

December 14, 2023

The Honorable Jessica Rosenworcel
Chairwoman
Federal Communications Commission
45 L Street NE,
Washington, DC 20554

The Honorable Nathan Simington
Commissioner
Federal Communications Commission
45 L Street NE,
Washington, DC 20554

The Honorable Brendan Carr
Commissioner
Federal Communications Commission
45 L Street NE,
Washington, DC 20554

The Honorable Anna M. Gomez
Commissioner
Federal Communications Commission
45 L Street NE,
Washington, DC 20554

The Honorable Geoffrey Starks
Commissioner
Federal Communications Commission
45 L Street NE,
Washington, DC 20554

RE: Safeguarding and Securing the Open Internet, WC Docket 23–320

Dear Chairwoman Rosenworcel and Commissioners Carr, Starks, Simington, and Gomez:

The leaders and professionals in higher education technology and research libraries who comprise EDUCAUSE and the Association of Research Libraries (ARL) have engaged consistently and constructively in the ongoing dialogue about ensuring an open Internet for many years. We have strongly expressed the importance of net neutrality protections to the public interests served by the higher education and library communities in the network neutrality principles¹ we released in conjunction with other associations in July 2014 and subsequently reaffirmed² in March 2017, through the comments³ and reply comments⁴ in which we participated in relation

¹ American Association of Community Colleges, et al, “[Net Neutrality Principles](#),” July 10, 2014.

² [Letter to Chairman Ajit Pai and Commissioners Michael O’Reilly and Mignon Clyburn, Federal Communications Commission, regarding Library and Higher Education Net Neutrality Principles](#), American Association of Community Colleges, et al, March 30, 2017.

³ American Association of State Colleges and Universities, et al, [In the Matter of Protecting and Promoting the Open Internet \(GN Docket No. 14-28\), Comments of American Association of State Colleges and Universities, ..., and Modern Language Association](#), July 18, 2014.

⁴ American Association of Community Colleges, et al, [In the Matter of Protecting and Promoting the Open Internet \(GN Docket No. 14-28\), Reply Comments of American Association of Community Colleges, ..., and the National Association of Independent Colleges and Universities](#), September 15, 2014.

to the *Protecting and Promoting the Open Internet* proceeding as well as the comments,⁵ reply comments,⁶ and letter to the Commission⁷ we joined regarding the *Restoring Internet Freedom* proceeding, and most recently through the higher education and libraries amicus brief in the 2018 case of *Mozilla v. FCC*.⁸ The *Mozilla* brief states the case plainly:

The open character of the Internet is critical to the missions and values of universities and libraries, which include advancing research, education, and information exchange. Increasingly, content is available solely or primarily online, as are the educational and information services based on such content. And increasingly, students and adult learners are relying on online courses and digital education tools to earn undergraduate or advanced degrees. As a result, universities and libraries—and their constituencies—depend more than ever on an open Internet to meet the needs of their students, faculty, patrons, and the general public. This trend line will only get steeper.

*ACE and the other amici are filing this brief to underscore that the FCC’s Restoring Internet Freedom Order imperils the Internet’s continued operation as a reliable platform for research, learning, and information sharing. By eroding the Internet’s openness and treating all content providers as though they are profit-motivated commercial actors, the Order will make it far more difficult for universities to educate their students and facilitate research and for libraries to provide digital content and no-fee public Internet access to the communities they serve.*⁹

Since the *Mozilla* court upheld the parts of the Commission’s *Restoring Internet Freedom* order that vacated both the network neutrality rules finalized in 2015 as well as the Commission’s authority under Title II of the Communications Act to set such rules, developments have only served to underscore the vital, ever-growing role that the Internet plays in the educational, research, and public service missions of colleges and universities. Likewise, libraries support their users as never before, with many relying on library internet access to complete homework assignments, reference government documents, consult federally-funded research, and more. Put simply, the institutions that our members support would have been essentially unable to serve students and patrons, conduct research, and provide important services to local, state,

⁵ American Association of Community Colleges, et al, [*In the Matter of Restoring Internet Freedom \(WC Docket No. 17-108\), Comments of American Association of Community Colleges, ..., and the National Association of Independent Colleges and Universities*](#), July 17, 2017.

⁶ American Association of Community Colleges, et al, [*In the Matter of Restoring Internet Freedom \(WC Docket No. 17-108\), Reply Comments of American Association of Community Colleges, ..., and the National Association of Independent Colleges and Universities*](#), August 30, 2017.

⁷ [*Letter to Chairman Ajit Pai and Commissioners Mignon Clyburn, Michael O’Reilly, Jessica Rosenworcel, and Brendan Carr, Federal Communications Commission, regarding Restoring Internet Freedom \(WC Docket No. 17-108\)*](#), American Council on Education, et al, December 7, 2017.

⁸ Peter McDonough, Jessica L. Ellsworth, et al, [*“Brief Amici Curiae of the American Council on Education and 19 Other Education and Library Associations in Support of Petitioners,” Mozilla Corporation, et al, v. Federal Communications Commission and United States of America*](#), August 27, 2018.

⁹ *Ibid*, pp. 2–3.

and national communities throughout the years of the COVID-19 pandemic without public (i.e., mass-market retail) broadband Internet access.

Even then, the broadband access challenges facing the country—which the Commission, other federal agencies, and public and private sector organizations are still working hard to resolve—placed great strain on our students, faculty, staff, and institutions. Parked cars became classrooms as institutions reoriented Wi-Fi antennas to extend wireless networks as far beyond their buildings as possible, faculty and students exchanged assignments over mobile phones as cellular networks became lifelines for those unable to reach campuses, and constant webconferencing sessions strained the bandwidth of even those with broadband Internet access at home as all members of a household had to depend on such access continuously. While all of us are grateful that the pandemic is behind us, the “new normal” that it led to has centered learning, research, and service, and many of the functions necessary to support them, irreversibly online.

Given this ever-increasing reliance on the Internet, the extent of concern across the higher education technology and library communities regarding the incentives that public broadband Internet access providers have to infringe on the openness of the Internet, which were strenuously highlighted throughout all of the previous higher education and library community submissions to the Commission cited above, cannot be overstated. For instance, providers might be tempted to make libraries pay more when they provide access to resource-intensive audiovisual collections, or large datasets that are curated and stored by research libraries, as those consume more bandwidth. The same could hold for colleges and universities that incorporate media-rich learning resources or advanced simulations in courses that students access online but off campus. As noted in the initial higher education and libraries response to the then-proposed *Restoring Internet Freedom* order, the potential for public broadband access providers to engage in paid prioritization is particularly disconcerting for colleges, universities, and research libraries given their general inability to absorb the costs that prioritization schemes would present, the increased expenses they would likely encounter as a result of content providers having to pay for prioritization themselves, and the distortion in the Internet’s development that paid prioritization would tend to produce:

From the standpoint of public service institutions that will rarely if ever have the resources to pay for priority treatment of their content, the opportunity for providers to extract prioritization fees, the clear financial incentives to do so, and the potential resulting harm – all are valid considerations that justify the existing rule.

The harm from paid prioritization will occur because many institutions that serve the public interest, such as libraries, colleges and universities, will often not be able to afford to pay the extra fees simply for the transmission of their content. As such they could find their Internet traffic relegated to chokepoints (the “slow lane”) while prioritized traffic zips through to its destination. Paid prioritization inevitably favors those who have the resources to pay for expedited transmission and disadvantages those entities – such as higher education and libraries – whose missions and resource constraints preclude them from paying these additional fees.

Further, it is likely that those who are able to pay for preferential treatment will pass along their costs to their consumers and/or subscribers. In some cases, libraries and other public institutions may be among these subscribers who would then be forced to pay more for services they may broker on behalf of their patrons....

... And from a broader perspective, paid prioritization creates artificial motivations and constraints on the use of the Internet, damaging the web of relationships and interactions that define the value of the Internet for both end users and edge providers.¹⁰

Furthermore, as discussed in the higher education–libraries *Mozilla* brief, even the *Restoring Internet Freedom* order recognized that blocking access to lawful content would run counter to basic Internet principles. However, the elimination of clear rules barring such behavior left the door open to public broadband Internet access providers blocking or throttling traffic to research and speech that they may disagree with or find controversial. Developments of this nature, for which ample precedent exists as the brief notes, would threaten the principle of academic freedom that stands at the heart of all aspects of the higher education mission, and thus generate unique harms to colleges and universities above and beyond the harms to end-users and edge providers in general that would result from such infringement.¹¹

Supporters of the steps taken by the Commission in the *Restoring Internet Freedom* order argue that those measures have not, to this point, produced the negative consequences that continue to concern our members. As a result, they further argue that our concern about the loss of clear, upfront net neutrality rules, both in the prior proceeding and this one, is unfounded. However, the arguments raised ignore a critical fact. The *Mozilla* court’s decision against the Commission’s assertion of authority in the *Restoring Internet Freedom* order that it could block states from establishing open Internet requirements in their jurisdictions led states with some of the largest public broadband Internet access markets in the country to set net neutrality protections mirroring the Commission’s 2015 open Internet rules.¹² Given the inherent difficulties involved in applying net neutrality rules in those markets but not in others, as well as in managing the nuances of different types of open Internet requirements across the states that impose them in one form or the other, it is fair to say that the nation has yet to operate in the environment that the *Restoring Internet Freedom* order, pre-*Mozilla*, envisioned, thus largely

¹⁰ American Association of Community Colleges, et al, [In the Matter of Restoring Internet Freedom \(WC Docket No. 17-108\), Comments of American Association of Community Colleges, ...](#), July 17, 2017, pp. 12-13. For more on public broadband Internet access providers’ potential to engage in paid prioritization, see also *Verizon v. FCC*, 740 F.3d at 645 (2014) (upholding Commission finding that “broadband providers . . . have incentives to interfere with the operation of third-party Internet-based services that compete with the providers’ . . . services.”) (internal quotes omitted).

¹¹ McDonough, Ellsworth, et al, pp. 26-27.

¹² Paul Bischoff, [“Does Your State Support Net Neutrality? All 50 states ranked by support for net neutrality,” Comparitech](#), August 3, 2023. See also Heather Morton, [“Net Neutrality 2022 Legislation,” National Conference of State Legislatures](#), May 4, 2022.

preventing, at least so far, the harms to higher education and libraries that the loss of the Commission's 2015 open Internet protections would otherwise have produced.

The Commission's currently proposed order, however, recognizes that the inherent difficulties that diverse, state-level net neutrality protections pose for those with strong incentives to violate Internet openness also unduly and unnecessarily complicate the ability to ensure an open Internet nationwide.¹³ Consistent with the long-standing higher education and libraries position described above and discussed in detail across the many filings cited, the Commission's current order also rightly notes the continuing threats to an open Internet presented by paid prioritization, blocking, throttling, and other potential conduct detrimental to Internet openness. It thus proposes the restoration of the strong network neutrality requirements originally established by the Commission in 2015 to preserve definitively an open Internet, and the virtuous cycle of innovation it sustains, for all public broadband users throughout the country.¹⁴ And finally, the higher education and libraries position regarding the classification of public broadband Internet access service as a telecommunications service under Title II of the Communications Act fully aligns with that expressed in the current order.¹⁵ As stated in the 2017 higher education and libraries comments regarding the *Restoring Internet Freedom* order:

Classification of public broadband Internet access service as a Title II "common carrier" service has allowed the Commission to establish policies and procedures that effectively ensure the broader public interest goals of an open Internet are met, while providing the Commission with the flexibility to adapt and tailor these regulations as market conditions change. Treating providers of broadband services offered to the general public as Title II common carriers provides valuable certainty to the marketplace about the FCC's legal authority to establish and apply network neutrality rules, and it places public broadband Internet access service on an equal regulatory footing with other communications services. Classification under Title II has proven legally sustainable and will ensure providers are not able to engage in "unreasonable discrimination" against or in favor of any particular content, application or service.¹⁶

Given the alignment between the proposed *Safeguarding and Securing the Open Internet* order and the well-established needs and interests of the higher education technology and research library communities, we urge the Commission to adopt the order as written and restore a national framework for preserving Internet openness. Among the many benefits of such an action, this step would allow the Commission to ensure that the Internet continues to provide an environment in which colleges, universities, and research libraries can best serve the vital public interests at the core of their missions.

¹³ Federal Communications Commission, "[Safeguarding and Securing the Open Internet](#)" (WC Docket 23-320), *Federal Register*, Vol. 88, No. 212, November 3, 2023, p. 76050.

¹⁴ *Ibid*, pp. 76072-76076.

¹⁵ *Ibid*, pp. 76059-76062.

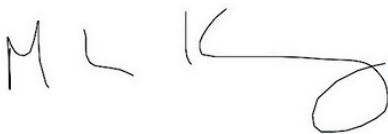
¹⁶ American Association of Community Colleges, et al, [In the Matter of Restoring Internet Freedom \(WC Docket No. 17-108\), Comments of American Association of Community Colleges, ...](#), July 17, 2017, p. 20.

In closing, we appreciate that the Commission’s proposed order reflects the longstanding position of the Commission that “private end-user networks such as [those of] libraries and universities” do not function as mass-market retail services that would or should be subject to the requirements for public broadband Internet access providers.¹⁷ As the FCC has historically found, end users should be free to decide how they use the broadband services they obtain from network operators and commercial ISPs.¹⁸ While not specifically discussed in the current order, we also appreciate the Commission’s continuing recognition as most recently acknowledged in its *BDS Order* that research and education (R&E) networks function as private networks not subject to common carrier requirements.¹⁹

Sincerely,



John O’Brien
President and CEO
EDUCAUSE



Mary Lee Kennedy
Executive Director
Association of Research Libraries

¹⁷ Federal Communications Commission, “Safeguarding and Securing the Open Internet,” *Federal Register*, Vol. 88, No. 212, November 3, 2023, p. 76058.

¹⁸ Jarret Cummings, “[Higher Ed/Libraries Re-Release Net Neutrality Principles](#),” *EDUCAUSE Review*, April 3, 2017.

¹⁹ Federal Communications Commission, “[Business Data Services in an Internet Protocol Environment, Technology Transitions, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services](#)” (WC Docket Nos. 16–143, 05–25, GN Docket No. 13–5, and RM–10593; FCC 17–43), *Federal Register*, Vol. 82, No. 105, June 2, 2017, p. 25697.