January 28, 2015

Chairman Tom Wheeler  
Commissioner Mignon Clyburn  
Commissioner Jessica Rosenworcel  
Commissioner Ajit Pai  
Commissioner Mike O’Rielly  
Federal Communications Commission  
445 12th St., SW  
Washington, DC 20554

RE: Ex parte presentation in WC Docket No. 14-28

Dear Mr. Chairman and Commissioners:

As the Federal Communications Commission (FCC) nears a decision regarding net neutrality, the higher education and library communities respectfully submit this letter to re-emphasize the importance of some of the key issues that will ensure that libraries, higher education, students, teachers, researchers, and library patrons continue to have access to an open Internet for education, research, and learning.

As we have stated in our previous comments, the Internet has become an essential platform for libraries and higher education in a wide variety of ways, such as for multi-media instruction and distance learning, educational collaboration through document-sharing websites and applications, storage and retrieval of digital archives, tele-health information, public access to Internet information, and many other educational services. This proceeding is not just about small businesses, innovation and economic growth, although those values are also extremely important. Preserving an open Internet is essential to our nation's freedom of speech, civic engagement, innovation, economic growth, and the broader public interest. Ensuring the Internet remains an open platform is absolutely essential for libraries and higher education to serve their communities as well as for the broader public good.

The Verizon court decision\(^1\) unfortunately gives public broadband providers the opportunity to act on their financial incentives to interfere with the openness of the Internet in ways that could be harmful to the public interest, including limiting the Internet content and services provided by libraries and educational institutions. Preserving the unimpeded flow of

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\(^1\) Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).
information over the public Internet and ensuring equitable access for all people is critical to our nation’s social, cultural, educational, and economic well-being.

We believe that the Commission can preserve the openness of the Internet by asserting its authority under both Section 706 of the Telecommunications Act and Title II of the Communications Act. While we have previously offered some thoughts about the legal basis for these rules, our immediate reason for this letter is to ensure that the other fundamental issues of interest to libraries and higher education are preserved in the upcoming rules. Our views on these issues are set forth below.


1. The final Open Internet decision should explicitly identify the importance of an open Internet for education, research, and learning.

The Notice of Proposed Rulemaking that launched this proceeding in May of 2014 eloquently described the threats to entrepreneurs, edge providers, and small businesses. The NPRM, however, barely mentioned the importance of an open Internet for education and libraries. (Only footnote 250 referenced a joint letter of ALA, ARL, and EDUCAUSE.) Our concern is more than simply hortatory. Public Broadband Internet Access Providers (PBIAPs) need to know from the outset that they have an obligation to treat library and educational institutions with the same degree of openness afforded to all other Internet users. Higher education and libraries also need this assurance to allow them the confidence to develop new teaching and learning applications. We have previously submitted comments identifying several detailed examples of the higher education and library uses of the Internet for education, research, and learning. We urge the FCC to incorporate the needs of libraries and institutions of higher education into its rationale justifying its open Internet policies as well as into the scope of the rules that are adopted. For example, the FCC should make clear that all libraries, colleges, universities, and other public interest institutions that purchase standardized broadband Internet access service from PBIAPs are included in the definition of “mass market” services.

2. The proposed ombudsperson should be authorized to protect the interests of libraries and educational institutions, not just small businesses.

The NPRM proposes to create an “ombudsperson” to “act as a watchdog to represent the interests of consumers, start-ups and small businesses.” (para. 8) We urge the Commission to clarify that the ombudsperson is chartered and authorized to look after the interests of

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Citing to these library and higher education examples will also bolster the Commission’s argument in court if, as is expected, the Commission’s Open Internet rules are appealed.

The proposed rules should only apply to those broadband providers that serve the general public, which we describe as “public broadband Internet access providers” or “public broadband providers.” The word “public” is in this context is intended to have a meaning similar to the definition of “telecommunications service,” which is defined as “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.”

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libraries, colleges and universities, and other anchor institutions in addition to consumers, start-ups, and small businesses. We also note that the discussion of an “ombudsperson” in paragraph 8 appears to focus on retail users, while the language in paragraph 171 focuses on edge providers. Since libraries and higher education are both end users and edge providers, we urge the Commission to clarify that the ombudsperson is authorized to watch out for the interests of both sets of Internet users.

3. The proposed rules should be technology-neutral and should apply equally to fixed and mobile services.

As described in our comments, students, faculty, library patrons, and staff use mobile and fixed Internet access services interchangeably. As the wireless connections continue to grow and mobile broadband substitutes for landline connections, there is less logic to applying different principles based on the technology. Treating the two technologies under different principles skews the marketplace and discriminates in favor of one technology over another. Both modes of Internet access should be regulated under the same principles; to the extent that there are technological differences between fixed and mobile networks, these differences can be addressed under “reasonable network management”.

4. The FCC should clarify that its Open Internet rules do not apply to private network services operated by libraries and higher education for their internal uses.

The FCC should ensure that the final rules are not applied to private networks or end users. There is substantial precedent in the law for treating private networks differently from networks available to the public. The 2010 Open Internet Order correctly found that the Open Internet rules should not apply to premise operators, such as individual consumers’ home Wi-Fi connections or bookstores or coffee shops that provide wireless services to their patrons (often described as the “coffee shop exception”). This list of services is not exhaustive. For instance, almost all libraries offer Wi-Fi connections to their patrons, and these end user Wi-Fi services should not be regulated as if they were public broadband providers. Also, many colleges and universities have their own private end-user networks (both on-campus and off-campus) that are not available to the general public and thus should not be subject to these rules.

5. The FCC should clarify that the “no-blocking” rule includes a “no-redirection” rule.

Just to be sure, it would be useful for the FCC to clarify that its no-blocking rule also prevents a PBIAP from re-directing a consumer from the web site he/she chooses to any other web site. For instance, it should be unlawful for a PBIAP to re-direct a consumer who wishes to access one college’s website to the site of a possible PBIAP “partner” institution, for example. Making this rule clear could prevent misbehavior by a PBIAP.

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4 Some colleges maintain several different campuses and maintain private networks connecting these campuses. These networks are analogous to intra-corporate networks that connect branch offices of a multi-location business. Such networks serve the internal communications and broadband needs of their owners and should not be subject to these rules.
B. The Commission should employ all its legal tools to ensure that Internet openness is protected and preserved.

The Commission should use all legal authority to preserve and protect the openness of the Internet. As noted in previous filings submitted jointly with other library and higher education groups, the FCC can rely on both its authority under Title II as well as Section 706 to preserve the open character of the Internet. Each section has its own strengths, as well as weaknesses. Both sources of authority provide a legal basis for the FCC to create rules to preserve and promote the open Internet.

If the FCC does choose to reclassify broadband providers as common carriers subject to Title II provisions, the FCC should not ignore its authority Section 706. Instead, the FCC should reassert its authority under Section 706 in order to provide strong legal support for these rules and ensure that blocking, discrimination and paid prioritization do not occur. These sources of authority can complement and supplement each other.

For instance, while the FCC may choose to rely on its Section 202 (under Title II of the Communications Act) authority to ban paid prioritization, simultaneously relying on its dual authority under Section 706 may provide added assurance in litigation. As noted in a November 6, 2014, ex parte filing by ARL and ALA, Section 706 would permit the FCC to prohibit edge provider paid prioritization: “Banning paid prioritization is simply a prohibition against a very particular business practice, not a duty to serve every edge provider/consumer in exactly the same way.” Its Section 706 authority could fill any perceived gaps under Section 202 jurisprudence regarding what is “reasonable” and therefore permissible discrimination.

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5 Comments of American Association of State Colleges and Universities, et. al., In the matter of Protecting and Promoting the Open Internet, GN Docket 14-28, at 3, available at http://www.arl.org/focus-areas/telecommunications-policies/3321-net-neutrality-comments-filed-with-fcc-by-higher-education-and-library-coalition. (“We believe that the FCC has all necessary authority to establish such rules. Title II provides valuable certainty to the marketplace and places public broadband Internet access service on an equal regulatory footing with other communications services. If Title II reclassification is not feasible, however, the FCC should craft enforceable rules using its authority under Section 706.”)
C. Conclusion

As the Commission nears its decision on protecting the open character of the Internet, it should keep in mind the needs of libraries and institutions of higher education in achieving their missions. An open Internet is critical for education, research, learning, and access to information, and the Commission should protect these public interests, which our groups serve.

Sincerely,

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