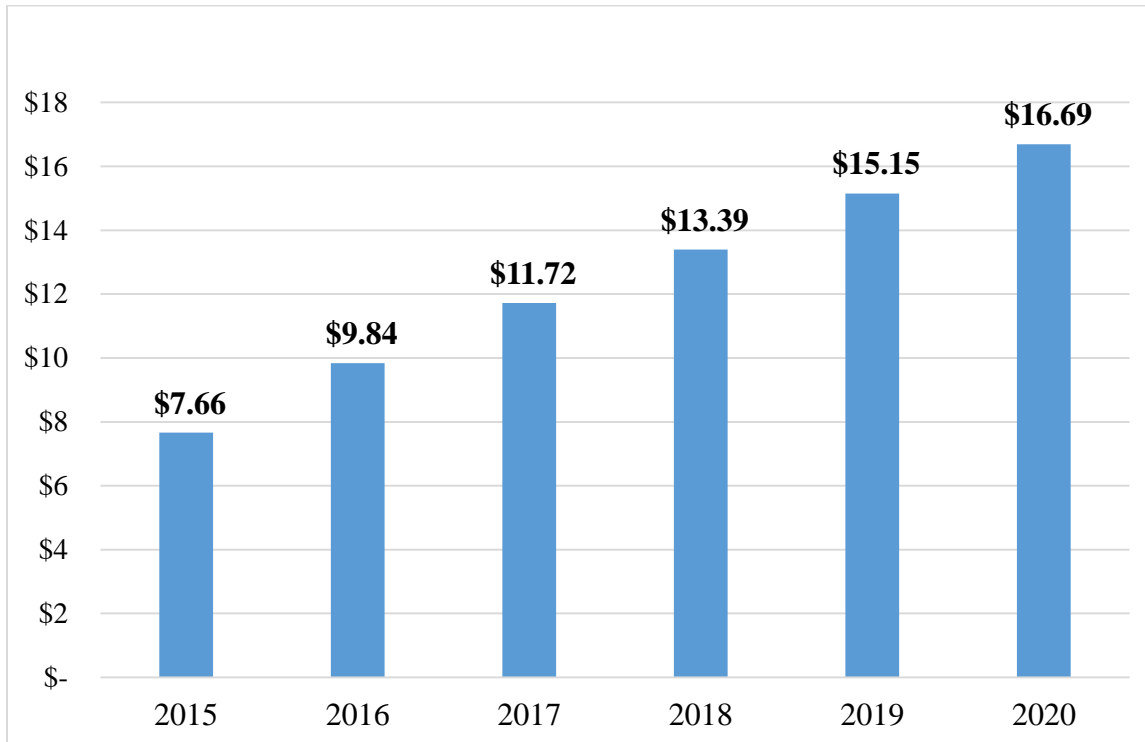
**Chart II. Online Video Content Spending by Hulu, Amazon and Netflix
(\$ in billions)**



Research firm eMarketer also projects significant growth in digital video advertising, which is another form of investment in the online video market as advertising funds online content and services.⁸⁰

⁸⁰ *Digital Video Advertising to Grow at Annual Double-Digit Rates*, eMarketer (Jun. 20, 2016), <https://www.emarketer.com/Article/Digital-Video-Advertising-Grow-Annual-Double-Digit-Rates/1014105>.

**Chart III. Digital Video Ad Spending
(\$ in billions)**



The FCC has already established the importance of edge provider investment and the virtuous cycle to the complete picture of broadband investment. The holistic analysis reveals the continued growth of broadband investment facilitated by an open Internet.

VI. Conclusion

The NPRM is an ideologically-driven proposal to hand control of the Internet to a few powerful gatekeepers. It contradicts more than a decade of bipartisan Commission policies and rules to protect the open Internet. The Commission's plan to reverse the classification of BIAS to an information service has no legal or factual basis. BIAS remains a quintessential telecommunications service and nothing has changed between the 2015 *Order* and present day to justify the proposed action. As outlined in this filing, open Internet rules have been vitally important to protecting and promoting online competition and innovation. These rules have been

necessary because of the well-documented history of ISPs exercising their gatekeeper power to harm competition. As competition on the Internet increases, particularly in the online video market, the incentive and ability of ISPs to exercise their gatekeeper power to harm the open Internet has only increased. If enacted, the NPRM will eliminate the Commission's ability to protect an open Internet through legally-enforceable rules. As such, it would hand control over the free and open Internet to ISPs, which will usher in an era of discriminatory, pay-for-play behavior by these powerful gatekeepers.