

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of)
)
Framework for Broadband) GN Docket No. 10-127
Internet Service)
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COMMENTS OF
The American Library Association, The Association of Research
Libraries, and EDUCAUSE

The American Library Association (ALA),¹ the Association of Research Libraries (ARL),² and EDUCAUSE³ welcome the FCC’s Notice of Inquiry (NOI) proposing a “third way” forward on the difficult question of regulatory authority over broadband Internet access service. Libraries, librarians, higher education and research networks, and their users all rely on a fast, reliable, and open Internet, and our associations urge the FCC to act quickly and responsibly to re-establish its authority over broadband access so that it can return to its vital role in encouraging broadband rollout and adoption and protecting the openness of the Internet.

I. Libraries and Educators Are Concerned about the Future of Broadband Regulation in Two Ways: As Users of Broadband Services and as Providers of Internet-based Content.

Broadband policies affect libraries, researchers, and higher education institutions in at least two ways: both as users of broadband services and as providers of Internet-based content. High-capacity broadband is the key infrastructure that libraries, community

¹ The American Library Association is a nonprofit organization with more than 63,000 members at all types of libraries including public, academic, and K-12 school libraries.

² The Association of Research Libraries is a nonprofit organization of 124 research libraries in North America. ARL’s members include university libraries, public libraries, government and national libraries. ARL influences the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities they serve.

³ EDUCAUSE is a nonprofit association whose mission is to advance higher education by promoting the intelligent use of information technology. The current membership comprises more than 2,000 colleges, universities, and educational organizations, including 200 corporations, with 15,000 active members.

colleges, colleges, universities, and many others depend upon to provide 21st century research and educational services, job-training courses, distance learning classes, access to e-government, and computer and technology training. For instance, libraries often provide licensed on-line content and specialized digital collections of historically valuable materials. Higher education specializes in developing the most innovative on-line learning services, such as wiki-based collaboration, and cloud computing capabilities. High-capacity broadband capabilities are especially vital for these institutions to serve the needs of the most vulnerable segments of our population – including those in rural areas; unemployed and low-income persons; and the elderly and disabled.

II. FCC Action is Necessary to Preserve Internet Openness and Fulfill the Goals of the National Broadband Plan

Libraries and research and educational institutions need the FCC to assert authority over broadband in order to advance two vital policy goals:

1. First, the FCC needs authority to enforce clear, simple rules to protect the open Internet. On principle, the education, research and library communities support net neutrality as a way to preserve the free flow of information. In practice, these communities require an open, accessible Internet to provide distance learning, telemedicine, access to e-government services, and many other essential services to their communities.⁴ Educators, researchers and librarians are increasingly developing new e-learning services and other teaching tools that depend on unfettered access to the Internet. These communities are very concerned that private sector broadband providers currently have the right and the motive to skew or distort Internet traffic, or to sell higher priority access to certain commercial content providers and discriminate against non-commercial providers such as colleges, universities, and libraries. Without a few simple rules to protect the open Internet, scholarly and educational content could be forced into a broadband slow lane.
2. Second, clear FCC authority over broadband is necessary to implement the National Broadband Plan's (NBP's) recommendations to provide high-capacity network capabilities to community anchor institutions. The library, research and education communities are extremely pleased with the NBP's recommendation that each community anchor institution have at least a 1 Gbps connection by 2020. Providing adequate broadband to community anchor institutions – schools, libraries, health care entities, and the like – is extremely important to our nation's future. Anchor institutions provide essential services to millions of vulnerable and disadvantaged consumers every day. These institutions also create and

⁴ Libraries have never been more important as a source of Internet access for underserved groups. Last year over 30 million people used public library computers to search for a job. The Department of Labor Employment and Training Administration recently partnered with the Institute of Museum and Library Services to augment the significant efforts libraries are already making to help Americans find jobs. See Institute of Museum and Library Services, Department of Labor Provides Guidance to Workforce Agencies on Partnering with Libraries, at www.imls.gov/news/2010/063010b.shtm, (June 30, 2010)..

distribute powerful research and education technologies that ensure the next generation of Americans will be competitive. Without clear authority over broadband, the FCC will not be able to reform the Universal Service Fund, promote access by disabled persons, promote the deployment and use of broadband to low-income Americans and other vulnerable segments of our society, and ensure that libraries, schools, colleges and other anchor institutions receive the high-capacity broadband that they need for the future.

III. The Third Way Is the Best Approach to Establishing FCC Authority

The Third Way proposal is the only realistic way to protect the open Internet and to achieve the Goals of the National Broadband Plan. The competing options outlined in the NOI are seriously flawed: relying on Title I would leave the agency far too weak, while applying all of Title II would give the agency powers that are irrelevant to broadband.

Title I authority is simply too weak a foundation for the important policies the FCC must pursue in coming years. The Court of Appeals decision in the *Comcast* case cast doubt upon any future FCC effort to use its Title I authority to regulate broadband services. Not only would any future action under Title I be appealed, such appeals are likely to be successful in overturning the FCC's actions.⁵ The FCC provided an impressive array of arguments in favor of its ancillary authority under Title I in the *Comcast* case, and the court rejected each of them.

Title II provides a much stronger basis for regulating broadband than Title I. Broadband services were generally regarded as "telecommunications services" under Title II until 2002. The FCC deregulated broadband services at that time under the expectation that competition would develop for broadband services. Now that the market has become dominated by the duopoly (cable and telecom providers), the FCC is justified in re-classifying broadband as a Title II service.

Nonetheless, applying the full panoply of Title II provisions to broadband would give the agency more authority than it needs or could possibly use. The Third Way would apply only those Title II provisions that are appropriate to a 21st century broadband platform. We reject the notion that these basic principles are somehow inapplicable to broadband service simply because it uses a novel underlying technology. Broadband consumers need basic protections, and the FCC should have the authority to promote the deployment and adoption of broadband services to all members of the public. At the same time, there are provisions in Title II that are tailored to telephone network technology and would not make sense in the broadband context. The Third Way would avoid needless overregulation by forbearing from those ill-suited portions of Title II.

⁵ By comparison, as FCC General Counsel Austin Schlick has argued, "the lawfulness of a limited reclassification [under Title II] could be confirmed relatively quickly in a single court case, avoiding the prolonged and uncertain case-by-case testing that would follow from continuing down the Title I road." Austin Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, May 6, 2010, <http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html>.

Some have suggested that the FCC is overstepping its bounds by taking any action at all without waiting for Congress to legislate. We respect the Congressional prerogative to legislate on these matters. It is not clear, however, that there is a consensus on legislation, and the legislative process often takes time. There are a host of competing priorities that will keep Congress busy in the near term and a thorough re-write of Internet-related provisions will have to compete with these priorities. Even though some are advocating a “rifle shot” legislative strategy, it is more likely that Congress will take a comprehensive look at broadband issues, which makes it unlikely that legislative reform could move quickly.

FCC action in the near-term will act as a “spare tire” to ensure that consumers are protected and to implement the Goals of the National Broadband Plan while Congress decides upon its course of action. Preserving the open Internet and implementing the NBP are high-priority issues that deserve to be addressed as soon as possible. Meanwhile, action in the near-term by the FCC will give powerful interests who oppose net neutrality and aspects of the broadband plan an incentive to deal in good faith with Congress.

IV. The FCC Should Only Regulate Broadband Networks That Are Offered to the General Public

The FCC should only reclassify under Title II those broadband networks that are “available to the general public.” Colleges, universities, and libraries often have their own “private” networks that simply connect institutions to each other. These networks are not open to the general public and should not be subject to regulation. We believe that the FCC’s Notice intends to exclude these private networks from regulation,⁶ but the FCC needs to be absolutely clear about this in the final order to prevent excessive regulation of internal, non-profit telecommunications systems. There is substantial precedent in FCC orders and in the Telecommunications Act of 1996 for treating private networks differently from networks available to the general public.⁷ We simply ask that the FCC follow this precedent.

⁶ See, e.g., *Framework for Broadband Internet Services*, GN Docket No. 10-127, Notice of Inquiry, __ FCC Rec’d __, para. 107 (2010) (“Nor do we intend here to address or disturb our treatment of services that are not sold by facilities-based Internet service providers to end users in the retail market....”).

⁷ See, e.g., Telecommunications Act of 1996, 47 U.S.C. § 153(46) (2006) (“The term ‘telecommunications service’ means the offering of telecommunications for a fee *directly to the public*, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”) (emphasis added); *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13086, para. 55 (2009) (“We do not intend that our proposals would apply to ‘establishments that acquire broadband Internet access service from a facilities-based provider to enable their patrons or customers to access the Internet from their respective establishments.’” (quoting *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 15006-07, para. 36 (2005)); .