UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

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Why Net Neutrality Matters

Written Testimony of the Writers Guild of America, East, AFL-CIO

The Writers Guild of America, East, AFL-CIO (the "WGAE") represents thousands of members who write comedies, dramas, and nonfiction programs for film, television, radio, and digital media. Our members work for the major television and radio networks and stations and for public television, where they write, produce, edit, and create graphics for news and public affairs programs. Their material is broadcast over the airwaves and cable television, and distributed on the Internet.

We believe the Federal Communications Commission should adopt rules which would ensure that the Internet remains open and nondiscriminatory. If the Commission is unable to accomplish this, we believe Congress should do so. Net neutrality rules should:

- Prohibit paid prioritization
- Extend beyond the "last mile" to encompass the relationship between Internet Service Providers and edge providers
- Apply fully to mobile Internet service
- Clarify that the Internet is subject to regulation under Title II of the Act.

1. The unprecedented opportunities presented by the Internet

The Internet and other digital media offer an unprecedented opportunity for creators to reach audiences and for people to watch and read what they want, when they want. This is profoundly different from the current media environment, in which a relative handful of multinational conglomerates decide what gets distributed to the public on television and in the movie theaters. Permitting broadband providers to discriminate amongst content, to decide which programs get priority distribution, would transform the open architecture of the internet into a slightly upgraded version of today's television and film industry. We believe the public and the economy benefit from an Internet that offers a greater variety of options than what is currently available on television and radio and in movie theaters. Digital technology presents a vast range of possibilities to content creators and consumers alike, and it would be a tragedy to squeeze all of that into a narrow commercial band.

We respectfully submit that the Open Internet Order as currently proposed by the Federal Communications Commission fails to recognize the transformed structure of electronic communications. Increasingly, the information and programming that Americans depend on arrives on a single pipeline which is controlled by a very small number of very large corporations (mostly cable companies, although telecommunications companies also compete in some markets). By focusing only on the "last mile" of Internet connections and by permitting paid prioritization – not only on the last mile but also farther upstream – the Order would do very little to ensure open access to content. Instead, the enormous democratic potential of digital media would be squandered in favor of a narrowly commercialized world controlled by huge, deep-pocketed gatekeepers.

In its deliberations about the Open Internet Order, the proposed merger of Comcast/NBCU and Time Warner Cable, and the proposed merger of AT&T and DirecTV, the Commission will determine how the media landscape is drawn for generations to come. The consolidation of major digital media entities, combined with the archaically-narrow scope of the Order, could mean the brave new world of

digital communications will wind up looking very much like the current television and film industry, in which a small number of powerful entities limit competition and thwart openness. To avoid this profoundly disturbing fate, the Commission must craft a new set of rules.

If the Commission is unable to take action, whether because of concerns about its jurisdiction or because of the enormity of the policy undertaking, we respectfully request Congress to step in. Our elected officials can clarify that the Internet is subject to regulation as a utility under Title II of the Act, and can adopt robust, far-ranging, and enforceable nondiscrimination rules that will protect the American public and the people who create interesting, inspiring, informative content for digital distribution.

2. New Business Arrangements and the Lack of Competition

In the years since the Commission began its work on an Open Internet Order, the business and technology of digital media have been transformed. Distinctions between content providers and content distributors have continued to blur. The most obvious example is Comcast/NBCU, a giant entity which owns production studios; broadcast and cable television networks; and an enormous system of wires which distribute signals to tens of millions of homes – both "cable television" signals and streams of Internet data (including streamed programs initially made for television or for movie theaters, and programs made for all-digital enterprises like Netflix, whose original series are in some respects indistinguishable from traditional television).

Moreover, Americans increasingly get all of their information and entertainment from a unified system of cables and cords which are controlled by a relative handful of gatekeepers[1]. In most markets there are only two such gatekeepers – the cable company and a telecommunications company, each of which offer a communications package that includes cable TV, broadband, and telephone. (In many markets, there is only the cable company.) These gatekeepers in turn have tremendous incentives to discriminate between content, to steer audiences to content the gatekeepers produce (as with

[1] Even the number of gatekeepers is poised to shrink, as Comcast/NBCU proposes to take over Time Warner Cable and expand into a number of the biggest urban markets, thereby increasing its leverage by a significant amount.

Comcast/NBCU) or to content which is more profitable to carry because the producers or licensees have deeper pockets and can pay for the advantage. This is not the open, innovative Internet the American public needs and wants.

ISPs have an incentive to squeeze edge providers and others by charging additional amounts for priority access to their distribution networks. Netflix' willingness to pay Comcast/NBCU and Verizon huge fees to ensure swift and smooth streaming is economically rational for both entities (and therefore commercially reasonable); Netflix' product is made substantially more attractive to customers as a result, and Comcast/NBCU gains enhanced revenues. Unfortunately, this also means that customers face upward price pressure and content creators and distributors who do not pay for this prioritization have a substantially more difficult time attracting viewers[2].

The FCC has suggested reviewing paid prioritization arrangements through the prism of "commercial reasonableness". Unfortunate, favoring some content and disfavoring the rest might be eminently reasonable to the parties with pockets deep enough to afford to do so. Therefore, a better approach would be a flat ban on pay-for-priority service.

Perhaps more fundamentally, it is difficult to analyze commercial reasonableness when the market is controlled by a monopoly or duopoly. In many parts of the country there is only one ISP – the cable company. In some areas, there are two – the cable company and the telecommunications carrier. In a perfectly competitive marketplace squeezing access to the Internet pipes into Americans' homes

[2] The inevitable result of permitting providers to create favored avenues within this distribution system is to direct consumer traffic to these favored avenues. Access times would be faster, or quality would be superior in some other way. Otherwise there would be no reason for providers to create these preferred avenues. Thus, paid prioritization enables providers to discriminate in favor of and against certain content, which directly contravenes the core principle of nondiscrimination. The preferred material will be distributed via the faster, better-quality fast lanes and consumers will favor it. The diverse, creative, original material made by writers and other independent content creators will be relegated to the slower or lower-quality lanes, and will languish – not because consumers have decided they don't like it as well, but because it is distributed on the official, slow-lane "internet".

through paid prioritization or otherwise would be very difficult to accomplish. Content creators and distributors could do business with any number of ISPs, as could edge providers and consumers. We are unaware of any economic theory in which a market is considered competitive if there is only one supplier, or at best two.

Let us underscore what is at stake. All data reaches consumers through a single pipe. Email, social media, television, feature films after their theatrical releases, made-for-digital programs, news in text form and in video form, land-line telephony. Permitting powerful gatekeepers to control and prioritize what flows through this single pipe, at what rate and quality, would have an enormous effect on what Americans watch and read and learn and write and communicate. Equal and open access is essential and must be protected.

3. The Last Mile

Nominally the Open Internet Order applies only to the relationship between the ISP and the ultimate consumer. Business developments have proven this scope to be far too narrow. Thus, for example, although the paid-prioritization arrangements between Netflix and Comcast/NBCU and Verizon are inherently discriminatory, those arrangements would apparently be beyond the scope of the Order because they involve the relationship between ISPs and an edge provider. This demonstrates that, in the current business environment, it is entirely arbitrary to draw the line at the last mile.

ISPs are just one component of an Internet system that is far more complex and involves far more powerful entities than perhaps one might have foreseen at the dawn of the Internet era. Although it is essential that the entities whose wires (or fiber cables) connect to American homes treat all content that flows through those wires in a nondiscriminatory manner, there are choke points farther up the stream that affect access. Edge providers in particular have clear incentives to consolidate their positions, to use their own economic and technological might to squeeze competitors (e.g., content creators not willing or able to pay the freight). Again, in a perfectly competitive market, it would be difficult for these dominant edge

providers to squeeze, whether by paying ISPs for priority or through other means. Political groups or writers or producers of content could bypass any attempt to squeeze access by sending their material through any number of competitive broadband services. But as long as there are only one or two viable ISPs in any given market, and as long as those ISPs are free to make anti-competitive arrangements with edge providers and others that are positioned farther up the road and not on the "last mile", the bedrock principles of openness and nondiscrimination will be unenforceable.

4. *Application of Open Internet Principles to Mobile Wireless Platforms*

There is no theoretically sound reason to distinguish between wired and wireless digital distribution in the net neutrality analysis. In both cases consumers have access to the same datasphere; in one case the device is connected by wires and in the other case, by a wireless connection. In fact, in most homes and businesses, the computer or iPad or handheld device used by the consumer is wireless; the wireless connection is made between that device and another device in or near the home which in turn interfaces with the internet. The same is true with mobile wireless devices; the only significant difference is that mobile devices can be moved farther away from the device that interfaces with the internet.

Less theoretically, from the perspective of the consumer and the content creator, it's all one distribution system, or at least it will be within a few years, at most. People already use their smart phones to watch streamed movies, access news and entertainment websites, participate in social networks, and engage in essentially the same activities they do on their desktop or laptop computers, in addition to using the smart phones to text and make phone calls. Indeed, the advent of the iPad and other tablet devices seems to eliminate the distinction between "computers" and "mobile devices" altogether.

For these reasons, it seems self-evident that all of the net neutrality principles, including the nondiscrimination principle, must apply with equal force to mobile wireless platforms.