Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	

REPLY COMMENTS OF
THE WALT DISNEY COMPANY
21st CENTURY FOX, INC.
TIME WARNER INC.
CBS CORPORATION,
SCRIPPS NETWORKS INTERACTIVE, INC,
AND VIACOM INC.

The Walt Disney Company, 21st Century Fox, Inc., Time Warner Inc., CBS Corporation, Scripps Networks Interactive, Inc., and Viacom Inc. are leading global content and entertainment companies. We have been consistent leaders in developing and embracing new and innovative ways to distribute video entertainment to American consumers on any number of platforms, including via broadband. Quality content is expensive to produce, and we take significant risks by investing in products for which there is no guarantee of success. We spend billions of dollars every year producing exceptional content that meets the needs and demands of American consumers, and we also continue to invest and experiment to find ways to deliver our content to viewers where and when they want it, and on the displays and devices they want to use.

The development of the broadband ecosystem has taken place alongside a dramatic reinvention of the video ecosystem. The undersigned companies have all transformed our distribution strategies to embrace the broadband revolution, moving out of a distribution system where viewers watched content on only one screen and at a specified time to a multi-

platform distribution system that allows viewers to enjoy our content where and when they want. This reinvention is continuing, and its development will continue to be closely tied to the evolution of the broadband ecosystem.

In order to foster the continued evolution of a new broadband video ecosystem, the undersigned content companies urge the Commission to decline the invitation by some commenters to extend the Open Internet regulations to edge providers. This approach would stifle innovation, be inconsistent with the D.C. Circuit's guidance in *Verizon*, and violate the First Amendment and copyright laws.

Several broadband providers filed opening comments which explicitly call for a no-blocking rule applicable to edge providers, especially video content creators and distributors. Not only do these proposals misread the narrow scope of the *Verizon* decision with respect to the FCC's authority over broadband providers only, but they utterly ignore that such a rule would violate the First Amendment and the rights of content creators and distributors under copyright law. We encourage the Commission to maintain its focus in a manner commensurate with the *Verizon* decision and other existing law.

Any framework adopted by the Commission should tightly focus on broadband Internet access providers. The regulations were not designed for, nor are they compatible with, other entities in the Internet ecosystem. Despite suggestions by a few cable interests including the National Cable & Telecommunications Association and the American Cable Association,[1] extending the regulations to edge providers is patently inconsistent with the limits of Section 706

[1] *See* American Cable Association at 24 (advocating that regulations apply to "online video providers"); National Cable Television Ass'n at 76-78 ("edge providers"); Bright House Networks at 7 ("online publishers"); Cox Communications at 13 ("an edge provider that hosts its content online"); Time Warner Cable at 25-26 ("content owners"); NTCA—The Rural Broadband Association, at 1–8, 14–16.

raised in *Verizon*, and would have troubling First Amendment and copyright law implications. Moreover, such an extension would undermine the virtuous circle of online innovation and, by introducing new uncertainties, discourage investment in new technologies.

The *Verizon* court recognized three limits on the Commission's power under Section 706. To be consistent with Section 706 regulations must: (1) fall within the Commission's subject matter jurisdiction over such communications, (2) be "designed to achieve a particular purpose: to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans'", and (3) not be enacted "in a manner that contravenes any specific prohibition contained in the Communications Act."[2]

Applying any Open Internet regulations to edge providers would be inconsistent with these limitations. While *Verizon* approved of regulations intended to further the "virtuous cycle" of innovation, it emphasized that the regulations before it only applied to broadband providers. That limitation was significant, because broadband providers are "the precise entities to which section 706 authority to encourage broadband deployment presumably extends."[3] *Verizon* does not suggest that Section 706 authorizes the Commission to regulate other entities under the virtuous cycle theory, as such regulations may "'stray' so far beyond the 'paradigm case' that Congress likely contemplated as to render the Commission's understanding of its authority unreasonable."[4]

The legislative history of Section 706 also suggests Congress intended that provision to apply to broadband providers, not edge providers. The Senate Report discusses the

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[2] *Verizon v. Fed. Commc'n Comm'n*, 740 F.3d 623, 640, 649 (D.C. Cir. 2014).

[3] *Id.* at 643 (emphasis added).

[4] *Id.*

goal of "deployment" as focusing on the regulation of "networks" and "equipment needed to deliver advanced broadband capability," not on companies whose content, products and services are distributed on such networks.[5] By focusing on "delivery," Congress clearly meant to apply Section 706 to the networks that directly "deliver" broadband content to consumers. The legislative history describes the legislation's goal as "to promote and encourage advanced telecommunications *networks*, capable of enabling users to originate and receive affordable high-quality voice, data, image, graphics, and video telecommunications services."[6] By focusing on networks—and not the content such networks are "capable of" sending— Congress signaled that Section 706 is directed towards broadband providers, not edge providers.[7]

The *Verizon* court also emphasized the importance of the Commission establishing a factual record that entities subject to any regulations derived from Section 706 authority actually represent a threat to Internet openness absent restrictions on their activity.[8] The court specifically approved of the Commission's detailed findings that broadband providers have the technical and economic ability to distinguish between certain types of Internet traffic,

[5] S. Rep. No. 104-23, at 50-51 (1995)

[6] *Id.* at 50 (emphasis added).

[7] Although the Commission has taken the position that broadband "deployment" is broader than physical deployment, *see In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Seventh Broadband Progress Report and Order on Reconsideration, GN Dkt. No. 10-159, 26 FCC Rcd. 8008, 8020-21 (May 20, 2011), it would be one leap too far to understand "deployment" as both broader than physical deployment and also directed at entities beyond those who provide broadband access.

[8] *Verizon*, 740 F.3d at 645.

giving them economic power.[9] No such factual record exists with respect to edge providers, thus making any regulations pursuant to Section 706 unsustainable under judicial scrutiny.[10]

In addition, subjecting edge providers to Open Internet regulations could have troubling First Amendment implications. If the Open Internet regulations were applied to edge providers in a way that forced them to make their content available to all broadband access providers and their subscribers, it would amount to compelled speech in violation of the First Amendment. As the Supreme Court has recognized, the First Amendment protects against compelled speech because "the choice to speak includes within it the choice of what not to say."[11] To be permissible, even under intermediate scrutiny, such regulations could not "burden substantially more speech than necessary" to serve "an important or substantial government interest."[12] However, this standard would be nearly impossible to meet when applied to edge providers, simply because of the great volume of speech that would be regulated, making it highly unlikely such regulations would be sufficiently tailored.

Finally, applying Open Internet regulations to edge providers would conflict with copyright law. It is a fundamental American constitutional and statutory principle that content creators are deemed to have exclusive rights in their works—works which often cost tens of millions of dollars to create individually, and billions of dollars to create in the aggregate. While we are motivated to distribute our content to as many consumers as possible across as many platforms as possible, we, as copyright owners, are and must remain free to determine how,

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[9] *Id.* at 646.

[10] Forcing copyright holders to share their copyrighted content with others also would implicate the Takings Clause of the U.S. Constitution.

[11] *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 16 (1986).

[12] *Turner Broad. Sys. v. Fed. Commc'n Comm'n*, 512 U.S. 622, 662 (1994).

when, where and to whom our works may be delivered. Any regulation that attempts to limit or curtail these fundamental rights would be inconsistent with and, in fact, abrogate copyright law.

For these reasons, we urge the Commission to decline the invitation to apply the Open Internet regulations to edge providers.

Respectfully submitted,

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