

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

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Introduction

Writers Guild of America, West, Inc. (WGAW) respectfully submits the following comments in response to the *Public Notice* by the Wireline Competition Bureau released on February 19, 2014, in GN Docket 14-28.

WGAW is a labor organization representing more than 8,000 professional writers working in film, television and new media, including news and documentaries. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in film are written by WGAW members and the members of our affiliate, Writers Guild of America, East (jointly, “WGA”). Increasingly, the original video programming available on sites such as Netflix, Amazon, Hulu, Crackle and YouTube, all made possible by an open Internet, are also written by WGA members. Given the importance of an open Internet to media competition, the WGAW has been an active participant in the FCC rulemaking process.¹ In addition, WGAW Assistant Executive Director Charles Slocum served as a member of the Open Internet Advisory Committee (OIAC).

A free and open Internet is essential to our democracy. As the Internet has become the modern town square, nondiscriminatory access to diverse and independent news, information and entertainment sources on this platform is necessary for the free exchange of ideas. The WGAW welcomes the Commission’s continued support for Open Internet rules despite the U.S. Court of Appeals for the District of Columbia Circuit decision in *Verizon v. FCC*. We are, however, deeply troubled that the proposed rules will allow Internet service providers (ISPs) to charge edge providers for priority access to their networks. The Commission has already found

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

that ISPs have both the incentive and ability to limit Internet openness, and fees for prioritization could “reduce edge providers’ incentives to invest and innovate.”² Allowing ISPs to engage in such behavior will fundamentally undermine an open Internet.

We urge the Commission to take action, including Title II reclassification of the transmission component of Internet service if necessary, to codify net neutrality principles and promote broadband adoption. Title II classification remains the most appropriate legal category for a quintessential telecommunications service like Internet access and the most effective way of ensuring the Internet remains a neutral platform for free speech and economic innovation. Internet users and content creators are not served by legal uncertainty when a clear path to net neutrality remains available. The remand also provides an opportunity to respond to serious discriminatory and anti-competitive practices in the delivery of Internet access that were not addressed under the previous rules.

Open Internet Rules Remain Necessary

In the three years since the Commission adopted the Open Internet rules, products and services available online have only become more robust. The Open Internet rules have kept entry barriers low, spurring innovation and competition across many industries. Writers are now benefitting from competition for content from new online video platforms which results in more choice for consumers. 2013 marked the debut of original television-length programming from outside the television ecosystem as Netflix and Amazon began offering original drama and comedy series directly to consumers. Press reports indicate Xbox and Playstation will be the next online providers to offer such programming.³

² *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010), ¶26.

³ Nellie Andreeva, “XBox Develops Pro Skater Comedy Series,” *Deadline Hollywood*, December 6, 2013, <http://www.deadline.com/2013/12/xbox-develops-pro-skaters-comedy-series/>; Marc Graser, “Microsoft to Launch

But, these new services represent a threat to incumbent multichannel video programming distributors who provide both cable television and Internet service. Reports of reduced quality streaming and paid peering arrangements indicate ISPs like Comcast are using their market power to limit the Internet's openness. The WGAW has also expressed concern over the increasing use of arbitrary data caps as a member of the Commission's Open Internet Advisory Committee. These developments make protecting the Internet more important than ever.

Essential Elements of Network Neutrality

For the Internet to remain a platform for innovation, competition and growth, the FCC must fulfill the three principles of the Open Internet rules: no blocking, no unreasonable discrimination, and transparency. But the Commission must go beyond the original rules because ISP behavior, including refusal to upgrade connections and use of discriminatory data caps, highlight important shortcomings which must be addressed.

Prevent ISP Interference with Legal Traffic

ISPs must be prohibited from blocking access to legal content, including at Internet peering or transit points. The no blocking rule must also cover more subtle practices that achieve the goal of blocking such as throttling, or degrading access to legal content. The Commission appropriately recognized how such behavior can have the same effect as outright blocking in the Open Internet Report and Order.⁴ This rule remains critical because many ISPs are also video

First Original Shows on Xbox in Early 2014," *Variety*, December 13, 2013 <http://variety.com/2013/digital/news/microsoft-to-launch-first-original-shows-on-xbox-in-early-2014-1200953110/#>; Nellie Andreeva, "Xbox Developing 1990s Music Series Based on Rapper Nas' Life," *Deadline Hollywood*, February 11, 2014, <http://www.deadline.com/2014/02/xbox-developing-1990s-comedy-series-based-on-rapper-nas-life/>; Bryan Bishop, "Sony's first original TV series for Playstation will be 'Powers,'" *The Verge*, March 19, 2014, <http://www.theverge.com/2014/3/19/5527878/sonys-first-original-tv-series-for-the-playstation-will-be-powers>.

⁴ *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010), ¶66.

distributors and phone service providers who have both the incentive and ability to limit the quality of service of competitors. The net neutrality rules must comprehensively protect competition by unaffiliated content and service providers.

Prohibit Discriminatory Behavior by ISPs

Allowing ISPs to serve as corporate gatekeepers of Internet content, deciding what viewers can see, will hurt consumers and content creators. We urge the Commission to prohibit ISPs from charging edge providers for enhanced delivery to consumers. Allowing such behavior would enhance ISP power over content providers, favor incumbents who can afford to pay and stifle innovation and competition. As such, a nondiscrimination principle that gives every business or individual the opportunity to compete for the Internet audience is necessary.

A nondiscrimination rule must address ISP practices such as data caps, which make substitution of online video for traditional video unaffordable or simply discriminate between content provided by the ISP and unaffiliated providers. ISPs already implement usage-based pricing by offering different tiers of Internet service, imposing data caps in addition to tiers prevents online video from competing with MVPD video that does not have equivalent caps.

Achieving nondiscrimination also requires the Commission ensure that the designation of “specialized services” not be used to allow preferential treatment of affiliated content or the content of companies willing and able to pay for special treatment. Allowing ISPs to charge for enhanced delivery of content on the Internet would provide an unfair advantage to dominant companies and foreclose opportunities for new entrants to the market. Such a designation can also be used to circumvent the nondiscrimination rule, as Comcast has done with its Xfinity app on Microsoft’s Xbox 360, stating that the app gets special treatment because it is “being

delivered over our private IP network and not the public Internet,” and that the Xbox “acts as an additional cable box.”⁵ Specialized services must be carefully defined to prohibit such anticompetitive behavior.

A nondiscrimination rule should also provide a process to address and limit the ways ISPs intentionally degrade Internet service, including excessively oversubscribing residential service and allowing interconnection points to become congested. Both of these schemes create artificial congestion that can then be exploited by ISPs as an excuse to extract fees from content providers, as in the recent Comcast-Netflix peering deal, or lead to inferior performance for subscribers during peak Internet use periods.

Require Disclosure of Network Management Practices

ISPs must be required to disclose how they address traffic congestion in order to prevent abuse. Such disclosure should include local performance characteristics, including interconnection. Transparency will ensure that ISPs do not use network management practices unfairly to enhance or degrade access to particular content.

Open Internet Rules Must be Applied Broadly

Recent developments make clear that the narrow application of the Commission’s rules will be insufficient to protect an open Internet. As such, all rules developed must be extended to the Internet backbone. ISP peering is a net neutrality issue because by charging for peering, an ISP is creating a superior, paid lane into its network. If rules only address intra-network discrimination, ISPs can still impose inter-network discrimination at the bottlenecks into their

⁵ Kyle Orland, “Comcast: Xbox 360 On Demand streams won’t count against data caps,” *Ars Technica*, March 26, 2012, <http://arstechnica.com/gaming/2012/03/comcast-xbox-360-on-demand-streams-wont-count-against-data-caps/>; Comcast, “FAQs: Xbox 360,” <http://xbox.comcast.net/faqs.html>.

networks. The Commission should prohibit ISPs from using their terminating access monopoly to extract payments from content providers or their delivery networks for Internet traffic that has already been paid for by ISP subscribers.

The rules must also apply to both wireline and wireless Internet access services: There should not be a second class of Internet access, where consumers are not guaranteed the right to the lawful content, services and applications of their choice. According to Pew Research, 10% of Americans have a smartphone but no home broadband connection.⁶

The FCC Must Use its Authority to Promote Broadband Competition

The Commission must use its authority to promote broadband adoption by addressing state laws that prohibit competition from municipal broadband initiatives. For many Americans a cable ISP is the only choice for high-speed Internet, making local initiatives vital to competition. We fully support Commission plans to undo the harm caused by laws restricting municipal broadband.

Conclusion

We stand at an important moment for the future of the Internet. The open nature of the Internet has enabled competition, innovation and economic growth. However, as ISPs and some Internet content providers grow in size, their ability to steer the direction of the market threatens this progress. To ensure competition continues to benefit all Internet users, the Commission must enact rules that maintain this openness and survive judicial scrutiny. Given the challenges to the

⁶ Pew Research, "Home Broadband 2013," August 26, 2013, <http://www.pewinternet.org/2013/08/26/home-broadband-2013/>.

FCC's authority under Section 706, we urge the Commission to do more than keep Title II on the table.