

December 7, 2017

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

The Honorable Mignon Clyburn
Commissioner
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

The Honorable Michael O’Rielly
Commissioner
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

The Honorable Jessica Rosenworcel
Commissioner
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

The Honorable Brendan Carr
Commissioner
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Restoring Internet Freedom, WC Docket No. 17-108

Dear Chairman Pai, Commissioner Clyburn, Commissioner O’Rielly, Commissioner Rosenworcel,
and Commissioner Carr,

The higher education, research, and library communities, as represented by the organizations listed below, believe strongly that open and neutral access to the Internet is essential to our nation's freedom of speech, educational achievement, and economic growth. The Internet serves as the primary, open platform for information exchange, intellectual discourse, civic engagement, creativity, research, innovation, teaching, and learning in our communities and the nation. We speak from the unique vantage of our institutions having established and nurtured the open Internet we know today. In addition to being Internet consumers, we produce and serve large amounts of Internet content on a non-profit basis which are indispensable to our communities and to the health of the nation’s economy, culture, and civil society.

We have actively participated in the *Restoring Internet Freedom* proceeding, filing comments, reply comments, and meeting with staff. We appreciate the opportunity to respond to the draft Declaratory Ruling, Report and Order, and Order (*Draft Order*) released in advance of the Commissions’ scheduled vote on December 14. We write, however, to express disappointment and serious concern about the direction the *Draft Order* takes. Our concerns are in two main areas: (1) the *Draft Order* fails to adequately recognize the unique role and contributions of our organizations and communities to public and civic life, and too easily dismisses our stated concerns that transparency, competition, and after-the-fact enforcement alone will not sufficiently protect the services and value we provide from harmful practices by broadband Internet access service (BIAS) providers; and (2) blurring the distinction between

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“the Internet” and “access to the Internet” unnecessarily undermines the Commission’s authority to enact net neutrality rules, and mischaracterizes the actions the *Draft Order* takes thereby missing an opportunity to elevate the terms of this important national debate.

First, as non-profit providers of edge content that addresses important economic and societal needs, higher education, research, and library communities are similar in some respects to public, educational, and governmental access (“PEG”) television providers. As we explained in our initial comments, distance learning and online education increasingly rely on rich multimedia content and interactive, adaptive learning techniques. University extension programs bring cutting edge research out of academia and into communities, government entities, businesses, and industries across the country. These activities provide diverse societal benefits, from improving the productivity and competitiveness of American business and industry, to educating our citizenry and enriching civic life. These benefits all depend on reliable, universal, open access to the Internet.

First and foremost, our organizations reject the *Draft Order’s* essential argument that ISP financial incentives to engage in harmful conduct are either non-existent or sufficiently offset by competition and other considerations. More specifically, the *Draft Order* too lightly dismisses the challenges our organizations will face in the market for paid priority that the *Draft Order* will unleash. For example, while the Commission notes the advantages small and new edge providers may enjoy by obtaining paid prioritization to compete with large, established edge providers, this assumes access to investor capital by such start-ups that higher education, research, and library organizations will never have. The *Draft Order* similarly dismisses concerns that paid prioritization will negatively affect the quality of services for non-prioritized customers such as non-profits. While we strongly disagree that paid prioritization will not affect service quality, even if the effects are neutral or positive in some locales, nothing in the record suggests these effects will be uniform across providers or geographic areas. The *Draft Order’s* dismissal of our quality of service concerns also overlooks the degree to which bandwidth-intensive, multimedia content and services increasingly define the online learning, research, and knowledge resources that colleges, universities, and libraries provide. As our institutions deploy new innovations in simulations, alternative/augmented reality, and artificial intelligence to advance learning and research, the negative implications of blocking, throttling, and paid prioritization for our public service missions will grow.

While the *Draft Order* continues to recognize blocking and throttling as harmful, it nevertheless eliminates current rules that prohibit such conduct, instead placing excessive reliance on non-binding pledges from ISPs, transparency rules that rest on uncertain legal foundations, and competition, to restrain these harmful practices. Our organizations are skeptical in particular that competition is sufficient or uniform enough to have the impact the *Draft Order* claims – especially given that competition is greatest at very low bandwidths compared to the services our students and stakeholders typically require.¹ Moreover, home and mobile broadband access to our online resources and services is also essential, as most students do not live on our campuses and other stakeholders (*e.g.*, faculty, community members) clearly do not.

¹ See *e.g.*, *Draft Order* at ¶ 125 (Citing data showing that 51.1% (5.9% + 45.2%) of the U.S. population live in census blocks partly served by at least two residential wireline broadband providers (providing speeds of 25 Mbps down and 3 Mbps up)). We are also skeptical of the contention that, even in areas where there is a single national provider offering BIAS, that provider’s practices may be constrained by facing competition in other areas. See ¶ 127.

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Where competition proves insufficient or otherwise fails to deter harmful practices, the *Draft Order* offers only after-the-fact litigation remedies – with the costs of pursuing these remedies concentrated on the harmed entities that seek redress. We reiterate that our organizations will never have the resources to pursue litigation remedies such as antitrust, and so will be solely reliant on other litigants or the FTC undertaking investigations. Given the importance to the public, the economy, and the civil society of access to higher education, research, and library resources, we strongly favor a preventative, rule-based net neutrality regime, rather than the wait-and-see, after-the-fact approach set forth in the *Draft Order*.

Our second major concern is that the *Draft Order* claims to restore the long-standing bipartisan consensus regarding the appropriate regulatory treatment of BIAS.² While Internet services – *i.e.*, applications and services that ride the network – have long enjoyed a bipartisan consensus that they be lightly regulated as “information services” (under Title I of the Communications Act), there has been no similar consensus regarding whether *access to the Internet* should receive similar regulatory treatment.³ Our purpose here is not to further debate this question. Rather, we simply observe that by mischaracterizing the scope of this consensus, the *Draft Order* implies there is no good faith basis to question whether *access to the Internet* should receive the same regulatory treatment as *the Internet* itself. This mischaracterization is at best unfortunate; at worst, it is disingenuous and contributes to the disinformation, misinformation, and hyperbole which continues to plague this debate.

Recent Commissions including this one find themselves politically and ideologically caught between “regulating the Internet”⁴ or “setting the Internet free,” on the one hand – and “protecting the Internet” or “destroying the Internet”⁵ on the other. By conflating *the Internet* with *access to the Internet*, this and perhaps prior Commissions share in the blame for this predicament.⁶ Only by recognizing and clarifying this intuitively obvious distinction can policymakers hope to have an honest debate on this issue.

² See, *e.g.*, FCC Fact Sheet (“This Declaratory Ruling, Report and Order, and Order would return to the bipartisan consensus on light-touch regulation, ending utility-style regulation of *the Internet*.”) (emphasis added).

³ The 2005 Supreme Court decision in *Brand X* certainly stands for that proposition. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*). See also, *e.g.*, Remarks of Jonathan Sallet, Partner, Steptoe & Johnson, The Regulatory State of the Internet, Panel Discussion at the Federalist Society 2017 National Lawyers Convention (Nov. 17, 2017), <https://fedsoc.org/conferences/2017-national-lawyers-convention?#agenda-item-the-regulatory-state-of-the-internet>. Our comments in this proceeding favored maintaining current net neutrality rules based on either regulation of BIAS under Title II of the Communications Act of 1934, or under Section 706 of the Telecommunications Act of 1996.

⁴ See, *e.g.*, Sen. Ted Cruz, *Beware of Obamacare for the Internet*, Chicago Tribune, Nov. 15, 2014 <http://www.chicagotribune.com/news/opinion/commentary/ct-cruz-net-neutrality-1117-20141114-story.html>.

⁵ See, *e.g.*, Tony Bradley, *FCC Makes Tone Deaf Appeal To Destroy Net Neutrality And Possibly The Internet*, Forbes, Nov. 30, 2017, <https://www.forbes.com/sites/tonybradley/2017/11/30/fcc-makes-tone-deaf-appeal-to-destroy-net-neutrality-and-possibly-the-internet/#9de2a135f965>.

⁶ See *Draft Order* at ¶ 45 (“ISPs are best understood as offering a service that inextricably intertwines the information processing capabilities described above and transmission.”). For those who maintain the *2015 Title II Order* attempted to bootstrap FCC jurisdiction over the entire Internet to jurisdiction over BIAS – also blurring the distinction between lightly regulated information services and regulated telecommunication services – this could be addressed by simply making brighter the line between the Internet and BIAS rather than attempting to eliminate or obscure it.

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Unfortunately, the *Draft Order* uses this claim that *the Internet* and *access to the Internet* are inseparable as a basis to abandon any meaningful FCC authority over the practices of BIAS providers – removing even the threat of future regulation over harmful practices. In this respect, it is this Commission that departs from a long-standing and broad industry consensus supporting clear rules prohibiting blocking and throttling and other harmful conduct. Even in the area of paid prioritization, major ISPs have historically supported some limits.⁷ Irrespective of whether the *Draft Order* has provided well-reasoned bases for its change in direction, claiming to restore a consensus while in fact departing from one is simply not accurate, reasonable, or appropriate.

Once again, we appreciate release of the *Draft Order* in advance of the vote on December 14. However, we urge the Commission to stay with the broad and long-standing industry consensus that favors clear and enforceable net neutrality rules. Only in this way can the Commission adequately protect the services and benefits offered by non-profit educational, research, and public interest institutions and organizations, and thereby avoid tangible harms to the civic, cultural, and economic life of this country.

Sincerely,

American Council on Education (ACE)

American Association of Community Colleges (AACC)

American Association of State Colleges and Universities (AASCU)

Association of American Universities (AAU)

Association of Public and Land-grant Universities (APLU)

National Association of Independent Colleges and Universities (NAICU)

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⁷ See, e.g., Comments of AT&T Services, Inc. in GN Docket Nos. 14-28 and 10-127, at 31-39 (Jul. 15, 2014) (2014 AT&T Comments) (recognizing Commission Section 706 authority to implement a ban on nonuser-directed paid prioritization for fixed broadband, and favoring adoption of a commercial reasonableness conduct standard for fixed broadband contracts), available at <https://ecfsapi.fcc.gov/file/7521679206.pdf>.