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

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108

REPLY COMMENTS OF

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES
AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES
AMERICAN COUNCIL ON EDUCATION
ASSOCIATION OF AMERICAN UNIVERSITIES
ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES
ASSOCIATION OF RESEARCH LIBRARIES
EDUCAUSE
NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS AND THE NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES

August 30, 2017

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EXECUTIVE SUMMARY

Our nation's institutions of higher education gave birth to the Internet and remain at the forefront of innovation using the Internet to further research, learning, and serving the public good. This experience provides our organizations with a unique and important perspective in the ongoing net neutrality debate. We strongly support maintaining current net neutrality rules in order to protect and ensure continued Internet openness. While Title II classification of public Internet access providers remains a sound basis for current neutrality rules, we support maintaining strong, enforceable rules via Section 706 authority if the Commission determines an alternative to Title II is needed.

The principles of an open Internet date back to its inception and remain of critical importance to our institutional missions of learning, research, and public service. We join commenters concerned that the Commission's proposal to reclassify public broadband Internet service as a non-common carrier service subject to Title I overlooks the extent to which Title I information services – which have become essential to all Americans – have always depended on a basic and universal Title II telecommunications network. In addition, we do not believe transparency alone, or alternative enforcement mechanisms such as antitrust law, are sufficient to ensure and protect an open Internet.

If the Commission does reclassify public broadband Internet access service as a Title I service, we agree with a broad spectrum of commenters that argued the Commission can and should establish enforceable rules against blocking and throttling under its Section 706 authority. We also believe the Commission can and should institute an "Internet reasonable" conduct standard under Section 706 authority by establishing rebuttable presumptions against certain types of conduct, such as paid prioritization, that are harmful to an open Internet.

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I. INTRODUCTION

Our nation's research libraries and institutions of higher education[1] gave birth to the Internet. Today we are leaders in creating, fostering, using, extending, and maximizing the potential of the Internet for research, education, and the public good. This experience provides our organizations with a unique and important perspective in this ongoing and vital civic debate.

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[1] The American Association of Community Colleges (AACC), the American Association of State Colleges and Universities (AASCU), the American Council on Education (ACE), the Association of American Universities (AAU), the Association of Public and Land-grant Universities (APLU), the Association of Research Libraries (ARL), EDUCAUSE, the National Association of College and University Business Officers (NACUBO), and the National Association of Independent Colleges and Universities (NAICU). A description of these entities is available in Appendix A to our initial comments in this proceeding. *See Restoring Internet Freedom*, Notice of Proposed Rulemaking, FCC 17-60 (rel. May 23, 2017) (*RIF NPRM*); Comments of AACC, AASCU, ACE, AAU, APLU, ARL, EDUCAUSE, NACUBO, and NAICU (*Higher Ed Net Neutrality Comments*), available at https://ecfsapi.fcc.gov/file/1071799489959/201707%20Higher%20Ed%20Net%20Neutrality%20Comments%20(AS%20FILED).pdf.

Given our experience and perspective, our organizations strongly support maintaining current net neutrality rules applicable to "public broadband Internet access providers" (which the Commission has traditionally defined as mass-market retail broadband services) in order to protect and ensure continued Internet openness. While Title II classification of such providers remains a sound basis for current neutrality rules, we stress the importance of maintaining strong rules, which the Commission can and should do via its Section 706 authority if necessary.

With these reply comments we discuss:

- The importance of an open Internet to our institutional missions of learning, research and public service;
- Our shared concerns with many commenters regarding the proposal to reclassify public broadband Internet service as a non-common carrier service subject to Title I – recognizing that now vital Title I information services have always depended upon a basic and universal Title II network. Moreover, transparency alone, or alternative enforcement mechanisms such as antitrust law, are insufficient to ensure and protect an open Internet;
- If the Commission does reclassify public broadband Internet access service as a Title I service, the Commission can and should institute an "Internet reasonable" conduct standard under the authority of Section 706 that would protect an open Internet by establishing rebuttable presumptions against certain types of conduct.

II. COMMISSION POLICY TOWARD THE INTERNET SHOULD REFLECT THE IMPORTANCE OF AN OPEN INTERNET TO LEARNING, RESEARCH, AND PUBLIC SERVICE

A. The Internet was created by University Researchers for the Benefit of Research and Education

In our initial comments, we noted that the Internet was initially created in university laboratories as an open platform to promote research and education, citing accounts of the founders of the Internet to support this view.[2] This history showed the original Internet architecture was created as an open platform that would support any application. The "Acceptable Use Policy" of the original National Science Foundation Network (NSFNet) was restricted to "research and education."[3]

The key National Science Foundation (NSF) report in 1988 that led to the creation of the Internet we know today was called "Toward a National Research Network."[4] As the authors of *A Brief History of the Internet* note: "This report was influential on then Senator Al Gore, and ushered in high speed networks that laid the networking foundation for the future information superhighway." The report was critical to the development of the High-Performance Computing Act of 1991[5] which supported the creation of a National Research and Education Network (NREN) initiative that became one of the major vehicles for the spread of the Internet beyond the field of computer science to the general public.

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[2] *See Higher Ed Net Neutrality Comments* at 5-6 (*citing* Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Larry G. Roberts, and Stephen Wolff, A Brief History of the Internet (1997) (*A Brief History of the Internet*), available at https://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet).

[3] *See A Brief History of the Internet* at "Transition to Widespread Infrastructure"; *see also* https://en.wikipedia.org/wiki/National_Science_Foundation_Network.

[4] *See A Brief History of the Internet* at "Transition to Widespread Infrastructure".

[5] Public Law No. 102-194, https://www.congress.gov/bill/102nd-congress/senate-bill/272.

That legislation specifically noted the importance of a national research and education network, and specifically recognized libraries and educational institutions (emphasis added):

> *(b) ACCESS- Federal agencies and departments shall work with private network service providers, State and local agencies,* ***libraries****,* ***educational institutions*** *and organizations, and others, as appropriate, in order to ensure that the* ***researchers****,* ***educators, and students*** *have access, as appropriate, to the Network. The Network is to provide users with appropriate access to high-performance computing systems, electronic information resources, other* ***research facilities, and libraries****. The Network shall provide access, to the extent practicable, to electronic information resources maintained by* ***libraries, research facilities****, publishers, and affiliated organizations*.[6]

We urge the Commission to acknowledge this history and continue this tradition by maintaining policies that ensure the Internet remains an open platform for learning, research, and service.

B. Preserving an Open Internet is Fundamentally Important to the Future of the Learning, Research, and Public Service Missions of Libraries and Higher Education

While the history of the Internet is a useful guide, how we specifically apply this history to the future is the critical issue. Higher education and libraries today depend on an open Internet for a wide variety of services. For example, higher education institutions including libraries increasingly rely on remote access to and storage of data. Most institutions and libraries subscribe to online resources (*e.g.*, full text journal and newspaper articles; legal, health, employment, and learning information) that can only be accessed via a robust and consistent Internet connection. University extension services and similar outreach programs bring cutting edge research out of academia and into the community, benefitting local governments, businesses, and industries across the country.

[6] https://www.congress.gov/bill/102nd-congress/senate-bill/272/text.

In addition, many colleges and universities have implemented or are transitioning to cloud-based productivity suites (*e.g.*, Google Apps for Education, Microsoft 365) to support faculty and student access to email, word processing, and related applications. Likewise, a number of institutions have adopted cloud-based administrative and learning management systems that allow them to run their operations and support learning via the Web while reducing the cost of implementing, managing, and maintaining such systems.

All these services depend on robust and open networks. If content and other edge providers are required to pay extra fees to guarantee service performance, these costs will be passed on to libraries and higher education, putting even more strain on their restricted budgets.[7]

III. TITLE II PROVIDES A LEGALLY SUSTAINABLE FOUNDATION FOR ENFORCEABLE NET NEUTRALITY RULES

A. The Commission Must be Careful Not to Throw out Basic, Universal Services with the Reclassification Bathwater

Our organizations continue to support Title II as the most stable legal regime for sustaining strong net neutrality protections. If the Commission chooses to re-classify public broadband Internet access services under Title I, it must proceed cautiously. Specifically, as we and other commenters observed, Title I information services have long rested on a stable foundation of Title II telecommunications services.[8] In an "All IP" world, Title II services (as the Commission is now

[7] *See Higher Ed. Neutrality Comments* at 10-11 (listing other examples of how our organization depend on an open Internet to fulfill our missions); *see also id.* at 12-13 ("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."); Comments of the American Library Association, *et. al* at 15-16 (identifying paid prioritization harms).

[8] *See c*omments of INCOMPAS (*INCOMPAS Comments*) at 51; corrected joint comments of Public Knowledge and Common Cause (*Public Knowledge and Common Cause Comments*) at 61 ("the [*RIF NPRM*] misunderstands the distinction between 'basic' and 'enhanced services,' as well as the purposes underlying these terms. *Computer II* . . . assumed that the perpetual existence of 'basic' telecommunications services, which would be separately identifiable from the enhanced services whose traffic they transmit. 'Because enhanced services are dependent upon the common

defining them) may effectively cease to exist.[9] We share the concerns of commenters that recognize that a world without Title II services may have implications for rules that rely on jurisdiction ancillary to Title II – the universal service contribution obligations of non-common carriers, for example. As the American Library Association (and its co-commenters) explained:

> While Title I sets out the Commission's general goals and mission, Section 1 does not confer regulatory authority. The *Comcast* court found that Section 1 was a broad policy statement but not a grant of authority to act. Thus, the Commission must look elsewhere in the Communications Act to justify regulatory oversight over broadband networks and service. Most of the tools to reach those goals are set forth in Title II (for common carriers). Without Title II, the Commission's authority to ensure universal service, to prevent discrimination, to ensure deployment and reasonable charges, etc., are limited.[10]

carrier offering of basic services, a basic service is the building block upon which enhanced services are offered.'") (citations omitted); *see also, e.g.*, Adam Candeub & Daniel McCartney, *Law and the Open Internet*, 64 FED. COMM. L.J. 493, 547 (2012) ("Once computer-based communications were ancillary to telephone—now telephone is ancillary to computer-based telecommunications"); *id.* at 547-48 ("Nothing in the 1996 Act evidences a retreat [from] the basic structure of regulating basic communications—and leaving more advanced technologies to the market."); *cf. Higher Ed. Net Neutrality Comments* at 21 ("Reliable, basic, and universal Title II services helped to form the foundation on which the Internet grew and ultimately prospered.").

[9] *See INCOMPAS Comments* at 51 ("Section 3 of the Communications Act defines an 'information service' as 'the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . .' Congress clearly understood that an information service needed the physical infrastructure of a telecommunications service to be distributed; by definition, an information service is one provided 'via telecommunications.' [H]owever, because the Commission has found that there is no telecommunications component of the broadband provider's offering, it is not clear that the broadband providers satisfy the statutory definition of information service. Because the telecommunications has disappeared, the definition of information services crumbles without the telecommunications foundation to support it.").

[10] *See* comments of the American Library Association, *et. al* at 20; *but see also, e.g.*, comments of NTCA-The Rural Broadband Association (*NTCA Comments*) at 10 ("Fortunately, it is settled law that the Commission can (if it does so in the right way) promote the goals of universal service and provide high-cost universal service support under section 254 of the Act, even if broadband is not classified as a telecommunications service. Thus, any reclassification now should not disrupt those mechanisms. Nevertheless, it will be important that the Commission neither abandon nor retreat from the notion of universal service as a result of reclassification, and to the contrary, the Commission should reaffirm its commitment to predictable, sufficient, and specific support of universal voice and broadband consistent with section 254.") (citation omitted); *see also id.* at 25-26.

B. Transparency or Reliance on Antitrust Law alone will not Adequately Protect and Ensure an Open Internet

Our organizations strongly oppose establishing a net neutrality regime that permits practices potentially harmful to an open Internet, provided such practices are simply disclosed in advance. For example, at least one commentator suggested the possibility of what could be reasonably characterized as a "transparency only" net neutrality regime based on the ancillary authority:[11]

> [T]he Commission could require broadband providers to make prominent disclosures to consumers if they wish to engage in blocking and throttling unjustified by reasonable network management principles. Such disclosures would shine a bright spotlight on any nonstandard industry practices by particular broadband ISPs. And they would place consumers on clear notice of any limitations in the Internet service they have purchased, enabling them to vote with their feet if they oppose those limitations for any reason. Of course, any ISP would also be subject to sanctions if it engaged in such practices without providing the required disclosures.[12]

But even where clearly disclosed in advance, paid prioritization in particular would inflict social as well as economic harms[13] that cannot necessarily be remedied by, for example, switching providers. Indeed, "voting with your feet" (*i.e.*, wallet) is not an available remedy unless other broadband providers are available, which is not always the case, particularly in rural markets. As

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[11] *See* comments of AT&T, Inc. at 109-110 (*AT&T Comments*) ("As an alternative to substantive rules, the Commission could also invoke ancillary authority to impose transparency requirements governing blocking, throttling, or paid prioritization practices".); *but see id.* at 109 ("the Commission could invoke ancillary authority to prohibit an ISP from anti-competitively excluding online services that directly compete with its own regulated services whenever doing so 'is necessary to further [the Commission's] regulation of activities over which it [has] express statutory authority' under Titles II, III, or VI.") (citation omitted).

[12] *Id.* at 110.

[13] *See* comments of Microsoft Corporation at 11 ("Commission authorization of paid prioritization would interfere with consumer demand, harm edge provider investment and innovation, and reduce incentives for broadband internet access services providers to invest in more and better network capacity to meet consumer demand. . . . *Having spent decades eliminating the market distorting effects of terminating access charges, now is not the time for the Commission to reintroduce those distortions by allowing terminating tolls for prioritization of internet traffic*.") (emphasis added).

one commenter explained (citations omitted): "[C]onsumers can't discipline providers by voting with their wallets. As the Commission's own data demonstrates, most Americans live in duopoly markets while a majority only have one choice for high-speed broadband."[14] Switching providers, therefore, would not be a generally available remedy if paid-prioritization-with-disclosure became standard in the industry.

Similarly, our organizations share the concerns of the many commenters questioning whether antitrust laws can effectively ensure an open Internet.[15] For example:

> [A]ntitrust law is an economic doctrine that gives little if any weight to freedom of expression and other noneconomic values secured by net neutrality. Antitrust law defines harm in terms of higher prices and diminished product quality. **If antitrust law deems that a practice is not harmful to competition, it does not matter how much it represses speech, distorts access to knowledge, or intrudes on privacy**.[16]

Such non-competitive harms – limits on free speech and unfettered access to knowledge – are of particular concern to higher education organizations and libraries.

We also agree with commenters that note that even where antitrust may allow parties to seek remedies for harm, the remedy will likely be too little and too late – particular for smaller

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[14] *See* Comments of Electronic Frontier Foundation at 16 (*EFF Comments*); *see also id.* at 7-8 (citing continuing consolidation and concentration in the market for high-speed Internet access); Comments of ITIF (Information Technology and Innovation Foundation) (*ITIF Comments*) at 18 ("Construction of large scale broadband networks, particularly wired ones, is an incredibly expensive and complicated undertaking. . . While the FCC continues to undertake steps to make network deployment easier, the reality is that network infrastructure is likely to remain concentrated in a relatively small number of broadband providers. A small number of providers is not necessarily a bad thing—indeed, it is likely the most efficient way to provide high-quality broadband access at reasonable cost. However, it does mean that these markets are unlikely to rely on competition to police conduct in a way that will be satisfactory to a political majority.") (citations omitted).

[15] *See RIF NPRM* at ¶¶ 78, 84.

[16] *EFF Comments* at 10 (emphasis added); *see also id* at 12 ("Antitrust law has also developed gaps that could allow harmful, non-neutral practices of the types documented in this rulemaking. Under the 'single entity doctrine,' a company cannot be liable for illegal collusion with its subsidiary or parent companies. So, for example, Comcast could make an arrangement to favor NBC-Universal content it owns without much fear from antitrust law. Additionally, a pair of Supreme Court decisions in 2004 and 2007 made it much harder to bring antitrust cases against companies in regulated industries, even if the regulations themselves are minimal.") (citations omitted).

entities that lack the resources to pursue expensive and time consuming litigation. As one commenter explained:

> Antitrust litigation is, by nature and practice, massively resource and time intensive. Broadband provider practices favoring affiliates are unlikely to manifest in the type of demonstrable price hikes or output effects that are most common predicates to successful antitrust challenges. Thus, the kind of challenge likely to be at issue here is among the most difficult to pursue, requiring significant financial resources, taking years to resolve, and resulting in monetary damages. Providers of third-party services, including start-ups and other small companies, that compete with ISP-affiliates are unlikely to have the resources to pursue such intensive litigation. And, even if they do, in the fast-paced market for Internet content and services, they will have lost significant ground before relief is granted.[17]

Higher education organizations, as consumers of Internet access and sometime edge providers, simply lack the resources to pursue antitrust remedies.

IV. IF THE COMMISSION RECLASSIFIES PUBLIC BROADBAND INTERNET ACCESS SERVICE UNDER TITLE I, THE COMMISSION CAN AND SHOULD ADOPT NET NEUTRALITY PROTECTIONS PURSUANT TO SECTION 706

If the Commission reclassifies public broadband Internet access services under Title I, it must not abandon net neutrality principles that have been widely accepted since Chairman Powell articulated them in 2004. In the subsections below we briefly consider comments that explored the scope of authority available under Section 706 and discuss the ability and importance of the Commission adopting an "Internet reasonable" conduct standard.

[17] *See, e.g.*, Comments of Akamai Technologies, Inc. at 8-9 (*Akamai Comments*) (citations omitted); *accord* Hal J. Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About*, A.B.A. THEANTITRUSTSOURCE, at 2 (Aug. 2017) (*Singer*) ("[A]ntitrust litigation imposes significant costs on private litigants, and it does not provide timely relief; if the net neutrality concern is a loss to edge innovation, a slow-placed antitrust court is not the right venue. . . . While public enforcement of innovation-based claims is possible, it likely would take an edge provider months if not years to motivate an antitrust agency to bring a case."), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug17_singer_8_2f.authcheckdam.pdf.

A. Many Commenters Supported Utilizing Authority Granted by Section 706 to Sustain Net Neutrality Rules

A broad and diverse group of commenters recognize that Section 706 authorizes the Commission to establish enforceable net neutrality protections. For example, both Verizon and AT&T recognize that the Commission could enact no blocking and no throttling rules pursuant to Section 706.[18] (We discuss in the next section how the Commission could also adopt an "Internet Reasonableness" conduct standard pursuant to Section 706.) As AT&T explained: "Section 706 is now an engrained part of telecommunications law, and the Commission could reasonably rely on that provision as its primary basis for open Internet rules."[19] Another commenter explained (citations omitted):

> Three appellate decisions from two U.S. Courts of Appeal have upheld [section 706] as an affirmative grant of Commission authority for certain regulations of residential broadband service.[[20]] And in *Verizon*, the D.C. Circuit specifically held that the concerns animating the Commission's open Internet rules fell within the ambit of that affirmative grant of authority and upheld the 2010 Transparency Rule under section 706.
>
> The Commission relied on section 706 as a source of legal authority for both its 2010 and 2015 open Internet rules. While the NPRM asks whether section 706 is better read as merely "hortatory," it neither points to changed circumstances nor articulates any explanation for such a changed interpretation, either as a general matter or—as relevant to this

[18] *See AT&T Comments* at 101-03; *id* at 105 ("the [DC Circuit in *Verizon*] held that section 706 affirmatively authorizes the Commission to adopt a no-blocking/no-throttling rule in the absence of a conflict with some other provision of law") (citation omitted); Comments of Verizon at 18 (*Verizon Comments*) ("[T]he D.C. Circuit has held that Section 706 . . . affords the Commission some authority to adopt rules pertaining to the open Internet.").

[19] *AT&T Comments* at 7; *see also, e.g.*, *NTCA Comments* at 15-17; *INCOMPAS Comments* at 64-65; *Akamai Comments* at 16; *ITIF Comments* at 19; *cf.* Comments of the National Association of Regulatory and Utility Commissioners (NARUC) at 7 ("NARUC encourages the Commission to rely strongly upon the authority conveyed by Section 706 of the Telecommunications Act of 1996 to support the adoption of open Internet rules that promote enhanced competition for broadband Internet access service and address potential market abuses, supplemented by authority provided by Titles I, II and III of the Communications Act, subject to reasonable forbearance where conditions warrant.").

[20] *Citing Verizon v. FCC*, 740 F.3d 623, 636-42 (reviewing the *2010 Open Internet Order*); *In re FCC 11-161*, 753 F.3d 1015, 1054 (10th Cir. 2014) (upholding universal service subsidies for broadband-capable networks); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 733–34 (D.C. Circ. 2016) (upholding the *2015 Open Internet Order*).

> proceeding—consistent with the Commission's "commitment to a free and open Internet." Indeed, in prior open Internet proceedings, parties from all corners of the Internet ecosystem have supported the use of section 706 as an affirmative source of Commission authority.[21]

Further with respect to whether section 706 is merely "hortatory"[22] – and setting aside the multiple courts that have already recognized Section 706 as a grant of authority – one commenter explained that a conclusion that Section 706 was not an affirmative grant of authority risked nullifying other significant Commission rules already grounded in Section 706.[23]

B. The Commission's Section 706 Authority Supports Adoption of an "Internet Reasonable" Conduct Standard to Govern the Relationship between Broadband Providers and Edge Providers

Maintaining a net neutrality legal framework that can evolve while preserving the culture and tradition of the Internet as an open platform is of paramount concern to our organizations. This means prohibiting harmful or potentially harmful conduct beyond blocking and throttling. If the Commission reverses Title II classification for public broadband Internet access providers and eliminates the current "general conduct rule", the Commission can and should adopt an alternative "Internet reasonable" conduct standard under its Section 706 authority. Such a standard would create a presumption against specific conduct that harms an open Internet – while allowing the presumption to be rebutted in cases where the challenged conduct is nevertheless in the public interest.[24] Many commenters generally recognize the importance of articulated conduct standards

[21] Comments of Entertainment Software Association at 15 (*ESA Comments*).

[22] *See RIF NPRM* at ¶ 101.

[23] *See Public Knowledge and Common Cause Comments* at 62-63.

[24] *See Higher Ed Net Neutrality Comments* at 22-25.

that will enable the Commission to perform meaningful case-by-case assessments of potentially harmful conduct.[25]

A standard based on what is "Internet reasonable" would allow the Commission to consider the merits of each action based on its impact on the Internet ecosystem, rather than solely the commercial interests of the contracting parties.[26] It further allows the Commission to take a more comprehensive look at several public interest factors, including the vital areas of public interest that higher education and libraries serve, and that the Internet was originally designed to support – learning, research, and public service.

Libraries, higher education, innovators and consumers increasingly operate as both consumers and edge providers, and an "Internet reasonable" approach could apply to both sides of the market. It would allow the Commission to preserve the traditional and practical ability of broadband Internet access subscribers to access and use the lawful Internet content, applications, services, and devices of their choice without interference from their provider of broadband Internet

[25] *See, e.g.*, *ITIF Comments* at 17 ("A case-by-case approach, with clearly defined guidelines of acceptable behavior, would allow the Commission to predictably step in where any practice harms consumers, competition, or innovation in any part of the Internet ecosystem. This approach also allows for adaptability in the network and economically efficient, welfare-enhancing deals that enable applications for which best-efforts Internet is not sufficient."); *ESA Comments* at 9 ("[T]the Commission can—and should—retain a general standard to protect against discriminatory broadband provider practices on a case-by-case basis. Such a standard has always been a component of the Commission's open Internet principles."); *accord Singer* at 11-12 (suggesting a case-by-case, complaint-driven process overseen by an administrative law judge).

[26] *Cf. NTCA Comments* at 17 ("[T]he Commission must . . . retain the authority and ability to assert itself if and when disputes or disagreements arise that hinder the goals of Section 706 and thus harm the public interest. Moreover, unlike common carrier regulations that turn upon the carrier-customer (or potential customer) relationship, the backstop that NTCA proposes **does not and should not turn upon contractual (or potential) privity between any given set of parties**. Instead, the simpler question would be whether a particular act or omission in connection with the interconnection and exchange of data or content, regardless of any contracts between the parties involved, has an adverse impact upon broadband deployment in contravention of Section 706.") (emphasis added); *see also INCOMPAS Comments* at 65 ("The jurisdictional basis for issuing the general conduct standard is identical to the *Data Roaming Order's* standard [upheld in *Cellco Partnership v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012)]. Both rely on a number of factors that provide significant flexibility. The Commission's mandate under Section 706 provides it with the authority to enforce the general conduct standard.") (citation omitted).

access services. It would also allow providers of online content, services, equipment, and applications to make their services and devices available to interested Internet users everywhere without having to negotiate for or obtain any kind of permission or agreement from broadband Internet access providers.

Furthermore, a clearly articulated standard that is focused on preserving the existing Internet would set expectations and provide guidance to the market, but would avoid hard and fast rules that might be too rigid for a rapidly changing broadband ecosystem. The Commission could consider and adjudicate complaints case-by-case to determine whether or not they are consistent with an "Internet reasonable" conduct standard. Broadband providers would have adequate notice of the rule in advance, and would still have the opportunity to make their case that a proposed practice would be in the public interest. Thus, the rules would remain flexible enough to adapt to changes in the broadband marketplace, while still allowing the Commission to proscribe specific behavior (such as paid prioritization or intentional degradation) that violate the principles of Internet openness.

Of course, in defining this standard, the Commission must abide by the limitations of the *Verizon* decision. The Commission cannot craft policies under Section 706 that "treat" ISPs as traditional common carriers. The question is: what boundaries over public broadband Internet access provider behavior can the Commission set that are less restrictive than common carriage, but still strong enough to protect the openness of the Internet and give meaning to the Commission's 706 authority? While there is no precise definition of what it means to "treat" a provider as a common carrier, and even the *Verizon* court admitted that this is a "gray area,"[27]

[27] *See Verizon*, 740 F.3d at 652.

there are two traditional indicia of common carriage – a duty to serve and a duty not to discriminate.[28]

The *Verizon* court viewed the 2010 Open Internet rules as incorporating both of these traditional common carrier duties. The court found that the Commission had attempted to use the exact same "unreasonable discrimination" standard that lies in Title II. It also found that the Commission imposed a mandate on broadband providers to provide carriage to every edge provider for free (the equivalent of a "duty to serve"). Finally, it noted that the Commission's rule left little "flexibility" for broadband providers to engage in "individual negotiations," which could be understood as the converse of the duties to serve and not to discriminate.[29]

In our view, this analysis means that, as long as the Commission avoids imposing these two duties on broadband providers, and as long as it permits some flexibility for broadband providers to engage in individual negotiations, the Commission's approach should avoid a finding that it is imposing "common carriage" obligations on public broadband Internet access providers. We also note that, as long as the Commission has reasonable grounds for regulating the broadband

[28] These general characteristics of common carriage are loosely derived from the following sources: "The Impending Doom of Common Carriage," by Eli Noam, March 15, 1994, ("[common carriage] intended to guarantee that no customer seeking service upon reasonable demand, willing and able to pay the established price, however set, would be denied lawful use of the service or would otherwise be discriminated against.") (available at http://www.columbia.edu/dlc/wp/citi/citinoam11.html); "The Rise of Shadow Common Carriers," Professor Barbara Cherry, Sept. 24, 2011 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1995162) ("the duties of common carriers are tort obligations to serve upon reasonable request without unreasonable discrimination at just and reasonable prices and performed with adequate care . . . "); (grouping Title II's responsibilities into four duties: "entry restrictions and the duty to serve, the obligation to charge rates that are nondiscriminatory, the obligation to charge rates that are just and reasonable, and structural separation.").

[29] *See Verizon*, 740 F.3d at 652 ("Thus, 'common carriage is not all or nothing—there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se*.' In this 'space between per se common carriage and per se private carriage,' we continued, 'the Commission's determination that a regulation does or does not confer common carrier status warrants deference.'") (internal citation omitted).

provider in a manner that does not impose duties to serve or not to discriminate, the Commission will be entitled to *Chevron* deference on judicial review.[30]

This analysis further suggests that, while the Commission cannot impose duties to serve or not to discriminate, it can impose conditions on the provision of broadband Internet access service that the public broadband Internet access provider has already chosen to offer. In other words, once a provider has voluntarily chosen to provide Internet access service (not because of a duty to serve but because of its own choice to do so), the Commission can regulate the terms and conditions of that offering under Section 706. The Commission can thus adopt a clear policy that bars public broadband Internet access providers from prioritizing, manipulating, distorting, or degrading edge provider traffic as one of the terms and conditions of providing service. Such a requirement is not a "duty to serve" because the condition only becomes activated after a public broadband provider voluntarily chooses to provide service. Such a policy does not impose a "non-discrimination" obligation because it would not require that the public broadband Internet access provider treat every edge provider equally.[31] The provider would still have the flexibility to negotiate over other aspects of the public broadband Internet access provider-edge provider relationship.

The Commission, under our proposal, would consider each action under a broader "Internet reasonable" framework. This framework would allow the Commission to assess whether a proposed public broadband Internet access provider practice would be consistent with the existing openness of the Internet, meaning whether it would result in paid prioritization or degradation or

[30] *Id.*, 740 F.3d at 650.

[31] To be sure, the *Verizon* court cited with approval the Commission's data roaming decision in *Cellco* because it allowed the wireless companies flexibility and "individualized negotiation." This does not, however, mean that the FCC must allow flexibility and "individual negotiations" over every aspect of the public broadband Internet access provider-edge provider relationship.

other activities that would violate the principle of Internet openness. Once the public broadband Internet access provider chooses to provide service, it would be lawful for the Commission to make these decisions on how the service is being provided (*i.e.*, as a term or condition of that service offering). The Commission could also make clear ahead of time to the broadband market that any effort to prioritize, manipulate, distort, or degrade edge provider traffic would not satisfy the "Internet reasonable" standard.

C. The Commission Can Establish Presumptions against Certain Practices and Place the Burden on the Broadband Provider

In order to address the *Verizon* court's view that public broadband Internet access providers need a certain amount of flexibility, the Commission can establish presumptions against certain activity rather than an outright ban on certain activity. Establishing a clear presumption against paid prioritization, for instance, would send the correct signal to the marketplace that such activity is strongly discouraged, while still allowing a provider the opportunity to convince the Commission that its proposed activity would nevertheless be in the best interests of the Internet ecosystem and should be permitted.

If such presumptions are not articulated in advance, there is a real possibility that the Commission's decisions could be issued on an *ad hoc* basis, creating uncertainty and leaving the marketplace at risk of lacking any indication of how the Commission might rule on any particular complaint.

On the other hand, establishing presumptions against certain activity can be a useful mechanism to frame the adjudication process. Establishing presumptions for or against certain activities – such as "paid prioritization," which is particularly harmful to non-profit edge providers

such as institutions of higher education and libraries[32] – can provide guidance to the market while also leaving flexibility to accommodate new technologies and marketplace changes. The Commission can evaluate complaints on a case-by-case basis, and even if a particular activity violates a presumption on its face, the broadband provider will still have the opportunity to overcome the presumption by providing sufficient evidence that the action being proposed is "Internet reasonable."

Such presumptions can help to promote investment in the network because they set the boundaries of acceptable/unacceptable behavior. At the same time, presumptions allow some degree of flexibility for the Commission to adapt its regulatory decisions to the marketplace.

V. THERE IS NO REASON TO EXPAND THE SCOPE OF THE COMMISSION'S OPEN INTERNET POLICIES TO PRIVATE NETWORKS

We are not aware of any commenter in this proceeding who argues the Commission should expand the scope of its net neutrality rules to include private networks. As we noted in our initial comments, the Commission has consistently held that private networks do not offer service to the general public and thus should not be subject to the same rules as those networks whose purpose is to serve the general public.[33]

[32] *See supra* at 5 n.7.

[33] *See Higher Ed Net Neutrality Comments* at 17-18 (noting, among other things, that "this Commission in the *BDS Order* acknowledged and left undisturbed its historic recognition of research and education (R&E) networks as providers of private rather than common carriage.") (citation omitted); *cf. Akamai Comments* at 10-11 (asking Commission to restate its long-held view that content delivery networks (CDNs) do not constitute paid prioritization).

VI. CONCLUSION

An open Internet is vital to the learning, research, and public service missions of higher education institutions and libraries. The comments in this proceeding show a broad consensus among stakeholders supporting current net neutrality rules prohibiting blocking and throttling – whether pursuant to current Title II authority or through Section 706 authority conferred repeatedly by the courts. Paid prioritization should continue to be prohibited under Title II, or alternatively, under an "Internet reasonable" conduct standard that we show can be enacted pursuant to Section 706 authority. An Internet reasonable conduct standard would be effective at addressing future threats to an open Internet on a case-by-case basis, while providing clear rules that will allow the Internet to continue evolve and grow.

Respectfully Submitted,

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES

AMERICAN COUNCIL ON EDUCATION

ASSOCIATION OF AMERICAN UNIVERSITIES

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THE NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES

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